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The Mental State Requirement for Accomplice Liability in American Criminal Law

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THE MENTAL STATE REQUIREMENT FOR ACCOMPLICE LIABILITY IN AMERICAN CRIMINAL LAW

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I. INTRODUCTION

Due to the inconsistency between the plain language of states' accomplice liability legislation and its respective interpretation in the state courts, many states' accomplice laws present a confused picture in terms of the law's stance on accomplice liability. No aspect of this law is more complex than that relating to the mental state requirement for accomplice liability. Nevertheless, if one engages in a cursory examination of the legal literature, case law, and state legislation concerning the mental state requirement for accomplice liability, essentially three approaches surface. These approaches differ in the degree to which they hold an individual culpable for the conduct of another. First, there is the perspective (which is particularly popular in the academic community) that favors a very limited, narrow approach whereby accomplice liability is dependent upon a finding that an accused's "purpose [was] to encourage or assist another in the commission of a crime."[1] Meanwhile, a second perspective (which the Model Penal Code follows to some extent[2]) tolerates a more

1. WAYNE R. LAFAVE, CRIMINAL LAW § 13.2(b), at 675 (4th ed. 2003).

2. *See* MODEL PENAL CODE § 2.06(4) (1962) (providing that a defendant is guilty of accomplice liability "if he acts with the kind of culpability . . . that is sufficient for the commission of the offense").

expansive approach whereby an accomplice's liability turns on whether the accomplice harbored the mental state required of the substantive crime allegedly aided or abetted.[3] Finally, the third and broadest approach holds an accomplice liable for the "natural and probable" consequences of a principal's conduct that the accomplice somehow assisted or encouraged,[4] regardless of the accomplice's mental state.[5]

The first approach, which this Article will refer to as the Category I approach, asserts that an individual should only be liable for the acts of a principal if that individual acted with the specific intent to promote or assist the principal's commission of the crime.[6] This theory holds that a mental state of knowledge or recklessness on the part of an alleged accomplice is insufficient to hold the alleged accomplice culpable.[7] Jurisdictions following this approach will only hold an alleged accomplice liable for the crimes that the alleged accomplice *intended* a perpetrator commit. Also, if the perpetrator commits a secondary crime in pursuance of the intended crime, the accomplice is not liable for the secondary crime unless the accomplice intended to promote or facilitate this offense as well.[8] So long as the alleged accomplice intended to somehow assist or encourage the principal's criminality, the accomplice is liable even if the substantive crime only requires recklessness or negligence on the part of the principal.[9] Thus, if *A* loans his gun to *B* knowing *B* intends to use it to shoot his

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3. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05[A] (4th ed. 2006) ("[I]t is more precisely correct to state that an accomplice must possess two states of mind: (1) the intent to assist the primary party to engage in the conduct that forms the basis of the offense; and (2) the mental state required for commission of the offense, as provided in the definition of the substantive crime." (citing State v. Foster, 522 A.2d 277, 283 (Conn. 1987))).

4. People v. Feagans, 480 N.E.2d 153, 159 (Ill. App. Ct. 1985) (citing People v. Campbell, 396 N.E.2d 607, 613 (Ill. App. Ct. 1979)).

5. LAFAVE, *supra* note 1, § 13.3(b), at 688.

6. *Id.* § 13.2(c), at 676 (citing Bogdanov v. People, 941 P.2d 247, 251 (Colo. 1997), *amended by* 955 P.2d 997 (Colo. 1997)) ("Under the usual requirement that the accomplice must intentionally assist or encourage, it is not sufficient that he intentionally engaged in acts which, as it turned out, did give assistance or encouragement to the principal. Rather, the accomplice must intend that his acts have the effect of assisting or encouraging another.").

7. *See id.* (citing People v. Beeman, 674 P.2d 1318, 1325 (Cal. 1984)) ("[E]ven if knowledge of the actor's intent (as opposed to sharing that intent) is otherwise sufficient, the accomplice must have intended to give the aid or encouragement.").

8. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) ("[An accomplice must] in some sort associate himself with the venture, . . . participate in it as in something that he wishes to bring about, [and] seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it.").

9. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 347 (1985) ("The intention requirement, however, does not preclude holding a person for complicity in a crime for which recklessness or negligence suffices for liability, so long as the secondary actor *intended* to help or persuade the primary actor to do the

neighbor's barking dog, *A* would not be an accomplice to *B*'s act unless he himself intends that *B*'s neighbor's dog be shot. Likewise, if *X* gives the keys of her car to *Y*, who is intoxicated, knowing *Y* intends to drive the car, *X* would not be criminally liable if *Y*'s reckless driving kills or injures an innocent person. Thus, this might simply be described as the "specific intent" approach.

The second approach, which this study refers to as the Category II model, is what might be called the "statutorily prescribed mental state" approach. According to this somewhat more expansive view, an individual may be liable for a crime the individual did not specifically intend for the perpetrator to commit.[10] Rather, liability attaches if the alleged accomplice acted "with the mental culpability required for the commission" of the offense.[11] Thus, states following this approach will hold an individual liable for the conduct of another if that individual possessed the mental state prescribed by the state's substantive criminal statute, whether the requisite mental state for conviction is intent, knowledge, recklessness, or criminal negligence.[12] Returning to the hypotheticals discussed above, where *A* loans his gun *knowing* of *B*'s intent to shoot the neighbor's barking dog, *A* would now be criminally liable for the knowing, unauthorized infliction of injury or death on an animal, even though *A* has no intent for the crime occur.[13] Likewise, where *X* gives her car keys to the intoxicated *Y* knowing *Y* will drive her car and *Y* recklessly kills *Z*, *X* would be liable for reckless homicide along with *Y* if we agree *X* harbors a *reckless* state of mind.[14] Both *A* and *X* would be liable because each acts with the mental culpability required for the commission of their respective offenses.

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reckless or negligent act. When a person does an act that recklessly causes the death of another, he is liable for manslaughter as a principal offender. That he did not intend the death is irrelevant.").

10. *See, e.g.*, State v. Foster, 522 A.2d 277, 282 (Conn. 1987) ("[Accomplice] liability does not require that a defendant act with the conscious objective to cause the result described by a statute.").

11. N.Y. PENAL LAW § 20.00 (McKinney 2004).

12. *See, e.g.*, N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007) (providing that an accomplice may be liable for "act[ing] purposely, knowingly, recklessly, or negligently with respect to [a] result, as required for the commission of the offense").

13. *See* MODEL PENAL CODE § 2.02(2)(b) (1962) ("A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.").

14. *See id.* § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

Category II states can be divided into two subcategories: (1) states that articulate the Category II approach statutorily, and (2) states whose courts have judicially interpreted the Category II approach from statutes void of Category II language. The states that statutorily follow the Category II approach can be further divided into states that require the statutorily prescribed mental state with regard to result-oriented crimes alone, and those that do not differentiate between conduct- and result-oriented crimes.[15] The Model Penal Code, codified by a number of states,[16] allows for liability if an accomplice possessed the requisite mental state for conviction of a perpetrator when "causing a particular result is an element" of the crime (e.g., the "death" in homicide; the "injury" in battery).[17] However, if the crime focuses on the conduct of the actor rather than the result (e.g., the "unauthorized entry" in burglary; the "substantial step" in criminal attempt), it is necessary that the accomplice have the specific intent that the principal commit the crime.[18] States that do not distinguish between conduct- and result-oriented crimes will hold an individual liable for the conduct of another as long as the individual possessed the statutorily prescribed mental state for the substantive crime.[19]

The third approach, which this Article refers to as Category III, is the most expansive of the approaches. States following this approach will hold an actor liable for all the natural and probable consequences of the intended crime.[20] Although some jurisdictions may not use this exact language,[21] these states reject the necessity of proving the accomplice had either the specific intent required by the Category I approach or the statutorily prescribed mental state mandated by the Category II approach. Therefore, if the principal committed a secondary crime in the course of carrying out the target crime even if the accomplice had no way of knowing or anticipating that an incidental or secondary crime would occur, a court will nonetheless convict the accomplice of the incidental crime if the court determines it to be a natural and probable consequence of the intended crime. Now the hypotheticals above become really

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15. *See infra* Part II.B.

16. DRESSLER, *supra* note 3, § 3.03, at 33 (citing Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539, 539 (1988)).

17. MODEL PENAL CODE § 2.06(4).

18. *Id.* § 2.06(3).

19. *See infra* notes 47–52 and accompanying text.

20. *See, e.g.*, WIS. STAT. ANN. § 939.05(2)(c) (West 2005) (holding an accomplice liable for any crime committed "in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime").

21. *See, e.g.*, MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008) (holding an accomplice liable for "any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended").

interesting. Assume after *B* shoots his neighbor's barking dog with *A*'s gun, the neighbor, *C*, becomes angry and engages *B* in a physical altercation during which *B* shoots and injures *C*. If we agree the altercation and resultant injury suffered by *C* are natural and probable consequences of *A*'s arming *B* while knowing of *B*'s intentions, *A* would be liable as an accomplice for *B*'s battery of *C*. In the example where *X* gives her keys to the intoxicated *Y* (which itself is a violation of the state's motor vehicle code), now assume *Y* not only recklessly becomes involved in a fatal vehicle crash but also that *Y* collides with a gasoline truck, which explodes and causes a nearby building to catch fire. If we agree that when *X* gives the intoxicated *Y* the keys to her car she should be held accountable for all natural and probable consequences, it is arguable that *X* is liable not only for reckless homicide if *Y* is involved in a fatal collision while driving *X*'s car but also for criminal damage to property or perhaps arson. Or, worse yet, if a firefighter or building occupant dies in the fire, it might even be asserted that *X* is liable for manslaughter.

Members of the academic community, including Professors Wayne LaFave,[22] Joshua Dressler,[23] and Audrey Rogers,[24] have strongly criticized the Category III approach because it holds an individual to the same culpability as a principal for a crime the commission of which the accomplice had no knowledge of or intent to assist in. Scholars have also asserted that "this foreseeable-offense extension of the complicity doctrine is clearly a minority view."[25] In any event, under this view one is held accountable for the incidental crime as a result of choosing to enter into the criminal arena, an environment

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22. LAFAVE, *supra* note 1, § 13.3, at 683–84 ("Under the better view, one is not an accomplice to a crime merely because that crime was committed in furtherance of a conspiracy of which he is a member, or because that crime was a natural and probable consequence of another offense as to which he is an accomplice."); *id.* § 13.3(b), at 688 ("The 'natural and probable consequence' rule of accomplice liability, if viewed as a broad generalization, is inconsistent with more fundamental principles of our system of criminal law.").

23. DRESSLER, *supra* note 3, § 30.05[B][5], at 517–18 (citing Sharma v. State, 56 P.3d 868, 872 (Nev. 2002); MODEL PENAL CODE § 2.06 cmt. 6, n.42; Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1361 & n.33 (1998)) ("The natural-and-probable-consequences doctrine has been subjected to substantial justifiable criticism. . . . Thus, the effect of the rule is to permit conviction of an accomplice whose culpability as to the non-target offense is *less* than is required to prove the guilt of the primary party. And yet, in view of the relative roles of the primary and secondary parties, one would assume that an accomplice should not be convicted of an offense unless he has the same or higher degree of culpability required to convict the perpetrator.").

24. Rogers, *supra* note 23, at 1379 ("Since the natural and probable consequence doctrine flouts the most fundamental tenet of criminal law that punishment be based on blameworthiness, courts should be especially mindful of it when assessing accomplice liability for unintentional crimes.").

25. PAUL H. ROBINSON, CRIMINAL LAW § 6.1, at 333 (1997).

where history has shown criminality has a tendency to spread like fast growing cancer cells.

The goal of this Article is to examine the legislation and case law concerning accomplice liability at the state level[26] in order to assess the extent to which individual states follow one approach over another regarding the required mental state for criminal accountability.[27] Part II focuses exclusively on the various accomplice liability statutes that appear at the state level. It points out language that commonly appears describing the *actus rea* and *mens rea* requirements and terminology which may be unique to a particular state jurisdiction. Part II also explores related statutory provisions, such as whether a state has a codified defense of withdrawal or an exception for the victim or incidental party. Part III explores the case law in those states that follow, or rather flirt with, the narrow Category I approach. Part IV examines those states that follow, by statute or judicial interpretation, either one of the two subcategories of the Category II, or statutorily prescribed, approach. Part V reviews those states that, by statute or judicial interpretation, accept the broadest approach (Category III) to accomplice liability and impose liability for the natural and probable consequences of a principal's conduct without regard to the mental state of an accomplice with respect to an incidental crime. Finally, Part VI addresses states with confusing, novel, or unique approaches to *mens rea* for accomplice liability. Some of these states have conflicting or inadequate case law on the issue of accomplice liability, preventing a categorization. Other states' *mens rea* requirements depend on the particular type of crime committed and therefore do not fit neatly into any one particular approach.

II. A FACIAL REVIEW OF THE STATUTORY LANGUAGE

This part of the Article focuses exclusively on the statutory language describing individual states' mental state requirements for accomplice liability. It analyzes, by engaging in a facial examination of the respective states' legislation, which category a particular state belongs to with respect to its

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26. For a review of accomplice liability and mental state law at the federal level, see Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341 (2002).

27. In deciding which category a particular state falls in, the designation will depend on whether the jurisdiction has case law following the natural and probable consequences approach or some variant, in which case the state will be placed in the Category III grouping. If it does not, an assessment will be made whether it favors a mental state requirement for accomplice liability that is required of the substantive crime, in which case it will be placed in the Category II grouping. If the jurisdiction insists an accomplice must intend that a particular crime be perpetrated by a principal, then it will be placed in the Category I grouping. Finally, for states that cannot be placed into any of the three categories, Part VI discusses the group of states having novel or unique approaches to accomplice liability.

accomplice liability statute. It does not reflect or refer to any judicial interpretation of the specific statutory provisions. Parts III–VI discuss at length the case law interpretations of the various states. Because of the inconsistencies between the statutory language and its application in the state courts, later Parts of this article reveal, for example, that a given state might pattern its legislation after a Category I approach while exploration of its case law may show that the state actually follows a Category III approach to the mental state requirement for accomplice liability.[28]

A. Category I Statutes: "Specific Intent"

At this juncture, it should be noted that section 2.06(3) of the Model Penal Code states:

> A person is an accomplice of another person in the commission of an offense if:
>
> (a) with the purpose of promoting or facilitating the commission of the offense, he
>
> (i) solicits such other person to commit it, or
>
> (ii) aids or agrees or attempts to aid such other person in planning or committing it, or
>
> (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so; or
>
> (b) his conduct is expressly declared by law to establish his complicity.[29]

Standing alone, this section appears to require nothing less than a specific intent to promote or facilitate the criminality of another before an alleged accomplice would be responsible for a perpetrator's conduct.[30]

It appears as many as thirteen states pattern their mental state requirement for their accomplice liability statutes after section 2.06(3) of the Model Penal

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28. *Compare* 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2002) (imposing liability where the alleged accomplice possesses "the intent to promote or facilitate" the perpetrator's commission of an offense), *with* People v. Feagans, 480 N.E.2d 153, 159 (Ill. App. Ct. 1985) (citing People v. Campbell, 396 N.E.2d 607, 613 (Ill. App. Ct. 1979)) (allowing liability where the crime was a "natural and probable consequence" of the intended offense).

29. MODEL PENAL CODE § 2.06(3) (1962).

30. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 851 (3d ed. 1982) ("A specific intent, when an element of the mens rea of a particular offense, is some intent other than to do the actus reus thereof which is specifically required for guilt.").

Code.[31] Focused solely on the statutory language in their accomplice liability legislation, these thirteen states therefore follow the Category I, or specific intent, approach to accomplice liability. Although these jurisdictions require nothing less than an alleged accomplice's specific intent to aid a perpetrator, legislatures express the mental state terminology in slightly different language from jurisdiction to jurisdiction. Three of these states pattern their legislation directly after the language used in section 2.06(3). These states' statutes contain nearly identical language to the Model Penal Code's requirement that an accomplice act with the purpose of promoting or facilitating the offense committed by the principal.[32] For example, New Jersey asserts a person is an accomplice of another if that person acts "[w]ith the purpose of promoting or facilitating the commission of the offense."[33] Montana uses nearly identical language to describe its mental state requirement for an accomplice.[34] Similarly, Missouri demands that an individual act "with the purpose of promoting the commission of an offense" before considering the individual criminally responsible for the conduct of another.[35]

Other states in this specific intent category, including Alaska, Colorado, Delaware, Illinois, Oregon, and South Dakota, deviate slightly from the Model Penal Code's language and require that an accomplice act with the intent to promote or assist another, rather than with the purpose to aid another, in the commission of an offense.[36] These six states use virtually identical language to describe an accomplice's required mental state. Colorado's statutory language, for example, holds a person legally accountable for the actions of a principal if the person acted "with the intent to promote or facilitate the commission of the

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31. *See* ALA. CODE § 13A-2-23 (LexisNexis 2005); ALASKA STAT. § 11.16.110(2) (2006); COLO. REV. STAT. § 18-1-603 (2008); DEL. CODE ANN. tit. 11, § 271(2) (2007); GA. CODE ANN. § 16-2-20(b)(3)–(4) (2007); 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2002); MO. ANN. STAT. § 562.041.1(2) (West 1999); MONT. CODE ANN. § 45-2-302(3) (2007); N.J. STAT. ANN. § 2C:2–6(c)(1) (West 2005); OR. REV. STAT. § 161.155(2) (2007); S.D. CODIFIED LAWS § 22-3-3 (2006); TENN. CODE ANN. § 39-11-402(2) (2006); TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003).

32. *Compare* MO. ANN. STAT. § 562.041.1(2) (West 1999) ("with the purpose of promoting the commission of an offense"), *and* MONT. CODE ANN. § 45-2-302(3) (2007) ("with the purpose to promote or facilitate such commission"), *and* N.J. STAT. ANN. § 2C:2–6(c)(1) (West 2005) ("[w]ith the purpose of promoting or facilitating the commission of the offense"), *with* MODEL PENAL CODE § 2.06(3) ("with the purpose of promoting or facilitating the commission of the offense").

33. N.J. STAT. ANN. § 2C:2-6(c)(1) (West 2005).

34. MONT. CODE ANN. § 45-2-302(3) (2007) ("with the purpose to promote or facilitate such commission").

35. MO. ANN. STAT. § 562.041(1)(2) (West 1999).

36. *See* ALASKA STAT. § 11.16.110(2) (2006); COLO. REV. STAT. § 18-1-603 (2008); DEL. CODE ANN. tit. 11, § 271(2) (2007); 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2002); OR. REV. STAT. § 161.155(2) (2007); S.D. CODIFIED LAWS § 22-3-3 (2006).

offense."[37] Similarly, Delaware insists that if a person is "[i]ntending to promote or facilitate the commission of the offense," that person is guilty of an offense committed by another.[38]

Alabama, Georgia, Tennessee, and Texas phrase their intent requirement for accomplice liability in a somewhat different manner.[39] Although it does not follow the exact wording of section 2.06(3) of the Model Penal Code, Alabama requires that an alleged accomplice act "with the intent to promote or assist the commission of the offense."[40] Tennessee and Texas, in this same respect, state in their respective statutes that a person is criminally liable for acting "with intent to promote or assist the commission of the offense."[41] Georgia, on the other hand, simply requires that an alleged accomplice either "[i]ntentionally aids or abets in the commission of the crime; or . . . [i]ntentionally advises, encourages, hires, counsels or procures" a principal.[42] In any event, none of these thirteen states have statutes reflecting Category II or Category III language.

B. Category II Statutes: "Statutorily Prescribed Mental State"

Section 2.06(4) of the Model Penal Code provides an alternate route to finding accomplice liability beyond that found in section 2.06(3). This subsection reflects what might be called a statutorily prescribed mental state approach. Specifically, it reads:

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.[43]

It is important to remember that the thirteen states following the specific intent, or Category I, scheme patterned after section 2.06(3) of the Model Penal Code

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37. COLO. REV. STAT. § 18-1-603 (2008).

38. DEL. CODE ANN. tit. 11, § 271(2) (2007).

39. *See* ALA. CODE § 13A-2-23 (LexisNexis 2005); GA. CODE ANN. § 16-2-20(b)(3)–(4) (2007); TENN. CODE ANN. § 39-11-402(2) (2006); TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003).

40. ALA. CODE § 13A-2-23 (LexisNexis 2005).

41. TENN. CODE ANN. § 39-11-402(2) (2006); TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003). It should be noted, however, that the Texas statute holds that if a person conspires with another to commit a felony, that person is responsible for another felony committed by a coconspirator notwithstanding the fact that the person had "no intent to commit it." § 7.02(b).

42. GA. CODE ANN. § 16-2-20(b)(3)–(4) (2007).

43. MODEL PENAL CODE § 2.06(4) (1962).

do not provide for accomplice liability similar to section 2.06(4).[44] Meanwhile, six states—Arkansas, Arizona, Hawaii, Kentucky, New Hampshire, and Pennsylvania—pattern their mental state requirement after section 2.06(4) of the Model Penal Code and provide for criminal liability when causing a particular result is an element of the offense and when an accused acted with the same kind of culpable mental state or the same kind of culpability with respect to the particular result that is required to convict a principal.[45] Each of these states follows both sections 2.06(3) and 2.06(4) of the Model Penal Code. In other words, these six states allow for liability if the accused either had the intention of promoting or facilitating the commission of the offense or had the kind of culpability with respect to the result that is sufficient for the commission of the offense for a result-oriented crime.[46]

Beyond those jurisdictions which provide for liability based on a shared mental state for result-oriented crimes, another five states—Connecticut, New York, North Dakota, Ohio, and Utah—extend criminal responsibility to an accomplice who harbored the mental state necessary for the commission of the crime, regardless of whether or not the crime committed contains a result element.[47] For instance, Connecticut and Utah hold an alleged accomplice liable who acts "with the mental state required for commission of an offense."[48] New York's statute states that so long as an accomplice had the "mental culpability required for the commission" of the offense, the accomplice is criminally responsible.[49] Similarly, Ohio requires that an alleged accomplice act "with the kind of culpability required for the commission of an offense,"[50] while North Dakota insists the accomplice act "with the kind of culpability required for the offense."[51] As with the states allowing for a shared mental state with respect to

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44. *See* statutes cited *supra* note 31.

45. *See* ARIZ. REV. STAT. ANN. § 13-303(B) (2008); ARK. CODE ANN. § 5-2-403(b) (2006); HAW. REV. STAT. ANN. § 702-223 (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(2) (LexisNexis 1999); N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007); 18 PA. CONS. STAT. ANN. § 306(d) (West 1998).

46. *See* ARIZ. REV. STAT. ANN. § 13-301, -303 (2008); ARK. CODE ANN. § 5-2-403(a)–(b) (2006); HAW. REV. STAT. ANN. §§ 702-222 to -223 (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(1)–(2) (LexisNexis 1999); N.H. REV. STAT. ANN. § 626:8(III)(a), (IV) (LexisNexis 2007); 18 PA. CONS. STAT. ANN. § 306(c)–(d) (West 1998). In this group, Arizona is the only state which has not only "intent to promote or facilitate" language, ARIZ. REV. STAT. ANN. § 13-301, and result-oriented language, *id.* § 13-303(B), but also a "natural and probable . . . consequence" provision. *Id.* § 13-303(A)(3).

47. *See* CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007); N.Y. PENAL LAW § 20.00 (McKinney 2004); N.D. CENT. CODE § 12.1-03-01(1)(a) (1997); OHIO REV. CODE ANN. § 2923.03(A) (LexisNexis 2006); UTAH CODE ANN. § 76-2-202 (2003).

48. CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007); UTAH CODE ANN. § 76-2-202 (2003).

49. N.Y. PENAL LAW § 20.00 (McKinney 2004).

50. OHIO REV. CODE ANN. § 2923.03(A) (LexisNexis 2006).

51. N.D. CENT. CODE § 12.1-03-01(1)(a) (1997).

result-oriented crimes, Connecticut, New York, North Dakota, and Utah also allow for liability if an actor intentionally aids another in the commission of a crime.[52] Thus, most of the states that follow the Category II, or statutorily prescribed mental state, approach also contain a provision mirroring the Category I, or specific intent, approach.

C. Category III Statutes: "Natural and Probable Consequences"

Six states do not limit liability merely to a person who possesses the specific intent or the statutorily prescribed mental state required for the actual commission of the crime in their respective accomplice liability legislation. Rather, this grouping follows a very broad model of accomplice liability and holds a person accountable not just for the crimes the person intended to aid and abet but also for any offense that is a reasonably foreseeable consequence of the criminal scheme.[53] Five of the Category III states have statutory provisions stating that an accomplice must have the specific intent to assist a perpetrator in the intended crime[54] but also have a second provision allowing for liability for any crimes done in furtherance of the intended crime.[55] For example, Kansas

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52. *See* CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007); N.Y. PENAL LAW § 20.00 (MCKINNEY 2004); N.D. CENT. CODE § 12.1-03-01(1)(b) (1997); UTAH CODE ANN. § 76-2-202 (2003). Ohio's statute contains no specific intent provision. *See* OHIO REV. CODE ANN. § 2923.03(A) (LexisNexis 2006). On the other hand, Arizona also has a natural and probable consequences provision. ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008).

53. *See* ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008); IOWA CODE ANN. § 703.2 (West 2003); KAN. STAT. ANN. § 21-3205(2) (2007); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (Supp. 2007); MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008); WIS. STAT. ANN. § 939.05(2)(c) (West 2005).

54. *See* ARIZ. REV. STAT. ANN. § 13-301 (2008) ("with the *intent* to promote or facilitate the commission of an offense") (emphasis added); KAN. STAT. ANN. § 21-3205(1) (2007) ("A person is criminally responsible for a crime committed by another if such person *intentionally* aids . . . the other . . . .") (emphasis added); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (Supp. 2007) ("[*w*]*ith the intent* of promoting or facilitating the commission of the crime") (emphasis added); MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008) ("A person is criminally liable for a crime committed by another if the person *intentionally* aids . . . the other . . . .") (emphasis added); WIS. STAT. ANN. § 939.05(2)(b) (West 2005) ("[*i*]*ntentionally* aids and abets the commission") (emphasis added).

55. *See* ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008) ("The person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice."); KAN. STAT. ANN. § 21-3205(2) (2007) ("A person liable under subsection (1) hereof is also liable for any other crime committed in pursuance of the intended crime if *reasonably foreseeable* by such person as a *probable consequence* of committing or attempting to commit the crime intended.") (emphasis added); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (Supp. 2007) ("A person is an accomplice under this subsection to any crime the commission of which was a *reasonably foreseeable consequence* of the person's conduct . . . .") (emphasis added);

and Minnesota both state that one is liable "for any other crime committed in pursuance of the intended crime if reasonably foreseeable . . . as a probable consequence,"[56] while Arizona states that one is responsible for "any offense that is a natural and probable or a reasonably foreseeable consequence of the offense for which the person was an accomplice."[57]

Wisconsin's statute differs in that it allows for liability for one who is a "party to a conspiracy with another to commit [an offense] or advises, hires, counsels or otherwise procures" the perpetrator.[58] Wisconsin, like the other states following the Category III approach, expands an accomplice's criminal liability to include "any other crime which is committed in pursuance of the intended crime" if it "is a natural and probable consequence of the intended crime."[59]

While Iowa's criminal code does not have a specific intent provision, it does use a similar approach regarding liability for crimes done in furtherance of the original crime. Iowa is unique in that it expresses this provision in negative nomenclature; namely, one is responsible for another's criminal acts "unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense."[60]

D. Statutes Requiring "Knowledge" Rather than "Intent"

Four states pattern their legislation similar to that of the Category I states with one major exception. Rather than requiring intent on the part of an accomplice, these states simply require that the accomplice knowingly assist a perpetrator in the commission of the crime.[61] Wyoming holds individuals accountable who "knowingly" aid or abet another's crime,[62] while Indiana

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MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008) ("A person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if *reasonably foreseeable* by the person as a *probable consequence* of committing or attempting to commit the crime intended.") (emphasis added); WIS. STAT. ANN. § 939.05(2)(c) (West 2005) ("Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a *natural and probable consequence* of the intended crime.") (emphasis added).

56. KAN. STAT. ANN. § 21-3205(2) (2007); MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008).

57. ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008).

58. WIS. STAT. ANN. § 939.05(2)(c) (West 2005).

59. *Id.*

60. IOWA CODE ANN. § 703.2 (West 2003).

61. *See* IND. CODE ANN. § 35-41-2-4 (LexisNexis 2004); WASH. REV. CODE ANN. § 9A.08.020(2)–(3)(a) (West 2000); W. VA. CODE ANN. § 61-2-14e (LexisNexis 2005); WYO. STAT. ANN. § 6-1-201(a) (2007).

62. WYO. STAT. ANN. § 6-1-201(a) (2007).

declares an individual responsible if that individual "knowingly or intentionally aids, induces, or causes another person to commit an offense."[63] West Virginia requires one to "knowingly" aid and abet a few crimes[64] but generally requires no mental state for accomplice liability with respect to other crimes.[65] Finally, Washington holds one liable as an accomplice who acts "[w]ith knowledge that [the assistance] will promote or facilitate the commission of the crime."[66]

E. Statutes Lacking Any Mental State Requirement

Eighteen states do not pattern their mental state requirements after the Category I, Category II, or Category III approach. Instead, these states do not appear to require any mental state on the part of an accomplice to find liability.[67] For example, Michigan's law indicates, "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission . . . shall be punished as if he had directly committed such offense."[68] Likewise, Nebraska's statute states that "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."[69] New Mexico imposes liability when an accomplice "procures, counsels, aids or abets in [the crime's] commission."[70] South Carolina and Vermont hold that courts are to treat "[a] person who aids in the commission of a felony" the same as a "principal."[71] California provides that "[a]ll persons . . . [who] aid and abet" are responsible,[72] while Florida's law reads that "[w]hoever . . . aids, abets, counsels, hires, or otherwise procures such offense

63. IND. CODE ANN. § 35-41-2-4 (LexisNexis 2004).

64. W. VA. CODE ANN. § 61-2-14e (LexisNexis 2005) (listing kidnapping, holding hostage, demanding ransom, concealment of a minor child, and several other crimes).

65. W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005).

66. WASH. REV. CODE ANN. § 9A.08.020(3)(a) (West 2000).

67. *See* CAL. PENAL CODE § 31 (West Supp. 2008); FLA. STAT. ANN. § 777.011 (West 2005); IDAHO CODE ANN. § 18-204 (2004 & Supp. 2008); LA. REV. STAT. ANN. § 14:24 (2007); MD. CODE. ANN., CRIM. PROC. § 4-204 (LexisNexis 2008); MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000); MICH. COMP. LAWS ANN. § 767.39 (West 2000); MISS. CODE ANN. § 97-1-3 (2006); NEB. REV. STAT. § 28-206 (1995); NEV. REV. STAT. ANN. § 195.020 (LexisNexis 2006); N.M. STAT. ANN. § 30-1-13 (LexisNexis 2004); N.C. GEN. STAT. § 14-5.2 (2007); OKLA. STAT. ANN. tit. 22, § 432 (West 2003); R.I. GEN. LAWS § 11-1-3 (2002); S.C. CODE ANN. § 16-1-40 (2003); VT. STAT. ANN. tit. 13, §§ 3–4 (1998); VA. CODE ANN. § 18.2-18 (2004); W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005).

68. MICH. COMP. LAWS ANN. § 767.39 (West 2000).

69. NEB. REV. STAT. § 28-206 (1995).

70. N.M. STAT. ANN. § 30-1-13 (LexisNexis 2004).

71. S.C. CODE ANN. § 16-1-40 (2003); VT. STAT. ANN. tit. 13, § 3 (1998).

72. CAL. PENAL CODE § 31 (West 1999).

to be committed" is liable under accountability principles.[73] Rhode Island's accomplice measure states that "[e]very person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense" is accountable to the same extent as "the principal offender."[74] Massachusetts states that "[w]hoever aids in the commission of a felony . . . by counseling, hiring or otherwise procuring such felony to be committed" is punishable in the manner as provided for "the principal felon."[75] Similarly, Oklahoma's law proscribes that any person "concerned in the commission of a felony," whether that person is the actual perpetrator or one who "aid[s] or abet[s] in its commission," is criminally accountable for such felony.[76] Mississippi's stricture reads that "[e]very person who shall be an accessory to any felony" is as criminally liable as "the principal."[77] North Carolina and Virginia's statutes offer similar language.[78]

Nevada explicitly denies the necessity of any mental state requirement for an accomplice to be criminally responsible.[79] Nevada's statute indicates that "[t]he fact that [a] person . . . could not or did not entertain a criminal intent shall not be a defense" if that person assisted a perpetrator's commission of an offense.[80]

Maryland's statute differs in that it not only lacks a mental state requirement, but it also lacks any indication of who it considers an "accessory before the fact."[81] The Maryland statute simply states, without further explanation, that "the distinction between an accessory before the fact and a principal is abrogated" and that "an accessory before the fact may be charged, tried, convicted, and sentenced as a principal."[82]

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73. FLA. STAT. ANN. § 777.011 (West 2005).
74. R.I. GEN. LAWS § 11-1-3 (2002).
75. MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000).
76. OKLA. STAT. ANN. tit. 22, § 432 (West 2003).
77. MISS. CODE ANN. § 97-1-3 (2006).
78. N.C. GEN. STAT. § 14-5.2 (2007); VA. CODE ANN. § 18.2-18 (2004).
79. NEV. REV. STAT. ANN. § 195.020 (LexisNexis 2006).
80. *Id.*
81. MD. CODE. ANN., CRIM. PROC. § 4-204 (LexisNexis 2008).
82. *Id.* § 4-204(b). It should be noted, however, that the *Maryland Pattern Jury Instructions* indicate that to prove a defendant was an accessory before the fact, the State must prove the defendant acted "with the intent to make the crime succeed." MD. STATE BAR ASS'N STANDING COMM. ON PATTERN JURY INSTRUCTIONS, MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS 6:01 (10th ed. 2005).

F. Statutes Allowing for a Defense for the Victim of a Crime

The Model Penal Code's accomplice liability statute protects one from accomplice liability if one "is a victim of that offense."[83] For example, under this provision, the minor victim of a statutory rape cannot be liable as an accomplice to the adult rapist's conduct, even if the minor encouraged the adult perpetrator.[84] Nine states have similar provisions in their accomplice liability legislation.[85] For example, Pennsylvania will not hold an alleged accomplice liable who "is a victim of that offense,"[86] while Washington's statute will not allow for the conviction of an alleged accomplice who "is a victim of that crime."[87]

G. Statutes with Incidental Party Provisions

Another defense the Model Penal Code provides protects an individual if the crime "is so defined that his conduct is inevitably incident to its commission."[88] This provision, for instance, would not allow a state to charge the purchaser of illegal drugs as an accomplice to the sale of the drugs.[89] Six states have codified similar incidental party provisions in their accomplice liability statutes.[90] Missouri's statute indicates an alleged accomplice will not be liable if the crime "is so defined that his conduct was necessarily incident to the commission or attempt to commit the offense."[91] Maine's provision likewise allows a defense for an alleged accomplice if "the crime is so defined that it cannot be committed without the person's cooperation."[92]

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83. MODEL PENAL CODE § 2.06(6)(a) (1962).

84. *Id.* § 2.06 cmt. 9(a).

85. *See* DEL. CODE ANN. tit. 11, § 273(1) (2007); 720 ILL. COMP. STAT. ANN. 5/5-2(c)(1) (West 2002); ME. REV. STAT. ANN. tit. 17-A, § 57(5)(A) (Supp. 2007); MO. ANN. STAT. § 562.041.2(1) (West 1999); MONT. CODE ANN. § 45-2-302(3)(a) (2007); N.H. REV. STAT. ANN. § 626:8(VI)(a) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2–6(e)(1) (West 2005); 18 PA. CONS. STAT. ANN. § 306(f)(1) (West 1998); WASH. REV. CODE ANN. § 9A.08.020(5)(a) (West 2000).

86. 18 PA. CONS. STAT. ANN. § 306(f)(1) (West 1998).

87. WASH. REV. CODE ANN. § 9A.08.020(5)(a) (West 2000).

88. MODEL PENAL CODE § 2.06(6)(b).

89. JOHN F. DECKER, ILLINOIS CRIMINAL LAW § 3.10, at 188 (4th ed. 2006) (citing 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 38, at 252–53 (15th ed. 1993)).

90. *See* 720 ILL. COMP. STAT. ANN. 5/5-2(c)(2) (West 2002); ME. REV. STAT. ANN. tit. 17-A, § 57(5)(B) (Supp. 2007); MO. ANN. STAT. § 562.041.2(2) (West 1999); N.H. REV. STAT. ANN. § 626:8(VI)(B) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2–6(e)(2) (West 2005); 18 PA. CONS. STAT. ANN. § 306(f)(2) (West 1998).

91. MO. ANN. STAT. § 562.041.2(2) (West 1999).

92. ME. REV. STAT. ANN. tit. 17-A, § 57(5)(B) (Supp. 2007).

H. Statutes with Withdrawal Provisions

The Model Penal Code allows for an alleged accomplice to avoid criminal liability by withdrawing from the criminal complicity prior to a perpetrator's commission of the crime.[93] Subsection (6)(c) of the Model Penal Code's accomplice liability provision provides a defense for one who "terminates his complicity prior to the commission of the offense and (i) wholly deprives it of effectiveness in the commission of the offense; or (ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense."[94] Twelve states have similar withdrawal provisions in their respective accomplice liability statutes.[95] For example, Illinois's statute states that an alleged accomplice is not criminally responsible if:

> Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and [either] wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.[96]

Minnesota, on the other hand, only requires that an individual who acted with the purpose of assisting the perpetrator "abandon[] that purpose and make[] a reasonable effort to prevent the commission of the crime prior to its commission."[97]

I. Statutes with Liability for Persons Exempt from the Substantive Offense

Also contained within section 2.06 of the Model Penal Code is a legislative exemption provision. This subsection holds an individual "who is legally incapable of committing" the offense accountable as an accomplice if the offense is "committed by the conduct of another person for which [the individual] is legally accountable."[98] This provision is designed to make a

93. MODEL PENAL CODE § 2.06(6)(c).

94. *Id.*

95. *See* DEL. CODE ANN. tit. 11, § 273(3) (2007); 720 ILL. COMP. STAT. ANN. 5/5-2(c)(3) (West 2002); IND. CODE ANN. § 35-41-3-10 (LexisNexis 2004); ME. REV. STAT. ANN. tit. 17-A, § 57(5)(C) (Supp. 2007); MINN. STAT. ANN. § 609.05(3) (West 2003 & Supp. 2008); MO. ANN. STAT. § 562.041.2(3) (West 1999); N.H. REV. STAT. ANN. § 626:8(VI)(c) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2–6(e)(3) (West 2005); OHIO REV. CODE ANN. § 2923.03(E) (LexisNexis 2006); 18 PA. CONS. STAT. ANN. § 306(f)(3) (West 1998); WASH. REV. CODE ANN. § 9A.08.020(5)(b) (West 2000); WIS. STAT. ANN. § 939.05(2)(c) (West 2005).

96. 720 ILL. COMP. STAT. ANN. 5/5-2(c)(3) (West 2002).

97. MINN. STAT. ANN. § 609.05(3) (West 2003 & Supp. 2008).

98. MODEL PENAL CODE § 2.06(5).

person an accomplice even though that person is personally exempt from the reach of the substantive offense.[99] The example cited in comments to the Model Penal Code—albeit rather antiquated—is the husband who is exempt from the reach of the common law rape proscription due to the marital exemption rule.[100] Perhaps a more appropriate example would be the adult who is free of the reach of the local curfew law but who encourages or facilitates a minor's presence in a public area after hours without adult accompaniment.[101]

Six states have statutory provisions similar to section 2.06(5).[102] Delaware's statute provides that "it is no defense that . . . [t]he offense in question, as defined, can be committed only by a particular class of persons," of which the defendant is not a member,[103] while New Jersey maintains that "[a] person who is legally incapable of committing a particular offense" may be liable if that person is "legally accountable" for the conduct of the perpetrator.[104]

J. Statutes Containing an Innocent Agent Provision

The Model Penal Code[105] and nineteen states[106] have an innocent agent provision in their accomplice accountability measures allowing for accomplice

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99. *See id.* § 2.06 cmt. 8.

100. *Id.* (citing Cody v. State, 361 P.2d 307, 315–16 (Okla. Crim. App. 1961)) (allowing a husband to be tried as an accessory for the rape of his wife); *cf. id.* § 213.1(1) ("A male who has sexual intercourse with a female not his wife is guilty of rape . . . .").

101. *See, e.g.*, UNIVERSITY CITY, MO., MUNICIPAL CODE § 9.20.020 (2007) ("It is unlawful for any minor under the age of seventeen (17) years to loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds or other public grounds, public places and public buildings, places of amusement and entertainment, vacant lots or other unsupervised places, between the hours of eleven p.m. and six a.m. of the following day, official city time, except on Fridays and Saturdays, when the hours shall be twelve midnight to six a.m.; however, the provisions of this section shall not apply to a minor accompanied by his or her parent, guardian or other adult person having the care and custody of the minor, or where the minor is upon an emergency errand or legitimate business directed by his or her parent, guardian or other adult person having the care and custody of the minor.").

102. *See* DEL. CODE ANN. tit. 11, § 272(3) (2007); ME. REV. STAT. ANN. tit. 17-A, § 57(4) (Supp. 2007); N.H. REV. STAT. ANN. § 626:8(I) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2–6(d) (West 2005); 18 PA. CONS. STAT. ANN. § 306(e) (West 1998); WASH. REV. CODE ANN. § 9A.08.020(4) (West 2000).

103. DEL. CODE ANN. tit. 11, § 272(3) (2007).

104. N.J. STAT. ANN. § 2C:2–6(d) (West 2005).

105. MODEL PENAL CODE § 2.06(2)(a).

106. *See* ALASKA STAT. § 11.16.110(3) (2006); ARIZ. REV. STAT. ANN. § 13-303(A)(2) (2008); ARK. CODE ANN. § 5-2-402(3) (2006); CAL. PENAL CODE § 31 (West 1999); COLO. REV. STAT. § 18-1-602(1)(b) (2008); DEL. CODE ANN. tit. 11, § 271(1) (2007); GA. CODE ANN. § 16-2-20(b)(2) (2007); HAW. REV. STAT. ANN. § 702-221(2)(a) (LexisNexis 2007); 720 ILL. COMP. STAT. ANN. 5/5-2(a) (West 2002); KY. REV. STAT. ANN. § 502.010(1) (LexisNexis 1999); ME. REV. STAT. ANN. tit. 17-A, § 57(2)(A) (Supp. 2007); MONT. CODE ANN. § 45-2-302(1) (2007); N.H. REV. STAT. ANN. § 626:8(II)(a) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2–6(b)(1) (West

liability if the alleged accomplice encouraged an innocent agent, such as a very young child, to perpetrate the offense. The Model Penal Code states that "[a] person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct."[107] For example, Alaska holds a person criminally accountable for another's conduct where the person is "acting with the culpable mental state that is sufficient for the commission of the offense, [and] the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct."[108]

K. Statutes Containing a Legal Duty Provision

Six states[109] and the Model Penal Code[110] base accomplice liability on one's breach of a legal duty. The Model Penal Code language states that a person is an accomplice of another if that person, "with the purpose of promoting or facilitating the commission of the offense, . . . having a legal duty to prevent the commission of the offense, fails to make proper effort so to do."[111] While most of the statutes in this small grouping parallel the Model Penal Code's language,[112] the Tennessee law in this regard reads that a person is criminally accountable for another's crimes if:

> Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.[113]

2005); OHIO REV. CODE ANN. § 2923.03(A)(4) (LexisNexis 2006); 18 PA. CONS. STAT. ANN. § 306(b)(1) (West 1998); TENN. CODE ANN. § 39-11-402(1) (2006); TEX. PENAL CODE ANN. § 7.02(a)(1) (Vernon 2003); WASH. REV. CODE ANN. § 9A.08.020(2)(a) (West 2000).

107. MODEL PENAL CODE § 2.06(2)(a).

108. ALASKA STAT. § 11.16.110(3) (2006).

109. *See* ARK. CODE ANN. § 5-2-403(a)(3) (2006); DEL. CODE ANN. tit. 11, § 271(2)(c) (2007); HAW. REV. STAT. ANN. § 702-222(1)(c) (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(1)(c) (LexisNexis 1999); OR. REV. STAT. § 161.155(2)(c) (2007); TENN. CODE ANN. § 39-11-402(3) (2006).

110. MODEL PENAL CODE § 2.06(3)(a)(iii).

111. *Id.*

112. *See* ARK. CODE ANN. § 5-2-403(a)(3) (2006); DEL. CODE ANN. tit. 11, § 271(2)(c) (2007); HAW. REV. STAT. ANN. § 702-222(1)(c) (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(1)(c) (LexisNexis 1999); OR. REV. STAT. § 161.155(2)(c) (2007).

113. TENN. CODE ANN. § 39-11-402(3) (2006).

L. Statutes Allowing for Liability of an Accomplice Without the Conviction of the Perpetrator

At common law, "an accessory could not be convicted of a crime unless and until the principal was convicted."[114] Similarly, "an accessory could not be convicted of a more serious offense, or a higher degree of an offense, than his principal."[115] However, the Model Penal Code makes it clear that:

> An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.[116]

Twenty states have similar statutes designed to abrogate the common law rule conditioning prosecution of an accomplice on the conviction of the principal.[117] For instance, the Illinois criminal code provides,

> A person who is legally accountable for the conduct of another which is an element of an offense may be convicted upon proof that the offense was committed and that he was so accountable, although the other person claimed to have committed the offense has not been prosecuted or convicted, or has been convicted of a different offense or degree of offense, or is not amenable to justice, or has been acquitted.[118]

Meanwhile, Iowa law provides, "The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part

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114. DRESSLER, *supra* note 3, § 30.03[B][5], at 505.

115. *Id.* § 30.03[B][6], at 506.

116. MODEL PENAL CODE § 2.06(7).

117. *See* DEL. CODE ANN. tit. 11, § 272(2) (2007); 720 ILL. COMP. STAT. ANN. 5/5-3 (West 2002); IND. CODE ANN. § 35-41-2-4 (LexisNexis 2004); IOWA CODE ANN. § 703.1 (West 2003); KAN. STAT. ANN. § 21-3205(3) (2007); ME. REV. STAT. ANN. tit. 17-A, § 57(6) (Supp. 2007); MD. CODE ANN., CRIM. PROC. § 4-204(c) (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 274, § 3 (West 2000); MINN. STAT. ANN. § 609.05(4) (West 2003 & Supp. 2008); MISS. CODE ANN. § 97-1-3 (2006); NEV. REV. STAT. ANN. § 195.040 (LexisNexis 2006); N.H. REV. STAT. ANN. § 626:8(VII) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2–6(f) (West 2005); N.M. STAT. ANN. § 30-1-13 (LexisNexis 2004); N.D. CENT. CODE § 12.1-03-01(2)(b) (1997); OHIO REV. CODE ANN. § 2923.03(B) (LexisNexis 2006); 18 PA. CONS. STAT. ANN. § 306(g) (West 1998); WASH. REV. CODE ANN. § 9A.08.020(6) (West 2000); W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005); WYO. STAT. ANN. § 6-1-201(b)(ii) (2007).

118. 720 ILL. COMP. STAT. ANN. 5/5-3 (West 2002).

the person had in it, and does not depend upon the degree of another person's guilt."[119]

M. Statutes Only Pertaining to Felonies

Although the Model Penal Code[120] and the vast majority of states hold an individual liable as an accomplice whether the offense is a felony or a misdemeanor, five states explicitly state that their accomplice statute applies only to felonies.[121] South Carolina's accomplice legislation only applies to "[a] person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony."[122] Similarly, Mississippi allows for criminal liability for "[e]very person who shall be an accessory to any felony, before the fact."[123]

N. Statutes with Provisions Unique to Their Particular State

Three states—Connecticut, North Carolina, and Virginia—have accomplice liability statutes with provisions unique to their particular state.[124] Connecticut, for instance, is the only state that has a firearm provision in its accomplice liability legislation. Specifically, it reads:

> A person who sells, delivers or provides any firearm . . . to another person to engage in conduct which constitutes an offense knowing or under circumstances in which he should know that such other person intends to use such firearm in such conduct shall be criminally liable for such conduct and shall be prosecuted and punished as if he were the principal offender.[125]

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119. IOWA CODE ANN. § 703.1 (West 2003).

120. *See* MODEL PENAL CODE § 2.06(1)–(2) (referring to "offenses").

121. *See* MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000); MISS. CODE ANN. § 97-1-3 (2006); OKLA. STAT. ANN. tit. 22, § 432 (West 2003); S.C. CODE ANN. § 16-1-40 (2003); VA. CODE ANN. § 18.2-18 (2004).

122. S.C. CODE ANN. § 16-1-40 (2003).

123. MISS. CODE ANN. § 97-1-3 (2006).

124. *See* CONN. GEN. STAT. ANN. § 53a-8(b) (West 2007); N.C. GEN. STAT. § 14-5.2 (2007); VA. CODE ANN. § 18.2-18 (2004).

125. CONN. GEN. STAT. ANN. § 53a-8(b) (West 2007).

In other words, if an accomplice provides a firearm to the principal, the accomplice must only possess the mental state of knowledge rather than the requisite mental state necessary to convict the principal.[126]

North Carolina's statute is unique in that it contains a provision regarding the evidence necessary to convict an accomplice of a capital felony. The North Carolina law reads:

> [I]f a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B2 felony.[127]

A Class B2 felony falls outside the reach of North Carolina's death penalty provision.[128] Thus, if the offense is a capital felony, North Carolina will hold an alleged accomplice to a lesser penalty than the principal felon if there is no evidence against the accomplice besides the testimony of the other parties to the crime.[129]

While several states explicitly provide that they will hold an accomplice to an offense as liable as the actual perpetrator,[130] Virginia's statute is distinctive in that it specifies only certain types of capital murder in which Virginia will treat an accessory before the fact as the actual perpetrator.[131] Virginia's code

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126. Connecticut is a Category II state with regard to all other offenses and therefore requires that the accomplice have the shared mental state with regard to the crime that is necessary to convict the perpetrator. *See id.*; *supra* notes 47–48 and accompanying text.

127. N.C. GEN. STAT. § 14-5.2 (2007).

128. In North Carolina, a felon convicted of murder in the first degree is guilty of a Class A felony and therefore may receive the death penalty. *Id.* § 14-17. However, a felon convicted of murder in the second degree, which is a Class B2 felony, *id.*, is not eligible for the death penalty. *Id.* § 15A-1340.17.

129. *Id.* § 14-5.2.

130. *See, e.g.*, S.D. CODIFIED LAWS § 22-3-3 (2006) ("Any person who, with the intent to promote or facilitate the commission of a crime, aids, abets, or advises another person in planning or committing the crime, is legally accountable, as a principal to the crime.").

131. VA. CODE ANN. § 18.2-18 (2004) ("In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree; provided, however, that except in the case of a killing for hire under the provisions of subdivision 2 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise under the provisions of subdivision 10 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism under the provisions of subdivision 13 of § 18.2-31, an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.").

specifies that if an accessory before the fact aids in the offenses of murder for hire, murder in connection with a criminal enterprise, or murder in connection with terrorism, then the accessory before the fact is liable for murder in the first degree,[132] which is a Class 2 felony.[133] However, principals who commit those crimes are liable for capital murder, which is a Class 1 felony.[134] For all other crimes, however, accessories before the fact are treated in the same manner as the perpetrator.[135]

O. Statutes that Make Reference to the Common Law Distinctions of Principals and Accessories

Although the Model Penal Code[136] and the majority of states[137] no longer maintain the common law distinctions of accessories and principals in their statutory language, six states continue to use these common law terms in their legislation.[138] North Carolina's statute, for instance, asserts that "[e]very person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal."[139] Vermont has patterned its legislation in a similar manner. Using the same common law terminology, it states that "[a] person who is accessory before the fact" is equally as liable as the "principal offender."[140] Virginia's statute refers to both the "principal in the second degree" and the "accessory before the fact."[141]

P. Statutes that Intertwine Criminal Facilitation or Conspiracy

Because the crimes of criminal facilitation and conspiracy have many of the same elements as accomplice liability,[142] some states have intertwined their

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132. *Id.*

133. *Id.* § 18.2-32.

134. *Id.* § 18.2-31 (Supp. 2008).

135. *Id.* § 18.2-18.

136. *See* MODEL PENAL CODE § 2.06(c)(2) (1962).

137. LAFAVE, *supra* note 1, § 13.1(e), at 670.

138. *See* MD. CODE ANN., CRIM. PROC. § 4-204 (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000); N.C. GEN. STAT. § 14-5.2 (2007); VT. STAT. ANN. tit. 13, § 4 (1998); VA. CODE ANN. § 18.2-18 (2004); W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005).

139. N.C. GEN. STAT. § 14-5.2 (2007).

140. VT. STAT. ANN. tit. 13, § 4 (1998).

141. VA. CODE ANN. § 18.2-18 (2004).

142. *Compare* 16 AM. JUR. 2D *Conspiracy* §§ 10, 13–15 (1998) (listing the elements of conspiracy as agreement, intent, knowledge, and overt act), *and* 35 N.Y. JUR. 2D *Criminal Law: Substantive Principles and Offenses* §§ 344–46 (2008) (listing the elements of criminal facilitation as scienter, commission of the facilitated crime, and actual assistance), *with* 21 AM. JUR. 2D *Criminal Law* §§ 173–76 (2008) (listing the elements of accomplice liability as acting with another, common plan or design, knowledge, and intent).

criminal facilitation and conspiracy statutes with their accomplice liability legislation.[143] Ohio and Kentucky frame their respective complicity statutes to include both accomplice liability and conspiracy.[144] Under Ohio law, a person is liable under the complicity statute who, possessing the requisite mental state for conviction of the perpetrator, aids or abets the principal or "[c]onspire[s] with another to commit the offense."[145] Kentucky's statute, in the same respect, includes the offense of "engag[ing] in a conspiracy with another person" within its complicity statute.[146]

Texas includes the crime of conspiracy within its accomplice legislation;[147] however, the mental state requirement necessary for a conviction of conspiracy differs from that necessary for accomplice liability. The Texas law reads:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated . . . .[148]

Other states have criminal facilitation prohibitions separate and apart from their accomplice legislation.[149] Kentucky has codified the crime of criminal facilitation, holding an individual liable when, "acting with knowledge that another person is committing or intends to commit a crime, he . . . knowingly provides such person with means or opportunity for the commission of the crime."[150] Therefore, although Kentucky's accomplice liability statute allows conviction if the alleged accomplice either had the intention of promoting or facilitating the commission of the offense or had the kind of culpability with respect to the result that is sufficient for the commission of the offense for a

143. *See* KY. REV. STAT. ANN. § 502.020(2)(a) (LexisNexis 1999); OHIO REV. CODE ANN. § 2923.03(A)(2)–(3) (LexisNexis 2006); S.D. CODIFIED LAWS § 22-3-3 (2006); TEX. PENAL CODE ANN. § 7.02(b) (Vernon 2003).

144. *See* KY. REV. STAT. ANN. § 502.020(2)(a) (LexisNexis 1999); OHIO REV. CODE ANN. § 2923.03(A)(2)–(3) (LexisNexis 2006).

145. OHIO REV. CODE ANN. § 2923.03(A)(2)–(3) (LexisNexis 2006).

146. KY. REV. STAT. ANN. § 502.020(2)(a) (LexisNexis 1999).

147. TEX. PENAL CODE ANN. § 7.02(b) (Vernon 2003).

148. *Id.* Thus, while this provision uses a Category III mental state approach with regard to conspiracy, *id.*, Texas uses a Category I mental state approach with regard to accomplice liability, *id.* § 7.02(a).

149. *See* KY. REV. STAT. ANN. § 506.080(1) (LexisNexis 1999); N.Y. PENAL LAW §§ 115.00–115.15 (McKinney 2004).

150. KY. REV. STAT. ANN. § 506.080(1) (LexisNexis 1999).

result-oriented crime,[151] Kentucky may convict an individual of criminal facilitation for possessing a mental state of mere knowledge.[152]

III. STATES WITH CASE LAW FOLLOWING THE CATEGORY I APPROACH: SPECIFIC INTENT

When examining the respective states' case law, with most of these states having accomplice statutes patterned after either the Category I model,[153] the Category II model,[154] or both,[155] one finds only six states that interpret their statutes in a fashion demanding proof of specific intent to promote or assist on the part of the alleged accomplice. These states are Florida, Mississippi, New Mexico, Oregon, Pennsylvania, and Texas.

A. Florida

Florida's criminal code imposes liability on anyone who "aids, abets, counsels, hires, or otherwise procures" a criminal offense, regardless of that person's actual or constructive presence at the commission of the offense.[156] Notwithstanding the statutory language, the case law does not track the statute in that the case law also requires proof that a defendant intended to participate in the crime.[157] For example, in *Giniebra v. State*,[158] where a trial court had

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151. *See supra* note 46 and accompanying text.

152. § 506.080(1).

153. *See* discussion *supra* Part II.A.

154. *See* discussion *supra* Part II.B.

155. *See supra* notes 45–52 and accompanying text.

156. FLA. STAT. ANN. § 777.011 (West 2005) ("Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.").

157. In *Christie v. State*, 652 So. 2d 932 (Fla. Dist. Ct. App. 1995) (per curiam), the court explained that "[t]o convict defendant as an aider and abettor, the state had to show that defendant (1) assisted the actual perpetrators by doing or saying something that caused, encouraged, assisted or incited the perpetrators to actually commit the crime; and (2) intended to participate in the crime." *Id.* at 934 (citing Howard v. State, 473 So. 2d 841, 841 (Fla. Dist. Ct. App. 1985)). Therefore, in a cocaine transaction where the principals double-crossed cocaine suppliers, forcibly took the cocaine at the site of the drug deal, kidnapped the suppliers, and killed them, and where the defendant "was the boss of the drug deal, participated in its planning and supervised its execution," *id.* at 933, the court held that the defendant was a "willing participant." *Id.* at 935.

In *K.O. v. State*, 673 So. 2d 47 (Fla. Dist. Ct. App. 1995), the court held that where the defendant intended to participate in a scheme of breaking the window of a vehicle at a car dealership in order to steal a telephone, which his cohort apparently removed from the vehicle, "there was evidence sufficient to sustain the conviction for burglary under an aiding and abetting

convicted the defendant of second degree murder and kidnapping, the Florida District Court of Appeal affirmed only the kidnapping charge.[159] In this case, the defendant admitted after arrest to being present during the kidnapping of the victim that was motivated by ransom.[160] In addition to the defendant's admission to being present, forensic evidence placed the defendant at the scene where the kidnappers were holding and likely killed the victim.[161] The victim's murder followed the kidnapping and unsuccessful ransom demand, but the defendant denied having participated in the murder.[162]

The defendant appealed his convictions based on insufficiency of evidence.[163] The Florida District Court of Appeal stated that "[t]o convict as a principal, the State must show that [the defendant] intended the crime to be committed and assisted the actual perpetrator in committing the crime."[164] The court then stated that nothing in the record evinced that defendant intended or participated in the victim's murder, and consequently, the court reversed the defendant's conviction for second degree murder.[165] However, the court found sufficient evidence to affirm the conviction for kidnapping.[166]

Meanwhile, in *R.M. v. State*,[167] the defendant "was one of three youths who threw tiles at the victim . . . ; however, the victim was only struck by one of the

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theory." *Id.* at 48. The court explained that the defendant "could be convicted of burglary if the evidence presented by the state at trial was sufficient to show that he (1) assisted the actual perpetrators by doing or saying something that caused, encouraged, assisted, or incited the perpetrators to actually commit the crime, and (2) intended to participate in the crime." *Id.* (citing A.B.G. v. State, 586 So. 2d 445, 447 (Fla. Dist. Ct. App. 1991)).

Additionally, in *Evans v. State*, 643 So. 2d 1204 (Fla. Dist. Ct. App. 1994), the court provided that "[t]o secure a conviction on an aider and abettor theory, the state must establish . . . that the defendant intended to participate in the crime" and that "mere knowledge that an offense is being committed is not the same as participation with the requisite criminal intent." *Id.* at 1205–06 (quoting C.P.P. v. State, 479 So. 2d 858, 859 (Fla. Dist. Ct. App. 1985)) (internal quotation marks omitted). Therefore, the court held that where that the defendant–passenger merely knew that other occupants in a pickup truck intended to shoot the windows out of a store, the evidence was insufficient to convict him of aiding and abetting. *Id.* at 1206.

Finally, in *Jones v. State*, 648 So. 2d 1210 (Fla. Dist. Ct. App. 1995), the court upheld a jury instruction that the defendant's knowledge of the principal's use of a firearm was not required in order to convict the defendant. *Id.* at 1210–11. Notably, the court stated that "[t]o be found guilty as a principal it is not necessary for the aider and abettor to know of every detail of the crime so long as there exists evidence of the aider's intent to participate." *Id.* at 1211.

158. 787 So. 2d 51 (Fla. Dist. Ct. App. 2001).
159. *Id.* at 51, 53.
160. *Id.* at 52–53.
161. *Id.* at 52.
162. *Id.* at 52–53.
163. *See id.* at 53.
164. *Id.*
165. *Id.*
166. *Id.*
167. 664 So. 2d 42 (Fla. Dist. Ct. App. 1995).

tiles," and it was unclear as to which of the youths threw that particular tile.[168] Because of the uncertainty as to who caused the injury to the victim, the State prosecuted the defendant as an accomplice to battery.[169] The Florida appellate court stated that "[i]n order to be convicted as an aider and abettor, the evidence must show that the defendant '(1) assisted the actual perpetrator by doing or saying something that causes, encourages or assists or incites the perpetrator to actually commit the crime; and (2) *intended to participate in the crime.*'"[170] Here, the evidence revealed that "the concerted throwing of the tiles [demonstrated] that the crime had been planned in advance," and consequently, "there was sufficient evidence to convict [the defendant] of battery."[171]

B. Mississippi

It appears Mississippi is another one of the few states which falls into Category I status.[172] In *Malone v. State*,[173] the principal approached the victim as she was trying to enter her house, struck her with a "slapjack," and took money, diamonds, and jewelry from the victim.[174] At trial, the principal's testimony established that although the defendant was not present at the time of the robbery, he made the initial call to the principal and asked her to come meet his cohorts, who would assist her in stealing the diamonds.[175] The principal also stated that the defendant took the diamonds from the principal after the robbery and gave her five $100 bills for bringing him the diamonds.[176]

The defendant appealed his conviction of being an accessory before the fact of armed robbery, claiming the trial court's jury instructions charged the jury on a criminal conspiracy theory, failed to define "aiding and abetting," and failed to call for a finding of specific intent.[177] In regard to the issue of intent, the Supreme Court of Mississippi upheld the conviction after finding that the jury instructions, which required the jury to find that the defendant was "acting in concert with others . . . with the unlawful and felonious intent to steal" in order

168. *Id.*

169. *Id.* at 43.

170. *Id.* (emphasis added) (quoting Rouse v. State, 583 So. 2d 1111, 1112 (Fla. Dist. Ct. App. 1991)).

171. *Id.* at 42–43.

172. Interestingly, Mississippi law contains no mental state requirement. MISS. CODE ANN. § 97-1-3 (2006) ("Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal . . . .").

173. 486 So. 2d 360 (Miss. 1986).

174. *Id.* at 361 (internal quotation marks omitted).

175. *Id.* at 361–63.

176. *Id.* at 362.

177. *Id.* at 363–64.

to reach a guilty verdict, were proper.[178] The court concluded that "[a]ny alleged deficiency in the instructions on the matter of advising the jury of the concepts of aiding and abetting and specific intent were more than cured" by the instructions given.[179]

In *White v. State*,[180] the State charged and obtained a conviction of the defendant–accomplice for robbery.[181] In this case, the defendant and three others baited the victims to an isolated location and robbed them at gunpoint.[182] The three other individuals pleaded guilty and testified against the defendant.[183] The trial court gave the jury two avenues to find the defendant guilty, either as a direct participant or as an accomplice.[184] The jury found the defendant guilty of robbery but did not specify whether they convicted him as a principal or as an accessory.[185] The jury instruction regarding the theory that the defendant may have been an aider and abettor read in part:

> If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts *with the intent to commit a crime*, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.
>
> Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it *with the intent to bring about the crime.*[186]

The Mississippi Supreme Court upheld the defendant's conviction, finding "no error in the submission of this instruction."[187]

C. New Mexico

Notwithstanding its accessory statute which reflects no mental state requirement,[188] New Mexico provides a strong example of a jurisdiction which

178. *Id.* at 364–65.
179. *Id.* at 364.
180. 919 So. 2d 1029 (Miss. Ct. App. 2005).
181. *Id.* at 1031, 1034.
182. *Id.* at 1031.
183. *Id.*
184. *Id.* at 1032.
185. *Id.* at 1035.
186. *Id.* at 1033 (emphasis added).
187. *Id.* at 1034, 1036.

judicially adheres to the Category I perspective.[189] In *State v. Carrasco*,[190] two principals went into a convenience store while the defendant waited in the car.[191] While in the store, one principal struck the clerk, knocked her down, and kicked her as the other principal attempted to open the cash register.[192] When a customer entered the store, the principals ran out of the store, jumped into the car, and drove away with the defendant driving the vehicle.[193] At the defendant's trial, where he faced multiple charges as an accessory, the defendant "testified that he was intoxicated [during the incident] and that he either went to sleep or blacked-out in the car" while the principals were inside of the store.[194] Therefore, although the defendant admitted to driving the two principals away from the store, he also claimed to know "nothing of the acts" the principals committed inside the store until after they informed him of their attempted robbery while they were driving away.[195] Nevertheless, a trial court convicted the defendant of "conspiracy to commit robbery, accessory to assault with intent to commit a violent felony (robbery), accessory to aggravated battery, accessory to attempted robbery, and accessory to false imprisonment."[196]

The New Mexico Court of Appeals, in upholding the defendant's convictions, "relied on the doctrine that an accessory may be held liable for all crimes which are the natural and probable consequence of the attempted criminal offense."[197] However, the Supreme Court of New Mexico rejected this

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188. N.M. STAT. ANN. § 30-1-13 (LexisNexis 2004) ("A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission . . . .").

189. *See* State v. Bankert, 875 P.2d 370, 374 (N.M. 1994) (quoting N.M. RULES ANN., CRIM. U.J.I. § 14-2822) (adopting the elements of accomplice liability from the New Mexico uniform jury instructions for criminal cases). In *Bankert*, the evidence established that the alleged accomplice "badly wanted [an illegal drug] deal to take place"—so much so that he killed a supplier in order to allow the principal to take possession of the drugs. *Id.* at 375–76. The Supreme Court of New Mexico determined that the defendant–accomplice was guilty as an accomplice to possession of drugs with intent to distribute, which served as the predicate offense necessary to convict the defendant–accomplice of felony murder. *Id.* at 376. The *Bankert* court stated that the Uniform Jury Instructions demand proof that "[t]he defendant *intended that the crime be committed*; . . . [t]he crime was committed; [and t]he defendant helped, encouraged or caused the crime to be committed." *Id.* at 374 (emphasis added) (internal quotation marks omitted) (quoting N.M. RULES ANN., CRIM. U.J.I. § 14-2822).

190. 946 P.2d 1075 (N.M. 1997).

191. *Id.* at 1078.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1078–79.

197. *Id.* at 1079.

opinion insofar as it applied the "natural and probable consequence test."[198] Instead, the court stated that in order to be held liable as an accessory, an individual "must share the criminal intent of the principal."[199] The court noted that the *New Mexico Uniform Jury Instructions* demand that "[t]he defendant intended that *the crime* be committed" before accomplice liability attaches.[200] In other words:

> [A] jury must find a community of purpose for *each* crime of the principal. This principle means that a jury must find that a defendant *intended* that the acts necessary for *each* crime be committed; a jury cannot convict a defendant on accessory liability for a crime unless the defendant intended the principal's acts.[201]

In explicitly rejecting the natural and probable consequences test, the court commented that although other states have adopted this approach, scholars have criticized it.[202] Additionally, the court justified its refusal to adhere to the natural and probable consequences doctrine by noting that the doctrine does not conform to the mental state required by section 2.06(3) of the Model Penal Code or New Mexico's accomplice liability jurisprudence.[203] Finally, although the court felt there was sufficient evidence to warrant convictions on each of the charges under the correct mental state requirement, the court required a retrial due to unrelated error.[204]

D. Oregon

Oregon's accomplice statute[205] and courts[206] require proof that the defendant–accomplice acted with the "intent to promote or facilitate the

198. *Id.* (internal quotation marks omitted).
199. *Id.* (citing State v. Ochoa, 72 P.2d 609, 615 (N.M. 1937)).
200. *Id.* (quoting N.M. RULES ANN., CRIM. U.J.I. § 14-2822) (emphasis added).
201. *Id.*
202. *Id.*; *cf. supra* notes 22–25 and accompanying text (citing scholarly criticism).
203. *Corrasco*, 946 P.2d at 1079.
204. *Id.* at 1086.
205. OR. REV. STAT. § 161.155 (2007) ("A person is criminally liable for the conduct of another person constituting a crime if: (1) [t]he person is made criminally liable by the statute defining the crime; or (2) [w]ith the intent to promote or facilitate the commission of the crime the person: (a) [s]olicits or commands such other person to commit the crime; or (b) [a]ids or abets or agrees or attempts to aid or abet such person in planning or committing the crime; or (c) [h]aving a legal duty to prevent the commission of the crime, fails to make an effort the person is legally required to make.").
206. For example, in *State ex rel. Juvenile Dep't of Multnomah County v. Holloway*, 795 P.2d 589 (Or. Ct. App. 1990), the court held that although the juvenile defendant was in a pickup

commission of the crime." For example, *State ex rel. Juvenile Department of Marion County v. Arevalo*[207] involved a juvenile defendant a lower court found responsible for kidnapping as a principal and first degree sexual abuse as an accomplice.[208] Here, the defendant, "other boys and the victim were together in a physical education class when," during the teacher's absence, defendant and the other boys dragged the victim into an adjacent room.[209] As one of the boys sat on top of the victim, the defendant stood by the door while several of the other boys grabbed the victim's breasts.[210] The Oregon Court of Appeals upheld the findings of the juvenile court, including that the defendant aided and abetted the sexual abuse.[211] The court pointed out that "[t]he state was required to prove that [the] child aided or abetted the commission of the crime with the intent to facilitate its commission."[212] Here, although the defendant had not touched the victim's breasts, the defendant observed a codefendant's hands going up the victim's shirt and "could see that the assault had taken a sexual turn."[213] The defendant also invited other boys into the room and overheard one boy yell, "Take her shirt off."[214] Thus, the court concluded the defendant had the requisite "intent to promote or facilitate" the sexual abuse carried out by the other boys.[215]

Similarly, in *State v. Branam*,[216] based on the finding of the defendant's specific intent to aid and abet, the court found the defendant to be an accomplice to her boyfriend's first degree criminal mistreatment of her three young boys.[217] According to the evidence, the defendant's boyfriend spanked the boys to such an extent that they suffered bruises.[218] The appellate court noted that the accomplice statute imputes the conduct of another to an accused

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truck that was involved in a gang-related drive-by-shooting, he had not aided and abetted an attempted murder where the evidence did not support a conclusion that he had the "intent to promote or facilitate" the shooting. *Id.* at 590–92 (quoting OR. REV. STAT. § 161.155(2)(b) (2007)). Also, in *State ex rel. Juvenile Dep't of Multnomah County v. Greenwood*, 813 P.2d 58 (Or. Ct. App. 1991), the court upheld a defendant's conviction where she assisted her sister in forcibly stealing a purse from the victim because "under the accomplice statute, the state had only to show that the defendant had the intent to promote or facilitate her sister's commission of robbery in order to complete its proof of the elements of second-degree robbery." *Id.* at 59–60.

207. 844 P.2d 928 (Or. Ct. App. 1992).
208. *Id.* at 929.
209. *Id.*
210. *Id.*
211. *Id.* at 930–31.
212. *Id.* at 930.
213. *Id.* at 930–31.
214. *Id.* at 931 (internal quotation marks omitted).
215. *Id.* at 930.
216. 739 P.2d 606 (Or. Ct. App. 1987).
217. *Id.* at 607–08.
218. *Id.* at 607.

if the accused had the "intent to promote or facilitate" the perpetrator's criminality and had a "legal duty to prevent the commission of the crime, [but] fail[ed] to make an effort the [accused was legally] required to make."[219] Here, the trial court properly found the defendant had the necessary intent to promote or facilitate the criminal mistreatment.[220]

In *State v. Moreno*,[221] the defendant appealed his conviction of possession of a precursor substance with intent to manufacture a controlled substance.[222] In this case, the defendant stole five packages of Sudafed cold medicine from a pharmacy.[223] After his arrest, the defendant admitted that he stole the Sudafed and "that he intended to sell it on the street for money."[224] The defendant also acknowledged "that he knew that Sudafed contains pseudoephedrine and that pseudoephedrine is a precursor substance used to manufacture methamphetamine."[225] However, the defendant denied "that he intended personally to manufacture methamphetamine or that he even knew how to manufacture it."[226]

The Oregon drug measure under which the trial court convicted the defendant required the jury to find that the defendant held the "'conscious objective' to manufacture methamphetamine."[227] Because the facts of the case did not suggest that the defendant intended that the Sudafed be used to manufacture methamphetamine, the state argued for criminal liability on an aiding and abetting theory.[228] Accordingly, the state argued that the defendant possessed the requisite conscious objective because he intended to sell the Sudafed to another knowing the other person would likely or certainly use it to manufacture methamphetamine.[229]

However, the Court of Appeals of Oregon disagreed. Reversing the conviction, the court stated that knowledge was "not enough to establish liability on the state's alternative theory that defendant aided and abetted

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219. *Id.* (internal quotation marks omitted) (quoting OR. REV. STAT. § 161.155(2)(c) (2007)).

220. *Id.* at 608. There was also evidence the defendant spanked her children excessively. *Id.* at 607. However, the primary focus of the court's discussion regarding the defendant's liability was on the accomplice theory. *See id.* at 607–08.

221. 104 P.3d 628 (Or. Ct. App. 2005).

222. *Id.* at 628.

223. *Id.* at 628–29.

224. *Id.* at 629.

225. *Id.*

226. *Id.*

227. *Id.* at 630 (quoting OR. REV. STAT. § 161.085(7) (2007)).

228. *Id.* at 629–31.

229. *Id.* at 631.

another in the commission of the crime."[230] Ultimately, the court concluded that:

> The mental state required for criminal liability on an aid and abet theory is essentially the same as for a principal's liability in this circumstance. A person is guilty of a crime committed by another if that person, "*with the intent to promote or facilitate the commission or the crime*," aids and abets the "other person in planning or committing the crime."[231]

Therefore, the jury had to find that the defendant actually possessed the conscious objective, not merely the awareness, that another would use the Sudafed to manufacture methamphetamine.[232] In other words, at best, the defendant was interested in selling the Sudafed to make money, and as such, to assume he intended to sell it to some hypothetical person with the conscious objective that such person use it to manufacture methamphetamine was nothing less than pure conjecture.

E. Pennsylvania

Pennsylvania is a jurisdiction which reflects both Category I and Category II language in its accomplice statute,[233] but its case law follows a Category I pattern.[234] Although Pennsylvania opinions often refer to the need for shared

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230. *Id.*

231. *Id.* (quoting OR. REV. STAT. § 161.155(2) (2007)).

232. *Id.*

233. *See* 18 PA. CONS. STAT. ANN. § 306(c)–(d) (West 1998) ("A person is an accomplice of another person in the commission of an offense if: (1) with the intent of promoting or facilitating the commission of the offense, he: (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it; or (2) his conduct is expressly declared by law to establish his complicity. . . . When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.").

234. For example, the court in *Commonwealth v. Potts*, 566 A.2d 287 (Pa. Super. Ct. 1989), determined that "there was sufficient evidence for the fact finder to reject the [defendant's] contention that he merely intended to beat up the deceased, and to instead find that . . . he intended to facilitate the killing of [the victim]." *Id.* at 291. Therefore, the court upheld the defendant's conviction as an accomplice because "an accomplice is equally criminally liable for the acts of another if he acts 'with the intent of promoting or facilitating the commission of an offense,' and agrees or aids or attempts to aid such other person in either planning or committing the criminal offense." *Id.* (quoting Commonwealth v. Driver, 493 A.2d 778, 779–80 (Pa. Super. Ct. 1985)).

criminal intent,[235] a close examination of these decisions reveals the accomplice must have the intent to commit the crime perpetrated by the principal. In *Commonwealth v. Murphy*,[236] the Pennsylvania Supreme Court upheld the defendant's conviction as a principal and as an accomplice of delivery of and conspiracy to deliver a controlled substance.[237] In this case, an undercover Pennsylvania state trooper approached the defendant on the street and asked him if he knew where the undercover officer could buy some "dope."[238] The defendant asked the undercover officer if he was "a cop" and, when the officer replied that he was not, the defendant called the principal over.[239] The defendant told the principal that the officer was not a cop and assured the principal the officer was "cool."[240] After determining how much the officer wished to buy, the principal left the officer and the defendant on the corner for several minutes.[241] When he returned, the principal asked the officer to follow him down the street, where the officer eventually purchased two bags of heroin with two marked $20 bills.[242] When the officer returned to the corner with the drugs, the defendant asked the officer for half of one of the bags, but the officer declined.[243] Subsequently, officers arrested both the defendant and the principal, and the trial court convicted the defendant.[244] Thereafter, the defendant unsuccessfully appealed to the superior court.[245] Finally, the defendant appealed the superior court's decision that there was sufficient evidence to convict him of the delivery charges based on accomplice liability.[246]

In determining the propriety of this judgment, the Pennsylvania Supreme Court stated that an accomplice must have the requisite intent "'of promoting or facilitating the commission of the offense,'" which must be shown by first, "evidence that the defendant intended to aid or promote the underlying offense," and second, "evidence that the defendant actively participated in the crime by

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235. *See, e.g.*, Commonwealth v. Wilson, 296 A.2d 719, 721 (Pa. 1972) ("[S]hared criminal intent must be found to be present to justify a finding that an accused was an accomplice." (citing Commonwealth v. Lowry, 98 A.2d 733, 736 (Pa. 1953); Commonwealth v. Thomas, 53 A.2d 112, 114 (Pa. 1947); Commonwealth v. Doris, 135 A. 313, 314 (Pa. 1926))); Commonwealth v. Cunningham, 447 A.2d 615, 617 (Pa. Super. Ct. 1982) ("To aid and abet in the commission of a crime, one must possess a shared intent to commit it." (citing Commonwealth v. Leach, 317 A.2d 293, 295 (Pa. 1974); Commonwealth v. Henderson, 378 A.2d 393, 398 (Pa. Super. Ct. 1977))).

236. 844 A.2d 1228 (Pa. 2004).

237. *Id.* at 1232–33.

238. *Id.* at 1231.

239. *Id.*

240. *Id.* (internal quotation marks omitted).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 1231–32.

245. *Id.* at 1232–33.

246. *Id.* at 1233.

soliciting, aiding, or agreeing to aid the principal."[247] It upheld this conviction because the defendant aided in the delivery of the contraband with the clear intent to do so, as he "called out to [the principal] after the trooper approached him, confirmed to [the principal] that the trooper was not a police officer, stayed with the trooper while [the principal] got drugs, and requested compensation from the trooper for his efforts."[248]

In applying this approach to accomplice liability, the Pennsylvania courts have also explicitly rejected other, more expansive perspectives. For instance, in *Murphy* the court stated that a court could not convict the defendant where he simply knew of the criminal activity or was merely present at the scene of the crime: "There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so."[249] In this sense, Pennsylvania appears not to follow those jurisdictions where the State can secure a conviction for accomplice liability with a lesser mental state than specific intent.[250]

F. Texas

The Texas law entitled "Criminal Responsibility for Conduct of Another" contains a subsection which insists on "intent to promote or assist the commission of the offense" for aiding and abetting.[251] The Texas case law appears to be true to the state's accomplice legislation.[252]

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247. *Id.* at 1234 (quoting 18 PA. CONS. STAT. ANN. § 306(c)(1) (West 1998); Commonwealth v. Spotz, 716 A.2d 580, 585 (Pa. 1998)).

248. *Id.* at 1237.

249. *Id.* at 1234.

250. *See* discussion *supra* Part II.D.

251. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003) ("A person is criminally responsible for an offense committed by the conduct of another if: . . . (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.").

252. *See, e.g.*, Horton v. State, 880 S.W.2d 22 (Tex. App. 1993). In *Horton*, police officers charged the victim with driving while intoxicated. *Id.* at 23. After his arrest, the officers took him to the county jail, "booked [him] in, and then placed [him] in the detoxification tank." *Id.* Later, the victim died of injuries inflicted upon him while in the jail facility. *Id.* at 23–24. The defendant, a law enforcement officer, "was charged with the commission of murder as both a principal and/or as a party." *Id.* at 24. The appellate court reversed the defendant's conviction and concluded the record was "devoid of any evidence which would justify a finding that [the defendant] was guilty of the offense as a principal," noting that "any culpability of [the defendant] would be only as a party . . . ." *Id.* The court stated that where the defendant was at best "responsible for the actions of the primary actor, the State must prove conduct constituting an offense, plus an act by [the defendant] done *with the intent to promote or assist* such conduct." *Id.* at 24–25 (emphasis added) (citing Beier v. State, 687 S.W.2d 2, 3 (Tex. Crim. App. 1985)). Here, the court concluded that the

In *Hill v. State*,[253] a Texas Court of Appeals ruling, the defendant was found guilty "as a party to the first degree felony offense of injury to a child."[254] In this case, a hospital admitted the nine year old son of the defendant "with severe and infected bruises and injuries."[255] A registered nurse noticed the victim "had various bruises and injuries obviously inflicted at different times."[256] Subsequently, when police investigated the matter, the defendant's husband confessed that several days before the child's hospitalization he had "spanked" the victim with a metal rod.[257] Because the police believed the defendant to be an accomplice, they charged her with aiding and abetting her husband's beatings of the victim.[258] The appellate court stated that "for the appellant to be criminally responsible for the offense committed [by her husband], the evidence must show that 'acting with intent to promote or assist the commission of the offense, [she] solicit[ed], encourage[d], direct[ed], aid[ed], or attempt[ed] to aid the other person to commit the offense.'"[259] The court found,

> From the evidence, the jury could discern a pattern, existing during a number of years, that on the occasions when [her husband] arrived home from work and [the defendant] told him one of the children had been bad, [her husband] would take the child into his bedroom and "spank" the child with a metal rod or a stick. There was evidence that these "spankings" had resulted in physical injuries to the children, including knots on the heads . . . and the fracture of eight of [the victim's] ribs. On some of these occasions [the defendant] would be present; at other times she would leave the house at [her husband's] direction.[260]

The court concluded that the evidence was sufficient for the jury to find that the defendant, "albeit not present during the 'spanking,' acted to promote or assist in the 'spanking'" of the victim, and as such, the court affirmed her conviction.[261]

State failed to rebut the "reasonable hypothesis . . . that the fatal blows could have been inflicted [by others] either in the detox[ification] tank or in the hallway before [the defendant] was present." *Id.* at 25.

253. 883 S.W.2d 765 (Tex. App. 1994).
254. *Id.* at 766–67.
255. *Id.* at 767.
256. *Id.*
257. *Id.*
258. *Id.* at 767–68.
259. *Id.* at 770 (quoting TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003)).
260. *Id.*
261. *Id.* at 770–71.

In an another opinion from a Texas Court of Appeals, *Wooden v. State*,[262] a witness observed the defendant and three other men get out of a car and surround a parked truck, from which they evidently intended to steal some items.[263] Upon noticing the witness observing the men, the defendant and the other men returned to the car and drove to the witness's vantage point.[264] One of the men, seated in the rear seat behind the defendant, reached down, picked up a gun, and pointed it at the witness's car.[265] When the witness picked up his phone to call 911, the men drove away.[266] The trial court convicted the defendant as an accomplice to aggravated robbery based on the attempted theft and his companion's pointing the gun at the witness in an attempt to prevent the witness from interfering.[267] On appeal, the court stated that in order for a court to find the defendant guilty of aggravated robbery, the evidence must show he intended to promote both the theft and the pointing of the gun at the witness that created the basis for an aggravated robbery charge.[268] The defendant claimed that he did not know his companion had a gun and, as such, could not have intended to promote or assist an aggravated robbery.[269] The court agreed and therefore reversed the aggravated robbery conviction.[270] The court reasoned:

> While [defendant's] statement, "I did not throw out the gun," is some evidence that appellant knew a gun was thrown out of the car, it does not indicate that appellant knew the gun was in the car when the men were talking to [the witness] or that appellant encouraged his companion to threaten [the witness] with the gun.[271]

The court concluded that the State was required to prove the defendant "intended to promote or assist" the robbery but that it had not.[272]

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262. 101 S.W.3d 542 (Tex. App. 2003).
263. *Id.* at 543–44.
264. *Id.* at 544.
265. *Id.*
266. *Id.*
267. *Id.* at 545.
268. *Id.* at 547–48.
269. *Id.*
270. *Id.* at 546–49.
271. *Id.* at 548.
272. *Id.* at 547–48.

IV. STATES WITH CASE LAW FOLLOWING THE CATEGORY II APPROACH: STATUTORILY PRESCRIBED MENTAL STATE

The fourteen states that follow the Category II approach fit into one of two general subcategories: (1) states in which Category II language is codified and strictly applied by the courts and (2) states in which Category II language is not codified but judicially construed by the courts. Connecticut, Hawaii, Kentucky, New Hampshire, New York, and Utah are the only six states in this first category.[273] Of these states, Hawaii, Kentucky, and New Hampshire essentially codify Model Penal Code section 2.06(4),[274] while Connecticut, New York, and Utah require a shared mental state for any offense, not just for result-oriented crimes.[275] In Georgia, Idaho, Massachusetts, New Jersey, Oklahoma, Rhode Island, Vermont, and Wyoming, the state courts have created a Category II approach where Category II language is absent from the accomplice statutes.[276] Finally, although it might be argued that several other states, most notably Alaska and Washington, follow the Category II approach, Part VI explores these states' novel or unique approaches to accomplice liability.

A. "Codified" Category II Approach

While courts in Connecticut, New York, and Utah apply the Category II approach from statutes containing only Category II language,[277] courts in Hawaii, Kentucky, and New Hampshire follow the Category II approach from statutes that provide for accomplice liability under both a Category I and Category II perspective.[278]

1. Connecticut

In Connecticut, the courts strictly apply an accomplice statute under which an accomplice is liable for a crime committed by a principal if the accomplice aids and abets the principal and acts "with the mental state required for

273. *See* discussion *infra* Part IV.A.

274. *See supra* notes 43–47 and accompanying text.

275. *See supra* notes 47–48 and accompanying text.

276. *See* discussion *infra* Part IV.B.

277. *See* CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007); N.Y. PENAL LAW § 20.00 (McKinney 2004); UTAH CODE ANN. § 76-2-202 (2003).

278. *See* HAW. REV. STAT. ANN. §§ 702-222 to -223 (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(1)–(2) (LexisNexis 1999); N.H. REV. STAT. ANN. § 626:8(III)(a), (IV) (LexisNexis 2007).

commission of an offense."[279] In *State v. Foster*,[280] a jury convicted the defendant, *inter alia*, of criminally negligent homicide based on an accomplice theory.[281] In this case, the defendant and the principal confronted the victim, whom they suspected had raped the defendant's girlfriend.[282] The defendant beat the victim and then left the principal with a knife to guard the victim while the defendant retrieved his girlfriend to identify the victim as the rapist.[283] While the defendant was away, the victim charged at the principal, who then fatally stabbed the victim.[284]

On appeal, the defendant contended and the Supreme Court of Connecticut acknowledged that courts previously understood Connecticut accomplice law to require "proof of a dual intent, i.e., 'that the accessory have the intent to *aid* the principal *and* that in so aiding he intend to *commit* the offense with which he is charged.'"[285] The defendant then argued that because (1) accomplice liability in Connecticut required that the accomplice intend to commit the charged offense, and (2) "criminally negligent homicide requires that an unintended death occur," accomplice liability for criminally negligent homicide was a "logical impossibility in that it would require a defendant, in aiding another, to intend to commit a crime in which an unintended result occurs."[286]

The Supreme Court of Connecticut disagreed with the defendant, however, stating that the defendant's reliance on the concept of dual intent was "misplaced"[287] and concluding:

> [The accomplice liability statute] is not limited to cases where the substantive crime requires the specific intent to bring about a result. [It] merely requires that a defendant have the *mental state required for the commission of a crime* while intentionally aiding another. . . . Accordingly, an accessory may be liable in aiding another if he acts intentionally, knowingly, recklessly or with criminal negligence toward the result, depending on the mental state required by the substantive

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279. CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007) ("A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."). Importantly, this statute reflects no Category I language.

280. 522 A.2d 277 (Conn. 1987).

281. *Id.* at 278 (citing CONN. GEN. STAT. ANN. § 53a-8 (West 1987) (current version at CONN. GEN. STAT. ANN. § 53a-8 (West 2007)); CONN. GEN. STAT. ANN. § 53a-58 (West 2007)).

282. *Id.* at 279.

283. *Id.*

284. *Id.*

285. *Id.* at 280 (quoting State v. Harrison, 425 A.2d 111, 113 (Conn. 1979)).

286. *Id.* at 281.

287. *Id.*

> crime. When a crime requires that a person act with criminal negligence, an accessory is liable if he acts "with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists."[288]

Here, the jury could have reasonably concluded that the defendant intentionally aided the principal by giving him the knife and negligently "failed to perceive a substantial and unjustifiable risk that death would occur by handing [the principal] the knife to prevent [the victim] from escaping."[289] Accordingly, the Supreme Court of Connecticut affirmed the defendant's conviction for criminally negligent homicide[290] based on a Category II approach to accomplice liability.

In *State v. Crosswell*,[291] the defendant and the two principals agreed to steal $15,000 that the principals believed was hidden in an apartment.[292] The defendant and the principals broke into the apartment, ransacked it, and restrained its occupants; one of the principals also beat an occupant in order to silence her.[293] After one of the principals found the money, the defendant and the principals left and then divided the $15,000 among themselves.[294] A jury convicted the defendant, *inter alia*, as an accessory to first degree burglary.[295] Here, the jury instructions stated that "reference to the mental state required means that the alleged accessory must have the same intent to commit the crime that is required of the actual perpetrators of the crime."[296]

On appeal, the defendant claimed "that the [S]tate failed to prove that he intended to commit a crime" in the premises, which is an element of first degree burglary.[297] In addition, the defendant argued that being an accessory to first degree burglary requires proof of the same mental state necessary to commit first degree burglary.[298] The State, by contrast, argued that case law stated that an "accessory was not required to 'possess the intent to commit the specific

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288. *Id.* at 283 (footnote call numbers omitted) (quoting CONN. GEN. STAT. ANN. § 53a-3(14) (West 2007 & Supp. 2008)).

289. *Id.* at 286.

290. *Id.* at 288.

291. 612 A.2d 1174 (Conn. 1992).

292. *Id.* at 1177.

293. *Id.*

294. *Id.* at 1177–78.

295. *Id.* at 1176.

296. *Id.* at 1184 (internal quotation marks omitted).

297. *Id.* at 1181–82 (quoting CONN. GEN. STAT. ANN. § 53a-101(a) (West 1992) (current version at CONN. GEN. STAT. ANN. § 53a-101(a) (West Supp. 2008))).

298. *Id.* (citing CONN. GEN. STAT. ANN. § 53a-8 (West 1992) (current version at CONN. GEN. STAT. ANN. § 53a-8 (West 2007))).

degree' of the crime charged."[299] The Supreme Court of Connecticut responded that "[t]aking a literal view of the plain language of the accessory statute," it effectively agreed with the position "that 'the mental state required of an accomplice who is charged with a crime [cannot be] less than that which must be proved against a principal.'"[300] The court held that to be liable as an accomplice, the defendant must possess the mental state necessary to convict him of the substantive crime.[301] After examining the evidence, namely, that the defendant knew that the principals entered the house to commit a robbery and that infliction of injury was a possibility, the court concluded that the defendant had the mental state to commit first degree burglary.[302] Consequently, the court upheld the defendant's conviction for that offense.[303]

2. New York

Under New York's accomplice statute, to be guilty as an accomplice, one must act with the same "mental culpability" required of the principal.[304] New York's statute, like Connecticut's, has no Category I provision.[305] When analyzing earlier accomplice liability law, however, New York courts stated that when a defendant aided and abetted a "common purpose," he was "presumed to intend the natural consequences of his act."[306] For example, in *People v. Lieberman*, the New York Court of Appeals examined a case where a group of four young men decided to assault tramps and vagrants.[307] Upon finding a man sitting on the front steps of an abandoned home, members of the group proceeded to punch the man until he fell to the ground.[308] At this point, the victim ran to aid the man lying on the sidewalk, whereupon an altercation erupted between the victim and the group.[309] One of the defendant's confederates subsequently struck the victim, who fell to the sidewalk and struck the back of his head on the edge of the sidewalk, which rendered him

299. *Id.* (quoting State v. McCalpine, 463 A.2d 545, 551 (Conn. 1983)).

300. *Id.* at 1184 (quoting *McCalpine*, 463 A.2d at 551–52 (Shea, J., concurring) (alteration in original)).

301. *Id.*

302. *Id.*

303. *Id.*

304. N.Y. PENAL LAW § 20.00 (McKinney 2004) ("When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.").

305. *See id.*; *supra* note 279 and accompanying text.

306. People v. Lieberman, 148 N.E.2d 293, 295 (N.Y. 1958) (citations omitted).

307. *Id.* at 294.

308. *Id.*

309. *Id.*

unconscious.[310] The defendant and his three companions then left the scene, and the victim subsequently died without regaining consciousness.[311] The State prosecuted the defendant and his codefendants for manslaughter, but the trial court granted a motion to dismiss.[312]

On appeal, the New York Court of Appeals reinstated the charge.[313] The court held that the evidence proved the existence of a plan to "beat up 'tramps and vagrants' which, when set in motion," led to the victim's death.[314] The court reasoned that a jury could properly conclude that the defendant was "a willing and active participant from start to finish."[315] Although the victim's death may not have been what the group intended, the court noted that "both here and in sister States . . . a person is presumed to intend the natural consequences of his act."[316] Because the victim's death was a "natural and probable consequence" of the group's plan, the court concluded that a jury could find the defendant liable even though the victim's resulting death "was unexpected and formed no part of the original scheme."[317]

Notwithstanding *Lieberman* and similar early cases, later New York opinions track the requirements of the New York accomplice statute, which mandates shared intent. In *People v. Torres*,[318] the New York Supreme Court, Appellate Division, reversed the murder conviction of a defendant who had argued with the victim and armed himself with a knife with which to murder the victim.[319] Another man the defendant knew shot the victim.[320] In this case, the appellate court held that the People failed to prove the defendant was "acting in concert with the person who shot the deceased."[321] The court stated that "even if the defendant was aware of the weapon possessed by the shooter, the People failed to prove that the defendant shared or was aware of the shooter's intent to kill" the victim.[322] The court added that "[n]otwithstanding the defendant's admitted but uneffectuated intent to stab [the victim]," the People had not proved that the defendant had the intent to see the victim die by gunfire.[323]

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310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at 295.
314. *Id.* at 294.
315. *Id.*
316. *Id.* at 295 (citations omitted).
317. *Id.*
318. 545 N.Y.S.2d 398 (N.Y. App. Div. 1989).
319. *Id.* at 399.
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.* (citing People v. LaCoot, 500 N.Y.S.2d 12, 12 (N.Y. App. Div. 1986)).

Because the state failed to prove "that the defendant shared the shooter's intent to kill," the court felt obliged to reverse the defendant's conviction.[324]

In *People v. Rossey*,[325] the New York Supreme Court, Appellate Division, had previously reversed the defendant's murder conviction because it was not convinced the defendant "shared the intent to kill" the victim.[326] Later, the New York Court of Appeals reinstated the conviction of the defendant, who had driven the codefendant to an area, looked for and conversed with the victim, and drove the codefendant from the area afterward.[327] The court found that: (1) the defendant had been present during the commission of the crime, and (2) a rational trier of fact could have concluded the defendant was "acting in concert with the shooter," thus satisfying the requirements for conviction under an accomplice liability theory.[328] The court further stated that although it was circumstantial evidence that established that the "defendant shared [the principal's] intention to kill," such evidence could support a conviction under New York accomplice law.[329] In conclusion, *Rossey* and *Torres* demonstrate that New York follows a shared intent approach.

3. Utah

Utah's criminal code requires a shared mental state for aiding and abetting.[330] Its case law is true to its accomplice legislation.[331] In *State v. Cayer*,[332] a group of men beat the victim while the defendant remained inside a

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324. *Id.*

325. 678 N.E.2d 473 (N.Y. 1997).

326. *Id.* at 473 (citing People v. Rossey, 635 N.Y.S.2d 970, 971 (N.Y. App. Div. 1995)).

327. *Id.* at 474.

328. *Id.*

329. *Id.* at 473–74 (citing People v. Cabey, 649 N.E.2d 1164, 1166 (N.Y. 1995)).

330. UTAH CODE ANN. § 76-2-202 (2003) ("Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.").

331. *See* State v. Holgate, 10 P.3d 346 (Utah 2000) (holding that in order to convict a defendant of aggravated battery as an accomplice, the State "had to show that [the defendant], acting 'with the mental state required for the commission of' aggravated burglary," aided the principal in the commission of the offense (quoting UTAH CODE ANN. § 76-2-202 (2003))); *see also* State v. Chaney, 989 P.2d 1091, 1101, 1103 (Utah Ct. App. 1999) (stating that "criminal liability attaches to one who solicits, requests, commands, encourages, or intentionally aids another and does so with the mental state required for commission of the offense" and rejecting the argument that specific intent is required for accomplice liability); State v. Beltran-Felix, 922 P.2d 30, 36 (Utah Ct. App. 1996) (holding that where the defendant claimed that he did not act "with the mental state required to commit the offense" of aggravated sexual assault as an accomplice, the jury properly concluded that the "defendant intentionally aided [the principal] in the sexual assault").

332. 814 P.2d 604 (Utah Ct. App. 1991).

trailer and prevented the victim's friend from going to the victim's aid.[333] A jury convicted the defendant of second degree murder under the Utah accomplice liability statute and he appealed on the ground that there was insufficient evidence to support the jury's verdict.[334] The Court of Appeals of Utah disagreed, stating that the "[d]efendant prevented [the victim's friend] from going outside to help [the victim] by hitting [the friend] every time he attempted to get up. A jury could reasonably conclude this conduct by defendant aided his friends in the beating death of [the victim]."[335] Moreover, "a reasonable jury could infer that defendant had the requisite mental state for the offense" because "[h]e made no attempt to aid the victim either by seeking help . . . or by intervening on the victim's behalf."[336]

4. Hawaii

Under Hawaii's "complicity" liability statute, a person is an accomplice if that person aids with the intent to promote or facilitate the underlying offense.[337] Meanwhile, under Hawaii's "complicity with respect to the result" statute, where a "particular result is an element of an offense," a person is an accomplice to the conduct that produced the result if the person acted with the *mens rea* required for the offense.[338] Consequently, because one need not invariably harbor specific intent as to a criminal result to be an accomplice in Hawaii, this state is also a Category II jurisdiction.

In *State v. Hernandez*,[339] the Hawaii Supreme Court upheld a conviction relying on the complicity statute.[340] In that case, where the defendant was present when the perpetrator began his attack upon the victim, prevented the beaten and bloodied victim from escaping, and returned her to the perpetrator

333. *Id.* at 607.

334. *Id.* at 608, 612 (citing UTAH CODE ANN. § 76-5-203 (1990) (current version at UTAH CODE ANN. § 76-5-203 (Supp. 2008)); UTAH CODE ANN. § 76-2-202 (2003)).

335. *Id.* at 612.

336. *Id.*

337. HAW. REV. STAT. ANN. § 702-222 (LexisNexis 2007) ("A person is an accomplice of another person in the commission of an offense if: (1) [w]ith the intention of promoting or facilitating the commission of the offense, the person: (a) [s]olicits the other person to commit it; or (b) [a]ids or agrees or attempts to aid the other person in planning or committing it; or (c) [h]aving a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do . . . .").

338. HAW. REV. STAT. ANN. § 702-223 (LexisNexis 2007) ("When causing a particular result is an element of an offense, an accomplice in the conduct causing the result is an accomplice in the commission of that offense, if the accomplice acts, with respect to that result, with the state of mind that is sufficient for the commission of the offense.").

339. 605 P.2d 75 (Haw. 1980) (per curiam).

340. *Id.* at 79.

who then sexually abused her by inserting a beer bottle in her vagina, the defendant was liable as an accomplice for the sexual abuse because he had aided the perpetrator "with the intention of facilitating the commission of the offense."[341]

In *State v. Kaiama*,[342] the Hawaii Supreme Court applied the complicity with respect to the result statute.[343] After the defendant and the principal met the victim in a bar, the three went to a beach sometime after midnight, whereupon the victim offered to perform oral sex on the defendant and principal.[344] Infuriated by the suggestion, the defendant and principal attacked the victim, who escaped by jumping in the ocean.[345] The two then threw rocks at the victim to discourage him from coming out of the water.[346] The defendant claimed the principal went into the ocean, where he struggled with the victim.[347] Afterward, the principal told the defendant he had "drowned" the victim.[348] Later, the victim was found dead from drowning.[349] At the defendant's trial, where a jury convicted the defendant of second degree murder, the jury had been instructed that they could find the defendant liable as an accomplice for the homicide "as long as he acted with the required state of mind with respect to the actual result," to wit, the victim's death.[350] Although the defendant claimed that this instruction was inadequate, the Hawaii Supreme Court ruled that it was an accurate reflection of Hawaii's complicity with respect to the result law and affirmed the defendant's conviction.[351]

5. *New Hampshire*

The New Hampshire Supreme Court previously held that an accomplice must have specific intent that the principal commit the substantive offense that was charged, even though the language of the criminal code appeared to tolerate

341. *Id.* at 76–79 (citing HAW. REV. STAT. ANN. § 702-222 (LexisNexis 2007)). However, the evidence was insufficient to convict the defendant of a second count of sexual abuse arising from the State's claim that the perpetrator had also inserted the beer bottle into the victim's anus. *Id.* at 79.

342. 911 P.2d 735 (Haw. 1996).

343. *Id.* at 747 (citing HAW. REV. STAT. ANN. § 702-223 (LexisNexis 2007)).

344. *Id.* at 738.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 739.

349. *Id.* at 737.

350. *Id.* at 740, 746–47.

351. *Id.* at 747.

a lesser mental state for result-based crimes.[352] Then, in 2001, the legislature amended its accomplice legislation in a deliberate attempt to narrow the test for accomplice liability, making it clear that New Hampshire is a Category II state.[353]

In *Etzweiler*, a 1984 New Hampshire Supreme Court opinion, a grand jury indicted the defendant charging him with two counts of negligent homicide and with being an accomplice to two counts of negligent homicide, but the supreme court later dismissed all the charges against the defendant.[354] In this case, the defendant and principal arrived in the defendant's car at the plant where they both worked.[355] The defendant then loaned his car to the allegedly intoxicated principal, whom the defendant allegedly knew was intoxicated, and the principal drove and collided with another car, killing two of its passengers.[356]

The trial court transferred five questions of law to the Supreme Court of New Hampshire, but the supreme court recognized only the question of "whether the legislature . . . intended to impose criminal liability upon a person who lends his automobile to an intoxicated driver but does not accompany the driver, when the driver's operation of the borrowed automobile causes death."[357] The court held that whether the defendant's conduct could conceivably "fall within the statutory language defining negligent homicide"

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352. *Compare* State v. Etzweiler, 480 A.2d 870, 874 (N.H. 1984) ("[U]nder our statute, the accomplice must aid the primary actor in the substantive offense with the purpose of facilitating the substantive offense . . . ."), *superseded by statute*, Act of July 11, 2001, 2001 N.H. Laws 446 (codified as amended at N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007)), *as recognized in* State v. Anthony, 861 A.2d 773, 775 (N.H. 2004), *with* N.H. REV. STAT. ANN. § 626:8(III) (LexisNexis 1974) ("A person is an accomplice of another person in the commission of an offense if: (a) [w]ith the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it . . . ."), *and id.* § 626:8 (IV) ("[W]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.") (current version at N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007)).

353. *See* N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007) ("Notwithstanding the requirement of a purpose as set forth in paragraph III(a), when causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense. In other words, to establish accomplice liability under this section, it shall not be necessary that the accomplice act with a purpose to promote or facilitate the offense. An accomplice in conduct can be found criminally liable for causing a prohibited result, provided the result was a reasonably foreseeable consequence of the conduct and the accomplice acted purposely, knowingly, recklessly, or negligently with respect to that result, as required for the commission of the offense.").

354. *Etzweiler*, 480 A.2d at 872.

355. *Id.*

356. *Id.*

357. *Id.*

was a matter "for legislative concern" and, as such, chose only to address whether the defendant could be guilty as an accomplice.[358]

Discussing section 626:8 of the New Hampshire Revised Statutes, the Supreme Court of New Hampshire explained that subsection III "sets forth the elements which must be present above, beyond, and regardless of the substantive offense" for accomplice liability and subsection IV "sets forth the elements of the substantive offense that the State has the burden of establishing against the accomplice."[359] The supreme court continued:

> The State has alleged that, with the purpose of promoting or facilitating the offense of driving under the influence of alcohol, [the defendant] aided [the principal] in the commission of that offense. However, under [New Hampshire's] statute, the accomplice must aid the primary actor in the substantive offense with the purpose of facilitating the substantive offense—in this case, negligent homicide . . . .
>
> . . . [The defendant], as a matter of law, could not be an accomplice to negligent homicide. To satisfy the requirements of [the accomplice statute], the State must establish that [the defendant]'s acts were designed to aid [the principal] in committing negligent homicide. Yet under the negligent homicide statute, [the principal] must be unaware of the risk of death that his conduct created. . . . We cannot see how [the defendant] could intentionally aid [the principal] in a crime that [the principal] was unaware that he was committing. Thus, we hold, as a matter of law, that, in the present context of the Criminal Code, an individual may not be an accomplice to negligent homicide.[360]

The supreme court thereafter dismissed the charges against the defendant.[361]

Then, in 2004, the Supreme Court of New Hampshire rejected the *Etzweiler* holding after considering the 2001 legislative amendment to New Hampshire's accomplice liability statute.[362] In *State v. Anthony*, the defendant helped her

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358. *Id.* at 873. Here, the court felt it was beyond its judicial prerogative to rule that the defendant would be guilty as a principal under the terms of the negligent homicide statute when he was not even present in the vehicle when the deadly driving occurred. *See id.* at 872–73.

359. *Id.* at 873–74 (discussing N.H. REV. STAT. ANN. § 626:8(III)–(IV) (LexisNexis 1984) (current version at N.H. REV. STAT. ANN. § 626:8(III)–(IV) (LexisNexis 2007))).

360. *Id.* at 874–75 (citing N.H. REV. STAT. ANN. § 626:2(II)(d) (LexisNexis 2007); N.H. REV. STAT. ANN. § 630:3 (LexisNexis 1984) (current version at N.H. REV. STAT. ANN. § 630:3 (LexisNexis 2007))).

361. *Id.* at 875.

362. *See* State v. Anthony, 861 A.2d 773, 775 (N.H. 2004) (discussing N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007); State v. Locke, 761 A.2d 376, 379 (1999), *superseded by statute*, Act of July 1, 2001, 2001 N.H. Laws 446 (codified as amended at § 626:8(IV)); *Etzweiler*, 480 A.2d at 874).

husband tie a horse's legs together, which caused the horse to suffer pain and injury.[363] At trial, the State charged the defendant with being an accomplice to intentional cruelty to animals, but the jury found the defendant guilty of "the lesser included offense of accomplice to negligent cruelty to animals."[364]

On appeal, the defendant cited *Etzweiler*, contending that the *Etzweiler* interpretation of New Hampshire's accomplice liability statute would require an accomplice's purposeful intent to injure, and therefore being an accomplice to negligent cruelty to animals could not be a crime.[365] The Supreme Court of New Hampshire affirmed the conviction, however, concluding:

> [C]onsistent[] with the majority of courts interpreting accomplice liability statutes derived from the Model Penal Code, . . . accomplice liability under [section] 626:8, III and IV requires proof "(1) that the accomplice intended to promote or facilitate another's unlawful or dangerous *conduct*, and (2) that the accomplice acted with the culpable mental state specified in the underlying statute with respect to the result[]."[366]

The court explained that the legislature did not intend its use of the phrase "with a purpose to promote or facilitate the offense" to require, even under the original version of the New Hampshire accomplice law, both intent to aid and intent for the commission of the underlying offense; it further suggested that *Etzweiler* was simply wrongly decided.[367] Thereafter, the court upheld the defendant's conviction for negligent cruelty to animals under an accomplice theory because the defendant (1) "intentionally aided her husband in confining a horse" and (2) failed to become aware of the resulting "substantial and unjustifiable risk" to the horse.[368] Here, the defendant had both (1) the intent to aid the principal's conduct and (2) the negligence required of the substantive crime.[369]

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363. *Anthony*, 861 A.2d at 774.

364. *Id.*

365. *Id.* (citing N.H. REV. STAT. ANN. § 626:8 (LexisNexis 1984) (current version at N.H. REV. STAT. ANN. § 626:8 (LexisNexis 2007)); *Etzweiler*, 480 A.2d at 874).

366. *Id.* at 776 (quoting Riley v. State, 60 P.3d 204, 215 (Alaska Ct. App. 2002)).

367. *See id.* (quoting N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007)) ("We conclude that the 2001 amendment to [section] 626:8, IV was not enacted to alter the original intent of the statute, but rather to clarify it in response to *Etzweiler*.").

368. *Id.* at 777.

369. *See id.*

6. Kentucky

Kentucky's complicity statute follows sections 2.06(3)–(4) of the Model Penal Code, effectively making Kentucky a Category II state.[370] In *Tharp v. Commonwealth*,[371] the Supreme Court of Kentucky affirmed the conviction of the defendant for "wanton murder by complicity and . . . criminal abuse in the second degree."[372] The defendant's child had died from abuse by the defendant's husband.[373] At trial, the defendant "testified that she had never witnessed her husband abusing [their child]," although she had previously stated to the police that she had in fact seen her husband abusing their child on two separate occasions, one of which led to the death of their child.[374] A jury convicted the defendant on a theory of complicity; the defendant appealed, contending that the jury received improper instructions on guilt by complicity because the instructions did not require a determination of the husband's mental state at the time he killed the victim.[375]

On appeal, the Supreme Court of Kentucky explained:

> [Kentucky's accomplice liability statute] describes two separate and distinct theories under which a person can be found guilty by complicity, *i.e.*, "complicity to the act" under subsection (1) of the statute, which applies when the principal actor's *conduct* constitutes the criminal offense, and "complicity to the result" under subsection (2) of the statute, which applies when the *result* of the principal's conduct constitutes the criminal offense . . . .
>
> The primary distinction between these two statutory theories of accomplice liability is that a person can be guilty of "complicity to the act" under [subsection (1)] only if he/she possesses the *intent* that the principal actor commit the criminal act. However, a person can be guilty of "complicity to the result" under [subsection (2)] without the intent that the principal's act cause the criminal result, but with a state of mind which equates with "the kind of culpability with respect to the

370. *See supra* notes 44–46 and accompanying text; KY. REV. STAT. ANN. § 502.020 (LexisNexis 1999) ("A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he . . . [a]ids . . . such person in planning or committing the offense . . . . When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he . . . [a]ids . . . another person in planning, or engaging in the conduct causing such result . . . .").

371. 40 S.W.3d 356 (Ky. 2000).

372. *Id.* at 359–60, 369.

373. *Id.* at 359.

374. *Id.*

375. *Id.* at 359–60, 365.

> result that is sufficient for the commission of the offense," whether intent, recklessness, wantonness, or aggravated wantonness.[376]

The Supreme Court of Kentucky also cited the Model Penal Code:

> "[Section 2.06(4)] makes it clear that complicity in conduct causing a particular criminal result entails accountability for that result so long as the accomplice is personally culpable with respect to the result to the extent demanded by the definition of the crime. . . ." It has been asserted that the purpose of Section 2.06(4) is to ameliorate the harshest aspects of the so-called "natural and probable consequence" doctrine, under which an accomplice is held criminally liable for a crime which he/she *did not* intend to aid or assist so long as the resultant crime was a natural and probable consequence of the crime he/she *did* intend to aid or assist.[377]

Holding that the degree of liability of the husband was "immaterial" with regard to the defendant's culpability for a result-based crime, the court concluded that the defendant possessed the requisite level of "aggravated wantonness" for a conviction of wanton murder by complicity.[378]

In *Wilson v. Commonwealth*,[379] the Supreme Court of Kentucky reversed and remanded a circuit court's conviction of the defendant because the jury instructions on complicity were erroneous.[380] The circuit court had convicted the defendant of one count of complicity to first degree rape and two counts of complicity to second degree rape in the rape of her children by several men.[381] The defendant challenged paragraph D of the jury instruction, which read:

> You will find the Defendant . . . Guilty of Complicity to Second Degree Rape under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following: A. . . . [the principal] engaged in sexual intercourse with [the victim]; B. That at the time of such intercourse, [the principal] was eighteen (18) years of age or older and [the victim] was less than fourteen (14) years of age.

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376. *Id.* at 360 (citing KY. REV. STAT. ANN. § 502.020(1)–(2) (LexisNexis 1999); *id.* § 502 official commentary; ROBERT G. LAWSON & WILLIAM H. FORTUNE, KENTUCKY CRIMINAL LAW AND PROCEDURE §§ 3-3(b)(3), at 106, (c)(2), at 114 (1998)).

377. *Id.* at 365–66 (quoting MODEL PENAL CODE § 2.06 cmt. 7 (1962)) (citing Rogers, *supra* note 23, at 1360, 1362).

378. *Id.* at 366.

379. No. 2002-SC-370-MR, 2004 WL 2624155 (Ky. Nov. 18, 2004).

380. *Id.* at *1.

381. *Id.*

> C. That the Defendant . . . was the mother of [the victim]; AND D. That the Defendant . . . aided or assisted [the principal] in having sexual intercourse with [the victim] or, knowing that sexual intercourse may occur, failed to make a proper effort to prevent the act.[382]

The court acknowledged that it had approved an instruction containing language similar to paragraph D in its earlier opinion of *Tharp v. Commonwealth*, a homicide case.[383] However, the court in *Wilson* noted that homicide "is a 'result offense' . . . in which the crime is the result of the conduct"; in other words, the crime is the death itself, not the conduct that causes death.[384] Thus, "if the accomplice intended the principal's conduct to result in the victim's death, then such intent is a required element of the offense and the conviction is of complicity to murder or complicity to manslaughter in the first degree."[385] In contrast, "[i]f the accomplice did not intend the principal's conduct to cause the victim's death, then the classification of the homicide depends upon the degree of the defendant's culpability with respect to the result, *i.e.*, the victim's death."[386] The court pointed out, "In *Tharp*, there was no evidence that the victim's mother intended for her husband to kill her child."[387] Consequently,

> [T]he instructions in *Tharp* permitted the jury to convict the mother of reckless homicide if her failure to make a proper effort to prevent her child's death constituted recklessness, or of manslaughter in the second degree if her failure constituted wantonness, or of wanton murder if her failure constituted aggravated wantonness.[388]

Turning to the case at hand, the *Wilson* court then distinguished homicide from rape, which "is not a result offense."[389] The court pointed out that in "'statutory rape,' it is the *conduct* of sexual intercourse . . . that constitutes the crime."[390] Thus, "conviction of complicity to rape . . . requires proof of *intent*

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382. *Id.* at *2.
383. *Id.* (citing Tharp v. Commonwealth, 40 S.W.3d 356, 364 (Ky. 2000)).
384. *Id.*
385. *Id.*
386. *Id.* (citing KY. REV. STAT. ANN. § 502.020(1) (LexisNexis 1999); Harper v. Commonwealth, 43 S.W.3d 261, 266–67 (Ky. 2001)).
387. *Id.*
388. *Id.* (citing *Tharp*, 40 S.W.3d at 364–66).
389. *Id.* at *3.
390. *Id.* (emphasis added).

that the [rape] be committed."[391] Here, "[m]ere knowledge, as required by the instruction in this case, proves only criminal facilitation."[392]

The court concluded that "[t]here was ample evidence in this case from which a jury could have concluded that [the defendant] intended for [the principal] to engage in sexual intercourse with [the defendant's child]," but because "the instruction only required the jury to conclude that [the defendant] knew 'that sexual intercourse may occur,'" the deficiency warranted a reversal.[393] Furthermore, the court acknowledged that "other complicity instructions were similarly deficient," and as such, a new trial was warranted.[394]

B. "Judicially Construed" Category II Approach

Though the accomplice statutes in the eight remaining Category II states—Georgia, Idaho, Massachusetts, New Jersey, Oklahoma, Rhode Island, Vermont, and Wyoming—are devoid of any Category II language, the courts nevertheless construe their accomplice laws consistent with the Category II approach.

1. Georgia

Georgia's criminal code does not contain language reflecting either the natural and probable consequences doctrine or the shared intent approach.[395] Nevertheless, one Georgia appellate case has applied the natural and probable consequence doctrine where there was a common design. In *Guzman v. State*,[396] the defendant provided alcohol to minors, consumed it with them, and then gave his car keys to one of the minors, a fourteen year old, who drove off with two of the other minors and crashed into a tree, killing both passengers.[397] A jury convicted the defendant "as a party to the crime" of two counts of vehicular

391. *Id.* (emphasis added).

392. *Id.* (citing KY. REV. STAT. ANN. § 506.080(1) (LexisNexis 1999)) ("A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.").

393. *Id.*

394. *Id.*

395. GA. CODE ANN. § 16-2-20(a), (b)(3)–(4) (2007) ("Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime. . . . A person is concerned in the commission of a crime only if he: . . . [i]ntentionally aids or abets in the commission of the crime; or . . . [i]ntentionally advises, encourages, hires, counsels, or procures another to commit the crime.").

396. 586 S.E.2d 59 (Ga. Ct. App. 2003).

397. *Id.* at 61.

homicide in the first degree and five counts of furnishing alcohol to a minor.[398] As part of its analysis, the Georgia Court of Appeals raised the issue of whether there was a "common design [between the defendant and the minor driver] to act together for the accomplishment of driving under the influence in a less safe manner."[399] The court concluded that "[t]he jury could have reasonably concluded that [defendant and the minor] had a common design to allow [the minor] to drive after drinking alcohol" because, contrary to law, defendant provided the minor with alcohol and his car keys and did nothing to stop the minor, who had little experience in either driving or consuming alcohol, from leaving with the car.[400] The court reasoned that even though defendant's mere "presence" at the scene would not be enough to establish that defendant was a party to vehicular homicide,[401] "[e]very person is presumed to intend the *natural and probable consequences* of his conduct, particularly if that conduct be unlawful and dangerous to the safety or lives of others."[402]

However, a 2007 Georgia Supreme Court opinion follows the shared intent approach. In *Hill v. State*,[403] the defendant and codefendant had armed themselves and assaulted the victims in an attempt to rob a restaurant.[404] An alarm sounded and the first victim fled, but the codefendant chased him down in the belief that the victim had the restaurant's money.[405] The defendant allowed the second victim to run free and then joined the codefendant and first victim in a nearby alley.[406] The defendant, upon being asked by the codefendant whether the codefendant should kill the victim, first replied "no, don't" but then said "I don't know, man, it's up to you."[407] The codefendant then fatally shot the victim and both the defendants fled.[408] A jury convicted the defendant on charges of felony murder and kidnapping with bodily injury.[409] On appeal, the defendant argued, among other things, that the evidence adduced at trial supported the crimes in the restaurant but was insufficient for his conviction on charges arising from the codefendant's actions in the alley.[410] The Georgia Supreme

398. *Id.*
399. *Id.* at 62.
400. *Id.*
401. *Id.* at 63 (internal quotation marks omitted) (quoting Smith v. State, 373 S.E.2d 97, 98 (Ga. Ct. App. 1988)).
402. *Id.* (alteration in original) (emphasis added) (quoting Helton v. State, 455 S.E.2d 848, 849 (Ga. Ct. App. 1988)).
403. 642 S.E.2d 64 (Ga. 2007).
404. *Id.* at 65.
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*

Court affirmed the lower court's verdict, citing a previous discussion of Georgia statutory law by the court: "Proof that the defendant share[d] a common criminal intent with the actual perpetrators is necessary, and may be inferred from the defendant's conduct before, during, and after the crime."[411] The court concluded that the State had produced sufficient evidence at trial.[412] Based on the evidence that the defendant was "willingly present when [the victim] was killed"; that defendant "fled the crime scene with [codefendant]; and that he afterwards bragged about his participation in the crimes," the court concluded that a reasonable jury could have inferred the defendant "shared the criminal intent of the actual perpetrator."[413] Inasmuch as the Georgia Supreme Court has explicitly followed the shared intent approach in *Hill* and its previous decisions,[414] the author believes Georgia is a member of the Category II jurisdictions.

2. *Idaho*

In a single statutory provision, Idaho proscribes one's direct involvement in the crime and also covers one who "aid[s] and abet[s] in its commission, or, not being present, [one who may] have advised and encouraged its commission."[415] Its accomplice case law, meanwhile, holds that one must have the same mental state required for commission of the offense.[416] In *State v. Gonzalez*, a trial court acquitted the defendant of voluntary manslaughter on a theory of aiding and abetting.[417] In this case, the defendant and a confederate armed themselves after the defendant became jealous of suspected relations between his wife and

411. *Id.* at 66 (quoting Eckman v. State, 548 S.E.2d 310, 313 (Ga. 2001)).

412. *Id.*

413. *Id.* (quoting *Eckman*, 548 S.E.2d at 310).

414. *See, e.g.*, *Eckman*, 548 S.E.2d at 313 ("Proof that the defendant shares a common criminal intent with the actual perpetrators is necessary." (citing Jones v. State, 295 S.E.2d 71 (Ga. 1982))); Grace v. State, 425 S.E.2d 865, 869 (Ga. 1993) (inquiring if the defendant "shares in the criminal intent" (citing Sands v. State, 418 S.E.2d 55, 57 (Ga. 1992))); *Jones*, 295 S.E.2d at 73 (Ga. 1982) ("The elements of proof that one is a party to a crime or an accomplice requires proof of a common criminal intent." (citing Lamar v. State, 224 S.E.2d 69, 70 (Ga. Ct. App. 1976))); Thornton v. State, 46 S.E. 640, 642 (Ga. 1903) ("For one to be guilty as principal in the second degree, it is essential that he share in the criminal intent of the principal in the first degree. The same criminal intent must exist in the minds of both."); Springer v. State, 30 S.E. 971, 971 (Ga. 1897) ("Participation in the commission of the same criminal act, and in the execution of a common criminal intent, is therefore necessary, to render one criminal, in a legal sense, an accomplice of another."), *abrogated on other grounds by* Selvidge v. State, 313 S.E.2d 84 (Ga. 1984).

415. IDAHO CODE ANN. § 18-204 (2004 & Supp. 2008).

416. State v. Gonzalez, 12 P.3d 382, 384 (Idaho Ct. App. 2000) (quoting State v. Hickman, 806 P.2d 959, 960 (Idaho Ct. App. 1991)).

417. *Id.* at 383–84.

the victim.[418] The defendant and his confederate then waited in the confederate's trailer, where the victim also lived.[419] When the victim returned, he attacked the defendant before the defendant could react.[420] The defendant contended that while being attacked by the victim, he begged for his confederate to intervene, whereupon his confederate shot and killed the victim.[421] However, there was sufficient evidence to indicate that the defendant may have in fact attacked the victim first, failed in his attempt, and encouraged his confederate to shoot the victim after the victim began to defend himself.[422]

Although the jury convicted the defendant of voluntary manslaughter, the defendant "filed a renewed motion for judgment of acquittal on the ground that there was no evidence that [the defendant] knew [his confederate] was going to shoot and kill the victim when the victim was beating [the defendant] and [the defendant] asked [the confederate] for assistance."[423] The trial court granted the defendant's motion and explained that "no evidence supported the jury's conclusion that [the defendant] aided and abetted [the confederate's] shooting and killing the victim."[424] The Court of Appeals of Idaho disagreed.[425] The court explained, first, "[v]oluntary manslaughter is the unlawful killing of a human being, without malice, upon a sudden quarrel or heat of passion."[426] Second,

> [T]he aider and abettor must have the requisite intent and acted in some manner to bring about the intended result. The definition of aiding and abetting may encompass the activity of one who intentionally assists or encourages or knowingly participates by any of such means in bringing about the commission of a crime. Thus, in order to prove [the defendant] guilty of voluntary manslaughter, the state had to show that he had the requisite intent to bring about the death of [the victim] and acted in furtherance of that intent by encouraging or soliciting [his confederate] to shoot [the victim] under the circumstances which [the defendant] himself had helped to create.[427]

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418. *Id.* at 383.
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.* at 384.
423. *Id.* at 383–84.
424. *Id.* at 384.
425. *Id.*
426. *Id.* (citing IDAHO CODE ANN. § 18-4006(1) (2004 & Supp. 2008); State v. Grube, 883 P.2d 1069, 1073 (Idaho 1994)).
427. *Id.* at 384–85 (citation omitted).

The court concluded that a reasonable mind could infer from the facts of this case that the defendant had the requisite intent for voluntary manslaughter.[428] The jury could reasonably have found that the defendant "attempted to shoot [the victim] in accord with his previously expressed threat to kill him; that his attempt failed; that a struggle ensued in which [the defendant] encouraged [his confederate] to shoot and kill [the victim]; and that they thereafter agreed upon a story of self-defense."[429]

In *State v. Romero-Garcia*,[430] police officers met with a confidential informant who had arranged for a cocaine purchase through the defendant.[431] Officers followed the informant's vehicle while the informant picked up the defendant at his home.[432] The informant and the defendant subsequently drove to an apartment parking lot.[433] While under surveillance, the defendant "exited the vehicle, walked to an apartment, and returned to the vehicle" with a drug dealer.[434] The dealer "agreed to sell [the informant] an ounce of cocaine, and walked back to the apartment to obtain the drugs."[435] Upon returning to the vehicle, the dealer gave the ounce of cocaine to the informant in exchange for $800.[436] The defendant received $200 "[f]or his part in the transaction," and was taken home.[437] After police arrested the defendant, the trial court convicted the defendant of aiding and abetting trafficking in cocaine and aiding and abetting the failure to affix drug tax stamps.[438]

On appeal, the defendant contended that there was not sufficient evidence to support his conviction on the charge of aiding and abetting the failure to affix illegal drug tax stamps.[439] The Court of Appeals of Idaho stated that (1) "[u]nder the Idaho Illegal Drug Tax Act, illegal drug tax stamps were required to be permanently affixed to the cocaine sold"; (2) "[b]ecause no stamps were attached, the drug dealer was charged with and found guilty of failure to affix the required tax stamps"; and (3) the defendant was guilty of aiding and abetting the dealer's failure to affix the required tax stamps.[440]

According to the court, the main issue regarding whether the defendant was an accomplice to the tax stamp violation centered on the required mental state,

428. *Id.* at 386.
429. *Id.*
430. 75 P.3d 1209 (Idaho Ct. App. 2003).
431. *Id.* at 1211.
432. *Id.* at 1211–12.
433. *Id.* at 1212.
434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.*
440. *Id.* at 1214.

which is "generally the same as that required for the underlying offense—the aider and abettor must share the criminal intent of the principal and there must be a community of purpose in the unlawful undertaking."[441] After examining the tax stamp statute and the Idaho aiding and abetting law, the court explained that for a charge of aiding and abetting the failure to affix tax stamps "the mental state necessary to that charge required only that [the defendant] knowingly participated in or assisted the drug dealer in the possession or distribution of cocaine."[442] Since the State presented sufficient evidence supporting these facts at the trial level, the court affirmed the defendant's conviction.[443]

3. *Massachusetts*

In the state of Massachusetts, in order to establish guilt as an accessory before the fact,[444] the accomplice must "intentionally assist[] the principal in the commission of the crime and . . . shar[e] with the principal the [same] mental state" that is required to convict the principal of that crime.[445] In *Commonwealth v. Richards*, a jury had convicted the defendant–accomplice of armed robbery and assault with intent to murder.[446] The Massachusetts Supreme Judicial Court upheld the conviction on the grounds that the nature of the defendant–accomplice's aid in the commission of the armed robbery was evidence that he intended the assault with intent to murder that occurred.[447] Here, the defendant gave guns to the principal and a co-accomplice, drove them to a store, developed a plan for the robbery, and drove them away from the

441. *Id.* (citing State v. Scroggins, 716 P.2d 1152, 1158 (Idaho 1985)).

442. *Id.* at 1215.

443. *Id.* at 1216.

444. *See* MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000) ("Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon.").

445. Commonwealth v. Richards, 293 N.E.2d 854, 860 (Mass. 1973) (citing State v. Hickam, 8 S.W. 252, 258 (Mo. 1888); State v. Taylor, 39 A. 447, 451 (Vt. 1898)); *see also* Commonwealth v. Raposo, 595 N.E.2d 773, 776 (Mass. 1992) ("[I]t is clear that what is required to be convicted as an accessory before the fact is not only knowledge of the crime and a *shared intent* to bring it about, but also some sort of act that contributes to its happening.") (emphasis added); Commonwealth v. Pope, 491 N.E.2d 240, 245 (Mass. 1986) ("The Commonwealth had to show, first, that [the principal] killed [the victim] with deliberately premeditated malice aforethought and, second, that the defendant assisted [the principal] in the commission of [the] crime while *sharing with the principal the mental state* required for murder in the first degree, or, in the absence of deliberate premeditation, murder in the second degree.") (emphasis added).

446. *Richards*, 293 N.E.2d at 856.

447. *Id.* at 860.

robbery.[448] During the robbery, a police sergeant responded and the principal shot him while the defendant was outside the store.[449] The court laid out a procedure for convicting the defendant–accomplice: first, the State must show that the principal is guilty of the offense;[450] and second, the State must show that the accomplice "intentionally assisted the principal" and did so while "*sharing with the principal the mental state required for that crime*."[451] The court held that an accomplice meets the required mental state if the "purpose to murder in the mind of the [accomplice] was a conditional or contingent one, a willingness to see the shooting take place should it become necessary to effectuate the robbery or make good an escape."[452] In this case, the defendant was the "ringleader," he planned the robbery's commission and the escape, and he furnished loaded weapons.[453] The court held that these facts showed the defendant acted with a contingent plan in his mind that the principal would use the gun on anyone who obstructed the robbery.[454]

4. New Jersey

The New Jersey "complicity" statute contains no Category II language and on its face insists on proof of a defendant's "purpose of promoting or facilitating the commission of the offense."[455] Upon closer scrutiny, however, the case law from New Jersey, including the oft-cited *State v. Weeks*,[456] reveals it is in fact a Category II state insisting on "shared intent."[457] In *State v.*

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448. *Id.* at 856–57.

449. *Id.* at 857.

450. *Id.* at 860.

451. *Id.* (emphasis added) (citing State v. Hickam, 8 S.W. 252, 258 (Mo. 1888); State v. Taylor, 39 A. 447, 451 (Vt. 1898)).

452. *Id.* (citing *Taylor*, 39 A. at 451).

453. *Id.*

454. *Id.* (comparing these facts with the similar facts and guilty verdict in People v. Poplar, 173 N.W.2d 732 (Mich. Ct. App. 1969)).

455. N.J. STAT. ANN. § 2C:2–6C (West 2005) ("A person is an accomplice of another person in the commission of an offense if: (1) [w]ith the purpose of promoting or facilitating the commission of the offense; he (a) [s]olicits such other person to commit it; (b) [a]ids or agrees or attempts to aid such other person in planning or committing it; or (c) [h]aving a legal duty to prevent the commission of the offense, fails to make proper effort so to do . . . .").

456. 526 A.2d 1077 (N.J. 1987).

457. Much of the apparent confusion about New Jersey's stance on the mental state for accomplice liability appears to stem from *Weeks*, where the Supreme Court of New Jersey stated "the [Model Penal Code] now specifically requires that the accomplice have the 'purpose of promoting or facilitating the commission of the offense' of which the principal was convicted." *Id.* at 1080 (quoting MODEL PENAL CODE § 2.06(3)(a) (1985)). The court noted the New Jersey statutory "language in [section] 2C:2–6C(1) is identical." *Id.* Further, it pointed out that New Jersey law deliberately "limits the scope of liability to crimes which the accomplice had the purpose of promoting or facilitating. It is intended not to include those which he merely *knowingly*

Bielkiewicz,[458] two tow truck drivers, including the victim, first got into an argument and then a physical confrontation with the second defendant, whereupon the first defendant and another individual came to assist the second defendant.[459] When the two tow truck drivers attempted to leave the scene in their respective vehicles, the second tow truck driver stated that he saw the second defendant fire several shots into the victim's truck.[460] There was conflicting testimony about the first defendant's role at this point; at least one witness suggested that there were two shooters, one of whom was the defendant.[461] The prosecution proceeded on the theory that the gunfire which killed the victim was probably that of the second defendant and that the first defendant was an accomplice.[462] A jury convicted both defendants of purposeful and knowing murder.[463] Both defendants appealed, claiming the trial court's accomplice instructions were flawed for failing to consider the possibility of lesser included offense liability.[464]

The Superior Court of New Jersey, Appellate Division reversed both defendants' convictions because the trial court's accomplice instructions were incomplete and because it was unclear which defendant the jury believed to be the shooter.[465] The court first noted, "By definition an accomplice must be a person who acts with the *purpose* of promoting or facilitating the commission of *the* substantive offense for which he is charged as an accomplice."[466] Consequently, the trial court should instruct a jury that in order to find a defendant guilty as an accomplice it must find that the defendant "shared in the intent which is the crime's basic element, and at least indirectly participated in

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facilitated substantially. We agree with the [Model Penal Code] in this regard." *Id.* at 1081 (emphasis added) (internal quotation marks omitted) (quoting 2 N.J. CRIMINAL LAW REVISION COMM'N, THE NEW JERSEY PENAL CODE 58 (1971)). In *Weeks*, the Supreme Court of New Jersey ruled that a court could not convict a defendant as an accomplice to an armed robbery where the trial court's "instruction did not clearly require the jury to find that defendant had *shared the purpose* to commit a robbery *with a weapon*." *Id.* at 1082 (first emphasis added). This language seemingly would prevent a New Jersey defendant from being an accomplice where, for example, the defendant recklessly facilitated a criminal result. However, subsequent judicial interpretation reveals otherwise. *See infra* notes 458–72 and accompanying text.

458. 632 A.2d 277 (N.J. Super. Ct. App. Div. 1993).

459. *Id.* at 279–80.

460. *Id.* at 280.

461. *Id.*

462. *Id.*

463. *Id.* at 278.

464. *Id.* at 278–79.

465. *Id.* at 285–86.

466. *Id.* at 281 (internal quotation marks omitted) (quoting State v. White, 484 A.2d 691, 694 (N.J. 1984)).

the commission of the criminal act."[467] This presented the superior court with a question—assuming the first defendant did not intend the second defendant kill the tow truck driver but rather recklessly contributed to the victim's demise, how could the first defendant have intended a lesser crime, such as manslaughter, which required recklessness?[468] In answering this question, the court relied on its previous decision in *State v. Bridges*,[469] which stated:

> *Weeks* holds that in order to convict a defendant as an accomplice to a crime, the jury must "find that the defendant had the *purpose* to participate in the crime [as] defined in the Code. . . ." [*Weeks* demands h]e must have had the "conscious object or design of facilitating" *that* crime. . . .
>
> What then of vicarious liability for a crime whose culpability requirement is not knowing or purposeful action but rather reckless action? If vicarious liability requires the purpose that the crime be committed, but if the crime does not have a purposeful element, can there be vicarious liability at all? The apparent conundrum is how one can intend a reckless act. We are, however, satisfied that that conundrum is semantical rather than substantive. . . .
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> . . . .
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> . . . [I]mposition of vicarious liability for a crime whose culpability requirement is recklessness requires an initial focus on the actor's conduct rather than on the crime itself. As a first condition, the accomplice . . . must have intended that the actor's conduct take place, *i.e.,* that the accomplice . . . had the purpose of promoting or facilitating the commission of that conduct by the actor and took some step or steps . . . in order actually to promote or facilitate that conduct. . . .
>
> If the actor is liable for a "reckless" crime, vicarious liability for that crime or a lesser-included "reckless" crime may attach to an accomplice . . . who purposely promoted or facilitated the actor's conduct; who was aware when he did so, considering the circumstances then known to him, that the criminal result was a substantial and [un]justifiable risk of that conduct; and who nevertheless promoted that conduct in conscious disregard of that risk. If the actor is liable for an "intent" crime, vicarious liability for that crime may only attach to an accomplice . . . who shared the intent that that crime be committed.

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467. *Id.* (internal quotation marks omitted) (quoting State v. Fair, 211 A.2d 359, 369 (N.J. 1965)).

468. *Id.* at 281–82.

469. 604 A.2d 131 (N.J. Super. Ct. App. Div. 1992), *aff'd in part, rev'd in part*, 628 A.2d 270 (N.J. 1993)).

> *Vicarious liability for a "reckless" crime may also, however, attach when the actor commits an "intent" crime and the accomplice . . . did not intend that that crime be committed but nevertheless intended that the actor take a specific action or actions which resulted in the crime.* If criminal liability for the criminal result of that conduct can be predicated on a reckless state of mind, an accomplice . . . can be vicariously liable for that "reckless" crime under the same principles which apply where the actor's culpability is also based on recklessness. This is so even if the actor himself is guilty of an "intent" crime. The point . . . is that each participant in a common plan may participate therein with a different state of mind. The liability of each participant for any ensuing crime is dependent on his own state of mind, not on anyone else's.[470]

Thus, in *Bielkiewicz*, the court observed:

> [W]hile the [trial] court properly instructed the jury that a defendant must have "the purpose to promote or facilitate the crime of purposeful or knowing murder" to be found guilty of murder as an accomplice, it did not inform the jury that a defendant could be found guilty as an accomplice of aggravated manslaughter, manslaughter or assault. In fact, the court did not even mention accomplice liability in instructing the jury with respect to these lesser included offenses. The court also did not inform the jury that it could find one defendant guilty of murder as a principal and the other defendant guilty of aggravated manslaughter, manslaughter or assault as an accomplice. Indeed, the court implied the contrary when it told the jury that "one cannot be held as an accomplice unless you find as a fact that he shared the same purpose required to be proven against the person who actually committed the act."[471]

Here, then, the trial court could have informed the jury that although "the principal had committed purposeful or knowing murder, the accomplice could be found guilty of a lesser offense involving recklessness *if he intended that an assault be committed* upon [the victim] *but did not share the principal's intent that that assault cause death or serious bodily injury.*"[472] Consequently, if this was the case, it would have been proper "to convict the accomplice of

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470. *Id.* at 143–45 (third emphasis added) (citations omitted) (footnote call numbers omitted).

471. *Bielkiewicz*, 632 A.2d at 283.

472. *Id.* at 284–85 (emphasis added) (citing *Bridges*, 604 A.2d at 145).

aggravated manslaughter if there was a *probability* of death resulting from the assault he intended to commit or *manslaughter* if there was a [mere] *possibility* of death."[473]

To conclude, although the *Bielkiewicz* court's discussion became slightly confusing where it referred to New Jersey's oft-quoted "shared in the intent" requirement,[474] the court was in fact following a classic Category II analysis. If, indeed, the accomplice (1) intended to promote or facilitate the conduct—assaulting the victim—and (2) only harbored the mental state required for the lesser substantive crime—recklessly endangering the life of the victim without intent that he be killed—then the accomplice might be liable for some form of manslaughter but not purposeful and knowing murder. Here, the trial court's failure to clarify this point in its instructions required the reversal.[475]

State v. Cook[476] involved a defendant the State indicted for purposeful and knowing murder, unlawful possession of a weapon, and attempted theft charges.[477] In this case, the victim, a fifty-two year old homeless man, was murdered during an attempted robbery.[478] The defendant participated in the robbery but was not the actual perpetrator in the murder.[479] After the police found the victim's body, the defendant "first denied involvement but then admitted that he had watched [the principal] beat the victim and had himself hit the victim 'once or twice.'"[480]

A jury found the defendant guilty of "purposeful and/or knowing murder" and the other charges after considering the evidence at trial.[481] On appeal, the defendant contended the trial court did not abide by the principles laid out in *Bielkiewicz* when it failed to "adequately explain to the jury that it could find him guilty as an accomplice to the lesser included offenses of aggravated manslaughter or manslaughter even if it believed that [the principal] had

473. *Id.* at 285 (emphasis added) (citing State v. Bowens, 532 A.2d 215, 223 (N.J. 1987); State v. Curtis, 479 A.2d 425, 431–32 (N.J. Super. Ct. App. Div. 1984)).

474. *See supra* note 467 and accompanying text.

475. *Bielkiewicz*, 632 A.2d at 286; *see also* State v. Jackmon, 702 A.2d 489, 492–93, 495, 500 (N.J. Super. Ct. App. Div. 1997) (holding that where the trial court convicted a defendant of first degree murder on an accomplice theory in circumstances where he admitted an intent to participate in an armed robbery but claimed he was angered when the principal began shooting people, the defendant's mental state may have evinced only recklessness, and thus finding reversible error in the trial court's erroneous instruction that first degree murder could be predicated on less than a purposeful state of mind).

476. 693 A.2d 483 (N.J. Super. Ct. App. Div. 1996).

477. *Id.* at 484.

478. *Id.* at 485.

479. *Id.* at 486.

480. *Id.* at 487.

481. *Id.*

committed purposeful and/or knowing murder."[482] The New Jersey Superior Court, Appellate Division found error in the instruction, stating:

> To gain a conviction based on accomplice liability, it is "essential that [the accomplice and principal] shared in the intent which is the crime's basic element." . . .
>
> When an accomplice has been charged with an offense of a different degree than the principal or when the jury may find him/her guilty of a lesser included offense, the judge's instructions must "carefully impart[] to the jury the distinctions between the specific intent required for the grades of the offense." . . .
>
> These principles are particularly important where multiple participants engage in a violent attack with the potential for differing states of mind. In such cases, "[t]he liability of each participant for any ensuing crime is dependent on his own state of mind, not on anyone[] else's."[483]

The court went on to explain,

> [T]he [New Jersey] Supreme Court [has] stated: ["]If both parties enter into the commission of a crime with the same intent and purpose each is guilty to the same degree; but each may participate in the criminal act with a different intent. Each defendant may thus be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind.["][484]

The court concluded that, considering that even the State had theorized the murder resulted from a robbery gone awry, the facts of the case required the trial court to instruct the jury on the various degrees of culpability and the possibility of conviction for lesser homicidal offenses based on the degree of the defendant's mental culpability.[485] After considering the evidence presented in the trial court, the court noted two plausible options. The jury could find that neither defendant initially planned a murder, but after the victim attacked the principal, the principal became enraged and formulated the intent to kill the victim,[486] or that the defendant planned to tie the victim without expecting that

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482. *Id.* at 488.
483. *Id.* (last alteration added) (citations omitted).
484. *Id.* (quoting State v. Fair, 211 A.2d 359, 369 (N.J. 1965)).
485. *Id.* at 488–89.
486. *Id.* at 489.

the principal would take advantage and kill the victim.[487] Here, it is important to note that when the *Cook* court discussed the need to show that the defendant and the principal "shared in the intent which is the [substantive] crime's basic element,"[488] it was evidently using the term "intent" generically, referring to any mental state.

5. Oklahoma

Oklahoma also appears to follow the Category II model with respect to treating accomplices as principals, its courts generally using language stating that a defendant is an accomplice if the State could convict the defendant as a principal. Oklahoma law simply states: "[A]ll persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must be prosecuted, tried and punished as principals."[489] In *Conover v. State*,[490] witnesses observed the defendant and a confederate attack the victim, with the defendant "holding him and punching him and [the confederate] stabbing him."[491] When a passerby approached to see what was happening, the defendant ran to the passerby's car, banged on his windows while yelling profanities, and told him "that [the incident] was none of his business."[492] Meanwhile, the confederate, who stayed with the victim, found a bottle, broke it, and slashed and stabbed the victim with it.[493] After the victim died, an autopsy revealed the victim had bled to death as the result of stab wounds.[494] The State charged the defendant with first degree murder on the alternative theories that he was the principal or the accomplice.[495]

Following his conviction, the defendant argued he was neither a principal nor an accomplice to murder.[496] He claimed the aiding and abetting instructions were flawed because they did not require that he personally have the specific intent to kill as a condition for being convicted of first degree murder.[497] The

487. *Id.*

488. *Id.* at 488 (quoting State v. White, 484 A.2d 691, 695 (N.J. 1984)).

489. OKLA. STAT. ANN. tit. 22, § 432 (West 2003); *see also* OKLA. STAT. ANN. tit. 21, § 172 (West 2003) ("[A]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.").

490. 933 P.2d 904 (Okla. Crim. App. 1997).

491. *Id.* at 908.

492. *Id.* at 908–09.

493. *Id.* at 909.

494. *Id.*

495. *Id.* at 915.

496. *Id.* at 910.

497. *Id.* at 914.

Court of Criminal Appeals of Oklahoma pointed out that there was evidence that supported the defendant's conviction as a principal or as an accomplice.[498] As to the accomplice issue, the court noted that the trial court instructions correctly provided that the defendant could be accountable if he "aided and abetted [the principal's] acts *knowing* of [the principal's] intent to take [the victim's] life."[499] The court stated:

> To adopt [defendant's] argument that he could only be convicted if he personally had the specific intent to kill would be to void the law of principals as it relates to aider and abettor. Under [the defendant's] argument, an accused could not be convicted of a crime unless he was in fact a perpetrator. As the law allows both a perpetrator and an aider and abettor to be found guilty as a principal to a crime, we find [the defendant's] argument is without merit . . . .[500]

In *Cannon v. State*,[501] the defendant and the principal had ransacked the eighty-four year old victim's house and driven off with her; they then beat her for a second time, poured gasoline on her, and burned her to death.[502] On appealing his conviction for first degree murder, among other crimes, the defendant argued that the jury instructions on "aiding and abetting negated the element of specific intent to kill" required for "malice murder," which allowed the jury to convict him of murder even if he had only "general criminal intent" to commit a crime.[503] In other words, he asserted the jury could convict him of murder "if they found he had the intent to commit any crime."[504] The Court of Criminal Appeals of Oklahoma disagreed:

> The aiding and abetting instructions cannot be read in a vacuum; they explicitly refer to the underlying charged crime and indicate that the elements of the charged offense must be proved. Read as a whole, the instructions clearly required the jury to find that [the defendant's] conduct caused [the victim's] death and that he intended to take her life, or that he aided and abetted [the principal's] acts *knowing of and sharing in* [*the principal's*] *intent* to take [the victim's] life.[505]

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498. *Id.* at 911.
499. *Id.* at 915–16 (emphasis added).
500. *Id.* at 916.
501. 904 P.2d 89 (Okla. Crim. App. 1995).
502. *Id.* at 94.
503. *Id.* at 99.
504. *Id.*
505. *Id.* (emphasis added).

Thus, the trial court had properly required the defendant to share the principal's mental state—in this case, the intent to kill necessary for malice murder—in order to be liable as an aider and abettor.[506] As evidenced by these cases, Oklahoma follows a Category II perspective.

6. Rhode Island

The law of accomplice or accessory before the fact liability in Rhode Island contains no mental state requirement.[507] The case law, however, requires a mental state of shared criminal intent with the principal.[508] For example, in *State v. Gazerro*,[509] the Rhode Island Supreme Court reversed a conviction for murder obtained under an accomplice theory because there was insufficient evidence of shared criminal intent.[510] In this case, the victim was present in defendant's automobile with the codefendant and two other individuals when the codefendant shot the victim in the head.[511] A jury convicted the defendant in the trial court of murder as an aider and abettor,[512] and the defendant appealed. In laying out Rhode Island's accomplice liability law, the supreme court relied on language from a federal appellate case, stating that,

> Beyond mere presence, the circumstances must establish that a defendant "shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed. As the term 'aiding and abetting' implies, it assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed. It implies some conduct of

506. *Id.*

507. R.I. GEN. LAWS § 11-1-3 (2002) ("Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as a principal or as an accessory before the fact, according to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to by this title.").

508. State v. Brezinski, 731 A.2d 711, 715 (R.I. 1999) (per curiam) ("In order to find defendant guilty under the theory of aiding and abetting, the facts must establish that the defendant shared in the principal's criminal intent and that there was a community of unlawful purpose at the time the act is committed." (internal quotation marks omitted) (quoting State v. Diaz, 654 A.2d 1195, 1202 (R.I. 1995))).

509. 420 A.2d 816 (R.I. 1980).

510. *Id.* at 829–30.

511. *Id.* at 821 n.6.

512. *Id.* at 827.

> an affirmative nature and mere negative acquiescence is not sufficient."[513]

In analyzing the facts, the court first reasoned that the fact that the defendant was seen with the principals shortly before the shooting offered "nothing other than the mere fact of association."[514] Also, the fact that the defendant was the driver of the car did not itself indicate that he was part of any prearranged plan.[515] Finally, the victim's statements given before he died gave no hint of defendant's "state of mind or his knowledge of impending criminal activity."[516] Since there was no other evidence that defendant aided and abetted the commission of the murder, the court found the trial court's inferences of guilt drawn from the evidence was too speculative and thus reversed the defendant's conviction.[517]

In contrast, in *State v. Diaz*,[518] the Rhode Island Supreme Court affirmed convictions for two counts of murder under an accomplice theory where there was evidence of shared criminal intent.[519] Here, the defendant, who was possibly involved romantically with one of the victims, reported her firearm missing to the police before the principal's shooting of the victims.[520] Moreover, the defendant accompanied the principal, her boyfriend, to the scene of the shooting but fled before she could witness the shooting.[521] Later, the defendant lied to the police to cover for her boyfriend, who in the interim had committed suicide in New York.[522] Although the evidence presented before the trial court was almost all circumstantial, the jury convicted the defendant of murder as an accomplice.[523] Before affirming the convictions, the court discussed the standard by which it was to measure accomplice liability:

> In order to find that a defendant aided and abetted the commission of a crime, the facts must establish that the defendant *shared in the principal's criminal intent* and that there was "a community of unlawful purpose at the time the act is committed." The accused must be shown to have participated in the criminal act in furtherance of the

513. *Id.* at 828 (quoting Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952)).
514. *Id.* at 829.
515. *Id.*
516. *Id.*
517. *Id.* at 829–30. However the court affirmed the codefendant shooter's conviction. *Id.* at 830.
518. 654 A.2d 1195 (R.I. 1995).
519. *Id.* at 1202–04.
520. *Id.* at 1197.
521. *Id.* at 1198.
522. *Id.* at 1199.
523. *Id.* at 1196–1200.

> common design, either before or at the time the criminal act was committed. Conduct of an affirmative nature is required; mere negative acquiescence is insufficient to connote guilt. These standards do not require, however, that the accused must foresee the consequences of such unlawful acts, nor do they require that every act of the accused must coincide with those of the principal.[524]

The court then summarized what it would require before it could find accomplice liability in the case at hand: "in order to affirm the judgment of conviction, we must be able . . . to conclude that sufficient circumstantial evidence proved that [the] defendant, either alone or sharing in [the principal's] criminal intent, murdered the decedents deliberately with premeditation of longer than momentary duration."[525]

In affirming the conviction, the court considered the following facts: the principal used a gun owned by the defendant to kill the victims; defendant had falsely reported to police that her gun had been stolen; defendant accompanied the principal to the victims' home immediately before the shooting; defendant had a prior relationship with one of the victims; defendant saw the principal brandishing the weapon immediately before the shootings in such a manner as to suggest that a crime was about to occur; the principal carried out the murders in a manner defendant herself described as "execution-style"; and the defendant did not notify the authorities of the murders after feeling the scene.[526]

7. Vermont

Operating under perhaps the most oblique accomplice liability statute of the Category II states,[527] Vermont's courts changed their interpretation of the accomplice statute from Category III to Category II in *State v. Bacon*.[528] In that case, the defendant and the codefendant, both inmates, escaped together from a correctional work crew and "broke into unoccupied seasonal camps over the next few days and found food and lodging."[529] In a subsequent recorded statement to police, the defendant stated that he and the codefendant found a neighborhood watch directory indicating that the victim lived alone in the area year-round.[530] They then planned to steal the victim's car.[531] The plan was for

524. *Id.* at 1202 (emphasis added) (citations omitted).
525. *Id.*
526. *Id.* at 1203.
527. VT. STAT. ANN. tit. 13, § 3 (1998) ("A person who aids in the commission of a felony shall be punished as a principal.").
528. 658 A.2d 54 (Vt. 1995).
529. *Id.* at 58.
530. *Id.*

the defendant to enter the house and intimidate the victim with a metal bar.[532] The defendant and codefendant then went to the victim's house carrying a metal bar and a knife, respectively.[533] When they arrived at the house the defendant became skittish, and the codefendant "reacted by exchanging the knife for the metal bar [the] defendant was carrying."[534] The codefendant entered the house and shut the front door.[535] When the defendant subsequently went into the house, he saw the codefendant hit the victim on the head with the bar.[536] The codefendant then placed the bar over the victim's throat and stood on it.[537] Following the codefendant's instructions, the defendant closed off the victim's dogs in another room.[538] The codefendant then urged the defendant to stab the victim.[539] When the defendant refused, the codefendant grabbed the knife from defendant's hands and stabbed the victim to death.[540] Then, the defendant and codefendant stole money from the victim's purse, cleaned the blood stains, and "stole an ATV from a nearby camp to transport the body into the woods . . . . After disposing of the body, they returned to [the victim's] house and took her car."[541] Police later arrested them in Vermont.[542] The Vermont trial court convicted the defendant of being an accessory to felony murder committed during a burglary of the victim's residence and multiple other crimes associated with the murder.[543]

On appeal, the defendant (1) claimed that he had no "murderous intent" and (2) challenged an accomplice liability instruction by the trial court.[544] The instruction had included the following language:

> The prosecution must prove that the illegal common purpose existed and that one of the participants in the illegal plan committed the murder . . . during the alleged attempt or perpetration of the illegal plan to burglarize [the victim's] dwelling. *The defendant is liable for the acts of his accomplice . . . even if* [*the jury*] *find*[*s*] *that* [*the accomplice*] *departed from the illegal plan which they had previously*

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531. *Id.*
532. *Id.*
533. *Id.*
534. *Id.*
535. *Id.*
536. *Id.*
537. *Id.*
538. *Id.*
539. *Id.*
540. *Id.* at 58–59.
541. *Id.* at 59.
542. *Id.*
543. *Id.* at 58.
544. *Id.* at 59.

> *made so long as [the accomplice]'s acts were incidental to the execution of or as a natural and probable consequence of their original plan, and in furtherance of their alleged common purpose.*[545]

The Vermont Supreme Court held that these instructions improperly permitted the jury "to convict defendant of being an accomplice to felony murder even if he neither intended to kill or cause great bodily harm to [the victim] nor acted with extreme indifference to human life"; the instructions allowed the jury to "impute defendant's mental state with respect to the murder based solely on its determination that [the codefendant] harbored the requisite intent" to kill while the defendant may have only had the intent to burglarize the victim's dwelling.[546] The court disagreed with the accomplice liability principle from *State v. Orlandi*,[547] which it acknowledged to be Vermont's "leading case" on the required mental state for accomplice liability.[548] The court explained that in this leading case, the *Orlandi* court had held,

> Where several persons combine under a common understanding and with a common purpose to do an illegal act, every one is criminally responsible for the acts of each and all who participate with him in the execution of the unlawful design. . . .
>
> . . . So, when the evidence is sufficient to enable the jury to find beyond a reasonable doubt that several persons have formed a common design . . . and are present for that purpose at the place agreed upon for the commission of the offense, each one is criminally responsible for the acts of the others in the prosecution of the design, *and for everything done by any one of them which follows incidentally in the execution of the design as one of its natural consequences, even though it was not intended as a part of the original plan.*[549]

The Vermont Supreme Court stated in *Bacon* that the principle set forth by the *Orlandi* court "violates one of the most basic principles of criminal law by allowing the jury to convict a person for causing a bad result without determining that the person had some culpable mental state with respect to that result."[550] The court implied the *Orlandi* statement was actually dictum because

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545. *Id.* at 60.

546. *Id.* at 60–61.

547. 170 A. 908 (Vt. 1934).

548. *Bacon*, 658 A.2d at 61–62 (citing State v. Davignon, 565 A.2d 1301, 1304–05 (Vt. 1989); State v. Doucette, 470 A.2d 676, 681 (Vt. 1983); *Orlandi*, 170 A. at 910–11).

549. *Id.* at 61 (internal quotation marks omitted) (citations omitted) (quoting *Orlandi*, 170 A. at 910–11).

550. *Id.* at 62 (citing *Doucette*, 470 A.2d at 681).

in *Orlandi* "the charged conduct . . . was within the scope of the defendants' intended plan."[551] In any event, the court declared that a court can convict a defendant as an accomplice "'*only if he acted with the same intent as that required for' the principal perpetrator* of the crime."[552] The court then concluded:

> The purpose of the accomplice-liability rule is not to permit the conviction of participants to a crime who never intended a co-felon to commit the acts in fact committed. Rather, the rule is intended to allow the conviction of defendants who intended to, and did in fact, aid in the commission of the charged offense, but who were not the primary perpetrators of the crime or did not participate in every aspect of the planned illegal act.[553]

The court then turned to felony murder and held that "to convict a defendant as an accomplice to felony murder, the prosecutor must prove that the defendant possessed both the intent to commit the underlying felony as well as one of the three mental states required to convict the principal perpetrator of felony murder."[554] The Vermont Supreme Court reversed the felony murder conviction "because the [trial] court's charge permitted the element of intent as to [the victim's] murder to be found in either the defendant or his accomplice."[555] Thus, the shared intent requirement used by the *Bacon* court significantly narrowed the scope of Vermont's accomplice law.

State v. Pitts,[556] another Vermont Supreme Court opinion, involved a defendant whom the police charged with aggravated assault as a result of an altercation that left a laceration on the victim's face requiring multiple stitches and leaving permanent scars.[557] In this case, the victim and the father of the defendant's child were engaged.[558] Prior to the incident, the victim and her friends went to a pizzeria.[559] When the victim and her friends started to leave to go home, they walked past the defendant and the principal.[560] The defendant

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551. *Id.* at 61 (citing *Orlandi*, 170 A. at 910–11).

552. *Id.* (emphasis added) (quoting *Davignon*, 565 A.2d at 1304–05).

553. *Id.* at 62.

554. *Id.* at 63. The court listed the three mental states required as follows: "an intent to kill, an intent to do great bodily harm, or a wanton disregard of the likelihood that death or great bodily harm would result." *Id.* (citing *Doucette*, 470 A.2d at 682).

555. *Id.* at 64.

556. 800 A.2d 481 (Vt. 2002).

557. *Id.* at 482.

558. *Id.*

559. *Id.*

560. *Id.*

followed the victim and pushed her.[561] An altercation then occurred and the principal joined the fight.[562] The defendant and the principal alternated fighting the victim until the victim "felt a sudden burn on her che[e]k."[563] She later realized she had suffered an injury to her face but did not know who cut her.[564] After being taken into custody, the police found on the defendant a box cutter and a handwritten rap song that implicated the defendant and principal in the assault.[565] The police charged the defendant with aggravated assault.[566]

At trial, the State proceeded under two alternative theories: the defendant was the principal in the assault or the defendant aided and abetted the principal's assault.[567] The jury "acquitted defendant as the principal but convicted her of accessory to aggravated assault."[568] On appeal, the defendant argued the jury instruction was error.[569] Specifically, she contended she "could be convicted of accomplice liability only if she *intended* to 'purposely cause serious bodily injury to [the victim] *by cutting her.*'"[570] The court disagreed and stated that in *Bacon*, "we held that a defendant can be convicted as an accomplice only where he acted with the same intent that is required to convict the principal."[571] Here, the evidence supported the conclusion that the defendant shared the principal's intent to cut the victim's face. In the handwritten rap song, the defendant had "written in the first person of 'Shortie Assassin,' identified in trial testimony to be [the] defendant, and foretold that 'Ox,' identified in trial testimony to be [the principal], would hurt the women from King Street [(where the victim lived)]."[572] Specifically, the song lyrics predicted the injury to the victim's face: "my girl Ox . . . [s]licin bitches where there [sic] eyelids meet."[573] Further, the evidence "supported the State's theory that the defendant intended for herself or [the principal] to cause serious bodily injury to [the victim]."[574] Finally, the defendant claimed that "an accomplice must share not only the principal's intent to commit the elements of the crime, but also share the principal's intent as to the means which will be used to carry out the

561. *Id.*
562. *Id.*
563. *Id.*
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.*
568. *Id.*
569. *Id.*
570. *Id.* at 483 (first emphasis added).
571. *Id.* (citing State v. Bacon, 658 A.2d 54, 61 (Vt. 1995)).
572. *Id.*
573. *Id.* at 483–84 (first alteration in original) (internal quotation marks omitted).
574. *Id.* at 484.

crime."[575] The court responded that a defendant "need not share with the principal the intent to use the exact means of the crime, so long as she shares the intent to commit all the elements of the crime."[576]

8. Wyoming

In Wyoming, the "accessory" provision of the state's code requires the "accessory before the fact" to have a mental state of knowledge,[577] but the Wyoming courts' construction of the statute appears to follow a Category II approach, requiring a court to convict a defendant as an accessory if it could also convict him as a principal.[578] *Jahnke v. State* involved a defendant whose father psychologically and physically abused her and her brother, who developed an elaborate plan to confront their father.[579] Prior to the execution of her brother's plan, the defendant watched her brother prepare and lie in wait for their father, advised him about how to prepare for the crime, and saw herself as a "backup."[580] When the father returned home, her brother fired at their father, killing him almost instantly.[581] The defendant was prosecuted for first degree murder but convicted of aiding and abetting voluntary manslaughter.[582] The Supreme Court of Wyoming upheld the conviction for aiding and abetting the voluntary manslaughter of the victim.[583] The court reasoned that in order to convict a criminal defendant on an aiding and abetting charge, "[t]he prosecution must demonstrate that a defendant shared the criminal intent of the principal if he is to be found guilty as an aider and abettor."[584] The court concluded that a reasonable jury could have found that the defendant had the requisite mental state required for conviction of voluntary manslaughter—she "was acting 'upon a sudden heat of passion' aroused by the earlier incidents which continued through her participation in the planning and accomplishment of what she characterized as the father's execution."[585] Based on the court's

575. *Id.*

576. *Id.*

577. WYO. STAT. ANN. § 6-1-201(a) (2007) ("A person who knowingly aids or abets in the commission of a felony, or who counsels, encourages, hires, commands or procures a felony to be committed, is an accessory before the fact.").

578. Jahnke v. State, 692 P.2d 911, 921 (Wyo. 1984).

579. *Id.* at 914–15.

580. *Id.* at 915.

581. *Id.*

582. *Id.* at 916.

583. *Id.* at 914.

584. *Id.* at 921 (citations omitted).

585. *Id.* at 922 (referring to the Wyoming voluntary manslaughter law, WYO. STAT. ANN. § 6-2-105 (2007), which provides that whoever "unlawfully kills any human being without malice . . . [v]oluntarily, upon a sudden heat of passion" is guilty of voluntary manslaughter).

conclusion, it is obvious the court used the term "intent" to refer to any criminal mental state.

In *Fales v. State*,[586] pursuant to a plan to burglarize a junior high school, the defendant had waited outside the school while the principals vandalized it inside and then received various stolen goods handed to her out of the school's windows by the principals.[587] The defendant challenged her conviction as an accessory before the fact to burglary, arguing that the evidence could not establish that she knowingly served as a lookout while the principals burglarized the school or that she knew what they were doing when in the building.[588] The Wyoming Supreme Court disagreed, stating that an "aider and abettor must share the principal's criminal intent" in order for conviction.[589] Because the principals told the defendant of their intention to commit larceny in the school, a jury could reasonably infer that the defendant knew of their intent, especially since she remained outside and received stolen goods out the window, thus allowing the court to uphold the conviction.[590]

In *Black v. State*,[591] the defendant had planned and executed a robbery in the victim's apartment, and although the defendant was unarmed, the two principals threatened the occupants with a gun and a knife.[592] One of the principals struck the victim with the gun before removing money from his jacket.[593] A jury convicted the defendant of "aggravated assault with a deadly weapon, aggravated robbery, aggravated burglary, and conspiracy to commit aggravated robbery."[594] On appeal, the defendant argued the jury wrongly convicted him of the aggravated assault with a deadly weapon due to insufficient evidence that he had a deadly weapon or "knowingly or recklessly inflicted bodily injury on another person."[595] The Wyoming Supreme Court upheld the conviction, restating its past holdings that "no distinction is made between an aider and abettor and principal. Hence, an aider and abettor is guilty of the principal crime. Proof of participation in either capacity is sufficient to

586. 908 P.2d 404 (Wyo. 1995).

587. *Id.* at 407.

588. *Id.* at 407–08.

589. *Id.* at 408 (citing *Jahnke*, 692 P.2d at 921).

590. *Id.* (referring to the Wyoming burglary law, WYO. STAT. ANN. § 6-3-301(a) (2007), which states that "[a] person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit larceny or a felony therein").

591. 46 P.3d 298 (Wyo. 2002).

592. *Id.* at 301–02.

593. *Id.* at 302.

594. *Id.* at 299.

595. *Id.* at 300–01.

convict a defendant as a principal."[596] As to the fact that the defendant had no weapon, the court responded that "it is not necessary to prove that each defendant did that which was necessary to establish each element of an offense but that it is sufficient to show that they were associated together in doing that which comprises each element of the offense."[597]

V. STATES WITH CASE LAW FOLLOWING THE CATEGORY III APPROACH: NATURAL AND PROBABLE CONSEQUENCES.

There appear to be twenty states that have case law following the Category III model holding accomplices liable not just for crimes they intended to facilitate but also for incidental offenses that were "natural and foreseeable" or "natural and probable consequences" of the intended crime. These states fall into two subcategories: (1) states that codify the Category III approach and (2) states which do not codify Category III language but whose courts judicially construe it from accomplice statutes that on their face more resemble a Category I or Category II model.

A. "Codified" Category III Approach

Six states hold an accomplice liable for the natural and foreseeable consequences of the target crime pursuant to their respective accomplice liability statutes. These states are Arizona, Iowa, Kansas, Maine, Minnesota, and Wisconsin.[598]

1. Arizona

Prior to 2008, Arizona had both legislation and case law supporting a Category II approach but not Category III liability.[599] For example, in *State v.*

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596. *Id.* at 303 (citing Hawkes v. State, 626 P.2d 1041, 1043 (Wyo. 1981); Neilson v. State, 599 P.2d 1326, 1335 (Wyo. 1979)).

597. *Id.* at 301 (citing Edge v. State, 647 P.2d 557, 560 (Wyo. 1982)).

598. ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008); IOWA CODE ANN. § 703.2 (West 2003); KAN. STAT. ANN. § 21-3205(2) (2007); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (2006 & Supp. 2007); MINN. STAT. ANN. § 609.05 (West 2003 & Supp. 2008); WIS. STAT. ANN. § 939.05 (West 2005).

599. ARIZ. REV. STAT. ANN. § 13-301 (2008) ("'[A]ccomplice' means a person . . . who with the intent to promote or facilitate the commission of an offense: [(1) s]olicits or commands another person to commit the offense; or [(2) a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense[, or (3) p]rovides means or opportunity to another person to commit the offense."); *id.* § 13-303 ("A person is criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable

Garnica,[600] the Court of Appeals of Arizona affirmed the defendant's convictions for accomplice liability for second degree murder, aggravated assault, and endangerment.[601] In this case, the defendant was drinking and partying with friends when another group that "had been drinking and partying at a different location . . . drove into the area and exited their vehicles."[602] According to the defendant's subsequent confession, members of each group began trading insults and eventually threw bottles at each other; the defendant's brother then started shooting at the other group as the defendant provided him ammunition.[603] Ultimately, the defendant's brother not only shot a member of the other group but also killed an innocent victim.[604]

The Court of Appeals of Arizona first noted that the state had a statute patterned after Model Penal Code section 2.06(4), allowing for liability so long as the defendant "*acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense*."[605] The court concluded that by providing ammunition, the defendant not only intended to facilitate the shooter's conduct but also held the requisite mental state of recklessness required for each resulting crime of which the jury had convicted the defendant.[606] Thus, the court affirmed the defendant's convictions using the Category II approach, explaining that the defendant both intended to facilitate his brother's conduct[607] and recklessly created the result, to wit: endangerment,[608] second degree murder,[609] and assault.[610]

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consequence of the offense for which the person was an accomplice. . . . If causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense if: [(1) t]he person solicits or commands another person to engage in the conduct causing such result; or [(2) t]he person aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in the conduct causing such result.").

600. 98 P.3d 207 (Ariz. Ct. App. 2004).

601. *Id.* at 214.

602. *Id.* at 208.

603. *Id.*

604. *Id.*

605. *Id.* at 212 (internal quotation marks omitted) (citing MODEL PENAL CODE § 2.06(4) (1962)) (quoting ARIZ. REV. STAT. ANN. § 13-303(B) (2001) (current version at ARIZ. REV. STAT. ANN. § 13-303(B) (2008))).

606. *Id.* at 212–13.

607. *Id.* at 212. *Cf.* ARIZ. REV. STAT. ANN. § 13-303 (2008) (which is satisfied by proof of facilitating conduct).

608. *Id.* at 213 (citing ARIZ. REV. STAT. ANN. § 13-1201(A) (2001) (which is satisfied by proof of recklessly creating a substantial risk of imminent death)).

609. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (2001) (which is satisfied by proof of recklessly creating a grave risk of death) (current version at ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (Supp. 2007)).

610. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-1203(A)(1) (2001) (which is satisfied by proof of recklessly causing any physical injury to another)).

Likewise, in *State v. Nelson*,[611] the Court of Appeals of Arizona relied on similar reasoning after the defendant appealed his conviction for negligent homicide.[612] In this case, the victim, whom the defendant punched in the head many times and whom the principal continued to punch, died later at a hospital.[613] The State then tried and a jury convicted the defendant for negligent homicide on a theory of accomplice liability because of "the uncertainty about whether [the defendant] or [the principal] landed the punch or punches that caused [the victim]'s death."[614]

On appeal, the defendant contended that it was legally impossible to be convicted as an accomplice to negligent homicide because Arizona's statutory definition of accomplice required that an accomplice act intentionally.[615] However, the Court of Appeals of Arizona looked to the provisions regarding result-based crimes that *Garnica* had relied on and expanded accomplice liability beyond crimes requiring recklessness to crimes involving negligent *mens rea*.[616] The court held that the "intent" language in the accomplice statute refers only to aiding the conduct itself, not to the mental state required for conviction of the substantive crime.[617] Therefore, although the defendant may have only intended to beat the victim and not kill him, his negligent conduct facilitated the deadly result.[618]

However, in 2008, the Arizona legislature amended its accomplice statute by adding a provision which provides that an accomplice is criminally liable for "any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice."[619] Consequently, if a court were to review *Garnica* under the new Arizona law, it would be proper to rule that when the defendant recklessly endangered the life of the homicide victim by providing ammunition to his brother who was bent on harming the victim, the victim's death was a natural and probable consequence of the endangerment. Likewise, in a case such as *Nelson*, a court could hold under the new statute that the victim's death was a natural and probable consequence of the defendant and codefendant's assault on the victim.

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611. 150 P.3d 769 (Ariz. Ct. App. 2007).

612. *Id.* at 769.

613. *Id.* at 770.

614. *Id.*

615. *Id.*

616. *Id.* at 771–72 (discussing State v. Garnica, 98 P.3d 207, 213 (Ariz. Ct. App. 2004)) (citing ARIZ. REV. STAT. ANN. §§ 13-301, -303 (2001) (current versions at ARIZ. REV. STAT. ANN. §§ 13-301, -303 (2008))).

617. *Id.* at 772 (citing ARIZ. REV. STAT. ANN. § 13-303(B) (2001) (current version at ARIZ. REV. STAT. ANN. § 13-303(B) (2008))).

618. *Id.*

619. ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008).

2. Iowa

The Iowa legislature has codified the Category III approach in a "joint criminal conduct" provision which holds an alleged accomplice liable for another's criminal acts "unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense."[620] In *State v. Jefferson*,[621] the Supreme Court of Iowa set out the elements necessary for conviction under its "joint criminal liability" statute: (1) the "[d]efendant must be acting in concert with another"; (2) the "[d]efendant must knowingly be participating in a public offense"; (3) a "'different crime' must be committed by another participant in furtherance of [the] defendant's offense"; and (4) "[t]he commission of the different crime must be reasonably foreseen."[622] The *Jefferson* court applied these criteria to a case involving a robbery planned by the principal and accomplice; during the course of the robbery, the principal shot a convenience store clerk.[623] The court opined that a reasonable jury could conclude the result was one the accomplice "did not plan and in which he did not personally participate, but which could reasonably be expected" and, as such, he was an accomplice not only to first degree robbery but also to the assault of the store clerk.[624]

In *State v. Hustead*,[625] the Court of Appeals of Iowa upheld the defendant's conviction for second degree burglary and first degree theft where the defendant was party to an arrangement to purchase property he knew to be stolen by the principal.[626] In this case, the principal acted in concert with two other individuals to regularly burglarize businesses and farm sheds and then sell the stolen property to other individuals, including the defendant.[627] The defendant was aware of the theft and burglary scheme and had purchased stolen property from the principal on numerous previous occasions.[628] At trial, a jury convicted the defendant of aiding and abetting theft and burglary.[629]

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620. IOWA CODE ANN. § 703.2 (West 2003) ("When two or more persons, acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and each person's guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in furtherance of the commission of the offense.").

621. 574 N.W.2d 268 (Iowa 1997).

622. *Id.* at 277 (quoting State v. Hohle, 510 N.W.2d 847, 848 (Iowa 1994)).

623. *Id.* at 278.

624. *Id.*

625. 538 N.W.2d 867 (Iowa Ct. App. 1995).

626. *Id.* at 869.

627. *Id.*

628. *Id.*

629. *Id.*

On appeal, the defendant argued that the court could not hold him responsible for the crimes of theft and burglary because the State lacked sufficient evidence to show he "planned or participated" in the specific instances of theft and burglary "or had any knowledge of the specific crimes prior to the time they were committed."[630] In determining the defendant's liability, the appellate court concluded that one need not have knowledge of the "*particular* crime committed by the perpetrator" to be criminally responsible as an aider or abettor.[631] Rather, in accord with the Category III approach, the Court of Appeals stated that a court may convict an alleged accomplice of "any criminal act which in the ordinary course of events was the natural and probable consequence of the criminal act [the accomplice] encouraged."[632] Therefore, because the defendant had knowledge that the principal engaged in burglary and theft and, furthermore, facilitated the crimes the principal committed by purchasing the stolen goods, the court held that the trial court properly convicted defendant of first degree theft and second degree burglary.[633]

In *State v. Bahmer*,[634] the Court of Appeals of Iowa used the "natural and probable consequences" language of *Hustead* to uphold a conviction for theft where the defendant agreed to accept stolen property as payment for a narcotics debt the principal owed to her.[635] In this case, the principal stole a skid loader from a construction site to repay the defendant for the drug debt.[636] The defendant had told the principal prior to the theft that she would accept a skid loader as payment, and she accepted the stolen skid loader in exchange for two ounces of crack cocaine and a two thousand dollar reduction of the principal's drug debt.[637] A jury convicted the defendant of theft by taking.[638]

The defendant asserted on appeal that the court could not hold her criminally responsible for theft by taking as an aider and abettor because she was not physically with the principal when the theft took place and because the State lacked sufficient evidence to prove that she "took possession of the [property] with the intent to deprive the owner of the property."[639] The court upheld the defendant's conviction because, although she was not present at the time of the crime and may not have intended this specific owner be deprived of this specific skid loader, she was aware of the principal's plan to steal and

630. *Id.* at 869.
631. *Id.* at 870 (emphasis added).
632. *Id.* (citation omitted).
633. *Id.*
634. No. 03-1696, 2004 WL 2804819 (Iowa Ct. App. Dec. 8, 2004).
635. *Id.* at *2 (citing *Hustead*, 538 N.W.2d at 870).
636. *Id.* at *1.
637. *Id.*
638. *Id.*
639. *Id.*

encouraged the principal's criminal conduct.[640] Therefore, the court concluded that this particular crime of theft by taking was a natural and probable consequence of the defendant's encouragement.[641]

In *State v. Satern*,[642] the Supreme Court of Iowa pointed out that "sections 703.1 and 703.2 articulate the particulars of accomplice liability" in Iowa.[643] Specifically, section 703.1 provides that aiders and abettors are liable for the crime which they have "knowingly aided the principal in committing," either by participation or encouragement before or during its commission.[644] The joint criminal conduct provision, section 703.2, "contemplates *two* acts—the crime the joint actor has knowingly participated in, and a second or resulting crime that is unplanned but could reasonably be expected to occur in furtherance of the first one."[645] The court also stated that "[d]epending on the case, it may be appropriate for the court to instruct on both doctrines."[646] In Satern, where it was unclear whether the defendant or his companion was the intoxicated driver who collided with another vehicle, killing the other driver, the trial court instructed the jury on both theories and the jury found the defendant guilty of vehicular homicide.[647] Assuming the defendant was not the driver, he was still guilty because he allowed his intoxicated companion to drive his vehicle, which carried the potential of the natural and probable consequence of death to another.[648]

3. *Kansas*

Kansas's accomplice liability provision follows a Category III model in holding an alleged accomplice liable for any crime "committed in pursuance of the intended crime if reasonably foreseeable by him as a probable consequence" of the intended crime.[649] In *State v. Edwards*,[650] the defendant and three cohorts entered the victim's house to rob him.[651] During the course of the robbery, one of the robbers stabbed the victim while the defendant was in another room of

640. *See id.* (citing State v. Lott, 255 N.W.2d 105, 107, 109 (Iowa 1977); *Hustead*, 538 N.W.2d at 870).
641. *Id.*
642. 516 N.W.2d 839 (Iowa 1994).
643. *Id.* at 845 (discussing IOWA CODE ANN. § 703.1–.2 (West 2003)).
644. *Id.* at 843 (quoting *Lott*, 255 N.W.2d at 107).
645. *Id.* (citing State v. Irvin, 334 N.W.2d 312, 314–15 (Iowa Ct. App. 1983)).
646. *Id.* (citing State v. Thompson, 397 N.W.2d 679, 685 (Iowa 1986)).
647. *Id.* at 842–43.
648. *Id.* at 843.
649. KAN. STAT. ANN. § 21-3205(2) (2007).
650. 498 P.2d 48 (Kan. 1972).
651. *Id.* at 50.

the house.[652] The State charged the defendant with aggravated battery as well as robbery.[653] Following his conviction on the battery charge, the defendant argued it was not foreseeable that his cohort would stab the victim.[654] The Kansas Supreme Court disagreed:

> There can be little doubt from the evidence that both the robbery and the battery occurred. There was direct evidence that defendant transported [the codefendant responsible for the stabbing] to the scene of these crimes. The statement of the defendant, as he viewed [the victim's] furniture, that *they* could make a killing . . . can only be interpreted as indicating some action was contemplated by him and his companions. Robbery is a crime of violence committed by threat or force. There was evidence that defendant participated in the aggravated robbery by taking a radio from the premises. From the facts it may readily be inferred that violence, if necessary, was contemplated when the four entered the house. . . . Under these circumstances the defendant can hardly be considered an innocent bystander in the whole affair.[655]

Thus, the court concluded that a plan to commit a crime of violence such as robbery carried with it a serious potential to expand into even more serious violent behavior.[656] In other words, the aggravated battery could be seen as a natural outgrowth of the robbery. Here, the circumstances as a whole "clearly support an inference that defendant aided and abetted in the aggravated battery of the victim with the requisite criminal intent."[657]

In *State v. Davis*,[658] a trial court in Kansas convicted the defendant of aggravated battery and attempted misdemeanor theft.[659] A dispatcher had informed a security guard of a call by a resident of an apartment building who had reported hearing sounds as if someone was breaking into vending machines in the building.[660] Entering the building with his handgun drawn, the guard saw the defendant standing in front of the door to the laundry room and heard prying sounds from within the laundry room.[661] He ordered the defendant to place his

652. *Id.*
653. *Id.*
654. *Id.* at 51.
655. *Id.*
656. *Id.*
657. *Id.* at 53. It is important to note the "intentionally aid" language in subsection (1) of the Kansas statute incorporates the "reasonably foreseeable" language found in subsection (2). *See* KAN. STAT. ANN. § 21-3205(1)–(2) (2007).
658. 604 P.2d 68 (Kan. Ct. App. 1979).
659. *Id.* at 70.
660. *Id.* at 69.
661. *Id.*

hands against the wall, at which time he noticed the defendant only had one arm.[662] The defendant claimed he had recently left an apartment, then inquired to the guard about what was going on, and finally complied with the guard's orders on the third or fourth command.[663] A confederate then came out of the laundry room and placed his hands against the wall.[664] The guard noticed that a vending machine was pried open.[665] As the guard looked away from the men, "they both moved away from the wall at the same time and [the confederate] . . . ran into the laundry room."[666] Meanwhile, "[t]he defendant remained standing in the hallway, facing [the guard]," but did not try to attack the guard.[667] Very shortly "after [the confederate] ran into the laundry room, a hand holding a handgun appeared from the laundry room" and fired four or five shots, striking the guard in his right arm.[668] Although the guard did not see the shooter, "he did see the hand holding the handgun and did testify the gun was fired by a man of the same race as [the confederate]."[669] Unable to defend himself, the guard "ran out the back door and when he looked back inside he saw [the defendant] and [the confederate] running down the hall in the opposite direction."[670] The defendant and confederate were subsequently taken into custody and at trial were positively identified.[671]

The Kansas Court of Appeals held that because the jury "obviously" properly convicted the defendant of aiding and abetting the theft, the major issue was whether the defendant was liable for the aggravated battery.[672] Because the evidence was insufficient to establish that the defendant intentionally aided the aggravated battery, the court analyzed whether it was "reasonably foreseeable by the defendant that an aggravated battery would occur as a probable consequence of committing misdemeanor theft or attempting to commit misdemeanor theft."[673] The court first determined whether the intended crime was "inherently or foreseeably dangerous" to human life by "testing both the crime itself and the manner in which it was committed for dangerous characteristics."[674] Concluding that misdemeanor theft was not an

662. *Id.*
663. *Id.* at 69–70.
664. *Id.*
665. *Id.*
666. *Id.*
667. *Id.*
668. *Id.*
669. *Id.*
670. *Id.*
671. *Id.*
672. *Id.* at 70–71.
673. *Id.* at 71.
674. *Id.* at 71 (internal quotation marks omitted) (quoting State v. Smith, 594 P.2d 218, 222 (Kan. 1979)).

inherently dangerous crime, like the robbery in *Edwards*,[675] the court then examined the particular circumstances of the case:

> In the case at bar the intended crime, misdemeanor theft, was to take place in the early morning hours in a laundry room that the defendant knew to be unoccupied when the theft occurred. A lookout was posted to insure that no one walked into the room while the theft was in progress. . . . The record on appeal does not even hint that the defendant knew or had any reason to suspect [the confederate] had a weapon. . . .
>
> There is no evidence that the defendant and [the confederate] had any plan for escape or had discussed what they would do if discovered. There was no showing that either the defendant or [the confederate] had a propensity for violence or that they normally carried a weapon of any kind. Misdemeanor theft in itself is not a crime of violence, especially when conducted outside the presence of others.
>
> . . . In our opinion, it is mere speculation to say that a person who with another is planning to commit a misdemeanor theft in an unoccupied room can reasonably foresee in the absence of other facts that the coconspirator will shoot someone in an effort to avoid apprehension.
>
> . . . [In addition,] [t]he fact that defendant did not drop to the floor or run sheds no light on foreseeability. The security guard did not drop to the floor and he was being shot at.[676]

It is clear from the Kansas statute and opinions discussed above that Kansas courts are willing to apply the Category III model in appropriate circumstances.

4. Maine

Maine's criminal code states that "[a] person is an accomplice . . . to any crime the commission of which was a reasonably foreseeable consequence of his conduct."[677] Aside from this explicit language, the Supreme Judicial Court of Maine's interpretation of the statute's legislative history further supports the doctrine of natural and foreseeable consequences. The court has explained that "the legislature . . . intended to impose liability upon accomplices for those crimes that were the *reasonably foreseeable consequence of their criminal enterprise*," even if there exists "an absence on their part of the same culpability

675. State v. Edwards, 498 P.2d 48, 51 (Kan. 1972).
676. *Davis*, 604 P.2d at 72–73.
677. ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (2006 & Supp. 2007).

required for conviction as a principal to the crime."[678] Therefore, in Maine, "[s]o long as the accomplice intended to promote the primary crime, and the commission of the secondary crime was a *foreseeable consequence* of the accomplice's participation in the primary crime, *no further evidence of the accomplice's subjective state of mind as to the secondary crime* is required."[679]

In *State v. Williams*,[680] the defendant and the principal had entered a supermarket where the principal attempted to steal beer.[681] When the manager confronted the principal, the principal dropped the beer, punched the manager in the face, and began to exit the store.[682] Before he left the store, the principal pulled out a knife, swung it at the manager, and then stabbed another employee who had attempted to intervene.[683] Once outside the store, the principal and the defendant exchanged celebratory "high-fives."[684] Another employee who witnessed the attack then approached the principal and the defendant and pointed his finger at them.[685] The principal and the defendant then attacked this employee outside the store.[686] As two other store employees tried to approach to help, the defendant screamed, "He's got a knife, he's got a knife."[687] The employee who the principal and the defendant attacked outside the store later died from his stab wounds.[688] The defendant was indicted for murder, but the trial court convicted him of manslaughter.[689]

Upon review, the Supreme Judicial Court of Maine held that the trial court properly found the defendant guilty of manslaughter as an accomplice.[690] In applying the natural and foreseeable consequences reasoning, the court looked to the trial court's finding of fact that the defendant (1) had participated in the attack on the victim when the principal used the knife to stab the victim, and (2) confirmed his knowledge that the principal was wielding a weapon when he

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678. State v. Goodall, 407 A.2d 268, 278 (Me. 1979) (emphasis added) (upholding defendant's manslaughter conviction on an accomplice basis where the defendant intended his cohort assault the victim, who died, because the victim's death was a "reasonably foreseeable consequence" of the cohort's attack on the victim).

679. State v. Linscott, 520 A.2d 1067, 1070 (Me. 1987) (emphasis added). In this case, the court held the defendant accountable for murder based on the accountability theory even though the trial court found that the defendant did not intend to kill and "probably would not have participated in the robbery had he believed that [the victim] would be killed." *Id.* at 1068.

680. 653 A.2d 902 (Me. 1995).

681. *Id.* at 904.

682. *Id.*

683. *Id.*

684. *Id.* at 905.

685. *Id.*

686. *Id.*

687. *Id.*

688. *Id.*

689. *Id.*

690. *Id.* at 904.

shouted, "He's got a knife."[691] Here, the lower court properly concluded that "[t]he average reasonable person with knowledge that [the principal] was wielding a knife would have reasonably foreseen that the joint attack on [the victim] could result in [the victim's] death."[692]

5. Minnesota

Minnesota courts rely on the plain language of their state's accomplice liability statute in holding an alleged accomplice responsible for crimes "committed in pursuance of the intended crime if reasonably foreseeable by the [accomplice] as a probable consequence" of the intended crime.[693] In *State v. Filippi*,[694] the Minnesota Supreme Court upheld the defendant's conviction for two assaults committed during a burglary in which the defendant was the accomplice.[695] In this case, the defendant and the principal attempted to rob a drugstore,[696] and the principal shot at police officers who responded to the robbery.[697] After the police apprehended the two suspects, the principal testified at trial for the defendant, asserting "that the gun was his [own], that defendant had never seen him with the gun before, and that he did not tell defendant that he was carrying the gun with him during the burglary."[698] The defendant conceded to his involvement in the burglary but contended that the court should not hold him liable for the assaults committed by the principal.[699]

Referring to Minnesota's accomplice liability statute, the Minnesota Supreme Court affirmed the defendant's assault convictions.[700] The court interpreted Minnesota law as requiring a two-part test to determine liability: "(1) whether the assaults were committed in furtherance of the intended crime and (2) whether the assaults were reasonably foreseeable by defendant as a probable consequence of the commission of the burglary."[701] In the instant case,

691. *Id.* at 905.

692. *Id.* at 905–06.

693. MINN. STAT. ANN. § 609.05(1)–(2) (West 2003 & Supp. 2008) ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime. . . . A person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended.").

694. 335 N.W.2d 739 (Minn. 1983).

695. *Id.* at 739.

696. *Id.* at 741.

697. *Id.*

698. *Id.*

699. *Id.* at 742.

700. *Id.* at 742–43.

701. *Id.* at 742.

the court stated that since there was no issue regarding whether the assaults were committed in "furtherance" of the burglary, the real issue was whether the defendant could have "reasonably foreseen" that these assaults would occur.[702] The court reasoned that it is "reasonably foreseeable" that during the course of a burglary, police are likely to arrive on the scene.[703] The court further stated that a crime such as burglary "carries with it the possibility of violence" and that the defendant, simply through his participation in the crime, "knew or could foresee that the burglary might result in violence."[704] Therefore, the court found defendant liable for the assaults under a Category III analysis.

6. Wisconsin

The state of Wisconsin is another Category III state that follows the plain language of its accountability statute, which provides that a person can be an accomplice to the commission of a crime if that person "intentionally aids and abets" the offense or is acting in "pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime."[705] In addition, Wisconsin case law explicitly provides that the State is not required to prove intent in order to hold accomplices liable for the natural and probable consequences of their acts.[706] In *State v. Asfoor*, the Wisconsin Supreme Court stated that "the aider and abettor in a proper case is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of an act he knowingly aided or encouraged."[707] In

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702. *Id.*

703. *Id.*

704. *Id.*

705. WIS. STAT. ANN. § 939.05(2) (West 2005). Because the "intentionally aids" language is in one subsection of Wisconsin's "Parties to Crime" provision, *id.* § 939.05(2)(b), and the "natural and probable consequence" language is in another, *id.* § 939.05(2)(c), at least one defendant has argued that "only a conspirator or a solicitor—not an aider and abettor—can be held liable for a crime other than the intended crime." State v. Asfoor, 249 N.W.2d 529, 537 (Wis. 1977). In *Asfoor*, the court rejected this claim and held that a court can hold an aider or abettor liable under the statute for natural and probable consequences of the intended crimes. *Id.* at 537–38.

706. *See* State v. Ivy, 350 N.W.2d 622, 627–28 (Wis. 1984) (noting that the natural and probable consequence doctrine could support an accomplice's conviction for armed robbery although the accomplice did not have knowledge the principal was armed with a dangerous weapon); State v. Cydzik, 211 N.W.2d 421, 429, 431 (Wis. 1973) (relying on the natural and probable consequence doctrine to uphold an accomplice's conviction for murder carried out by the principal during their armed robbery of a supper club even though the accomplice had no intent that a killing occur).

707. *Asfoor*, 249 N.W.2d at 537–38 (quoting People v. Durham, 449 P.2d 198, 204 (Cal. 1969)).

Asfoor, the court upheld the defendant's conviction as an aider and abettor for the crime of negligent injury by use of a weapon even though the defendant had no intention of participating in that crime.[708] The court determined that although one cannot intend to negligently cause injury to another, "there are often many intentional acts which lead to an injury caused by negligence."[709] Here, the defendant knew that the principal and other perpetrators intended to commit a battery or the like against the victim, assisted them by driving them to the victim's location, and lent them his gun.[710] The court determined these were all overt acts in furtherance of the intended crime, which led to the unintended but natural and probable consequence of a gunshot injury to the victim caused by defendant's companion's negligent use of the gun.[711]

Similarly, in *State v. Hecht*,[712] the Wisconsin Supreme Court relied on natural and probable consequence reasoning and upheld the defendant's conviction as an aider and abettor to the crime of possession of a controlled substance with intent to deliver.[713] In this case, the defendant helped arrange a substantial cocaine sale between a supplier and an undercover law enforcement agent.[714] The arrangement included the defendant setting up a meeting between a cocaine supplier and two agents and ensuring that the parties continue their contact for the final exchange.[715] The court found that the defendant's in-depth orchestration from start to finish to ensure the exchange of the cocaine was sufficient to find him liable as an aider and abettor, thus rejecting defendant's contention that he was merely involved in directing the agents to the potential cocaine supplier. The court concluded:

> In this case, the jury could reasonably find that the defendant put into motion the wheels of a mechanism that would ultimately lead to a sale of cocaine to the agents. By his acts of keeping [the supplier] and the agents in close contact, he kept those wheels turning in a fluid motion. Under these circumstances, the jury could also reasonably find that the natural and probable consequence of this chain of events was the sale of cocaine and that the defendant is, therefore, liable for the possession

708. *See id.* at 536–37, 543.
709. *Id.* at 536.
710. *Id.*
711. *Id.* at 538.
712. 342 N.W.2d 721 (Wis. 1984).
713. *Id.* at 731, 733.
714. *Id.* at 730.
715. *Id.*

of a controlled substance with the intent to deliver, under the theory of aiding and abetting the commission of the crime.[716]

B. "Judicially Construed" Category III Approach

In addition to those states that codify the Category III approach, there are fourteen states that do not use Category III language in their criminal code but whose courts have judicially construed their state's respective accomplice statues to proscribe liability in a manner that resembles a Category III approach. These states are Alabama, Arkansas, California, Delaware, Illinois, Indiana, Louisiana, Maryland, Michigan, Nebraska, North Carolina, South Carolina, Tennessee, and Virginia.

1. Alabama

Although Alabama's criminal code requires specific intent to hold an individual accountable for the criminal behavior of another,[717] case law indicates that Alabama courts will consider holding accomplices liable for crimes that are "the proximate, natural, and logical consequences" of the target crime.[718] For example, in *Howell v. State* three individuals, including the defendant and the principal, conspired to rob a gas station.[719] When an officer arrived at the station suspecting something was amiss, the principal shot the officer. The defendant was convicted of assault with an intent to murder.[720] On appeal, the Alabama Court of Criminal Appeals considered whether there was sufficient evidence to establish that the defendant "aided and abetted" the principal's shooting of the officer.[721] The court stated, "[t]he accomplice . . . is criminally responsible for acts which are the direct, proximate, natural result of the conspiracy formed. He is not responsible for any special act[] not within the scope of the common purpose, but [which] grows out of the individual malice of the perpetrator."[722] Here, an evaluation of the evidence revealed that the

716. *Id.* at 731–32.

717. *See* ALA. CODE § 13A-2-23 (LexisNexis 2005) ("A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense: (1) [h]e procures, induces or causes such other person to commit the offense; or (2) [h]e aids or abets such other person in committing the offense; or (3) [h]aving a legal duty to prevent the commission of the offense, he fails to make an effort he is legally required to make.").

718. Howell v. State, 339 So. 2d 138, 140 (Ala. Crim. App. 1976) (internal quotation marks omitted) (quoting Tanner v. State, 9 So. 613, 615 (Ala. 1890)).

719. *Id.* at 139.

720. *Id.*

721. *Id.*

722. *Id.* at 140 (internal quotation marks omitted) (quoting *Tanner*, 9 So. at 615).

"[a]ssault with intent to murder would be a foreseeable consequence of the joint enterprise in which [the defendant and the two others] were engaged."[723]

In *Hollingsworth v. State*,[724] the defendant claimed that assaulting an officer was beyond the scope of his and the principal's original plan, and the Alabama Court of Criminal Appeals agreed.[725] The defendant acquired a pistol at the principal's request, and he and the principal drove around drinking and smoking pot, allegedly looking for a party, at which time the principal noted that they were nearing the home of the victim, a deputy sheriff.[726] The principal then pulled out a gun and emptied the magazine into the officer's house.[727] Defendant claimed he was unaware that the principal intended to shoot into the officer's house until immediately prior to the crime.[728]

The court addressed prior accomplice liability cases, indicating that those cases held that "an accomplice is criminally responsible for the 'proximate, natural, and logical consequences' of the criminal activity of the conspirators," but cautioned against "an extension of what was said in the cited cases beyond the 'particular facts' thereof."[729] The court noted that in each of these earlier accomplice liability cases, the underlying crime was homicide.[730] The court continued:

> That the principle set forth of criminal responsibility of an aider or abettor for the "proximate, natural, and logical consequences" of their common criminal undertaking would have applied under the circumstances of the instant case if [the victim], or anyone else in his dwelling, or thereabout, were in any way personally injured, by a bullet from the pistol fired by [the principal], constitutes no reason for holding [defendant] criminally responsible for any intentional crime of [the principal] directed at the person of [the victim], in the absence of any knowledge by [defendant], or reasonable notice to him, that [the principal] intended to injure [the victim].[731]

723. *Id.*
724. 366 So. 2d 326 (Ala. Crim. App. 1978).
725. *Id.* at 330–33.
726. *Id.* at 328.
727. *Id.* at 328–29.
728. *Id.* at 328.
729. *Id.* at 332 (discussing Stokley v. State, 49 So. 2d 284, 291 (Ala. 1950); Morris v. State, 41 So. 274, 280 (Ala. 1906); Tanner v. State, 9 So. 613, 615 (Ala. 1890)).
730. *Id.* at 332–33.
731. *Id.* at 333.

The court concluded that the defendant was guilty of criminal conduct but that there was "no substantial evidence that he was guilty of the crime of assault."[732]

In *D.L. v. State*,[733] a group of juveniles, including the defendant, had engaged in a series of burglaries and thefts.[734] One burglary involved theft of weapons from a home by the defendant, the principal, and other members of the group.[735] However, because the principal did not get one of the firearms stolen in the burglary, he became angry and started a fire in the residence.[736] After considering Alabama's accomplice law, the Alabama Court of Criminal Appeals observed that, although the group had "burglarized a number of residence[s] during their 'crime spree,' there [was] no evidence that arson was a part of their scheme or their method of operation."[737] Thus, there was "no evidence that the arson was the proximate, natural, and logical result of the criminal adventure of burglary and theft upon which [these] juveniles were engaged."[738]

2. *Arkansas*

Arkansas law reflects pieces of each of the three categories. Arkansas's statute reflects both the specific intent approach, like section 2.06(3) of the Model Penal Code, as well as a shared mental state provision similar to section 2.06(4) of the Model Penal Code.[739] Nevertheless, it appears that the Arkansas courts abide by the natural and foreseeable consequences doctrine.[740] In *Bosnick*

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732. *Id.*
733. 625 So. 2d 1201 (Ala. Crim. App. 1993).
734. *Id.* at 1202.
735. *Id.*
736. *Id.*
737. *Id.* at 1204.
738. *Id.*
739. *See* ARK. CODE ANN. § 5-2-403(a)–(b) (2006) ("A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person: (1) Solicits, advises, encourages, or coerces the other person to commit the offense; (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or (3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense. . . . When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person: (1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the particular result; (2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the particular result; or (3) Having a legal duty to prevent the conduct causing the particular result, fails to make a proper effort to prevent the conduct causing the particular result.").
740. *See, e.g.*, Johnson v. State, 482 S.W.2d 600, 605 (Ark. 1972) (citing Bosnick v. State, 454 S.W.2d 311, 314 (Ark. 1970)) ("Each conspirator or participant is responsible for everything

v. State,[741] the defendant drove three armed men to a convenience store.[742] Upon arriving, the defendant stayed in the car while his cohorts entered the store.[743] A police officer arrived and knocked on the door and one of the codefendants fired, killing him.[744] Immediately afterward, the defendant yelled "[c]ome on, lets go" and drove the defendants away.[745] A jury later convicted the defendant of premeditated murder.[746] On appeal, the Supreme Court of Arkansas stated that an accomplice can be held liable for "every thing done which followed directly and immediately in the execution of the common purpose as one of its probable and natural consequences."[747] The court reversed the conviction, however, because it determined that the trial court should have instructed the jury on the lesser included offense of felony murder.[748]

In *Pettit v. State*,[749] the State charged the defendants with assault with intent to kill arising out of a robbery.[750] Here, the two defendants and the principal had planned to rob the victim, who reportedly had a lot of money in his house.[751] The victim later testified that before the robbery he heard someone at his door saying, "[W]e know you're in there. If you don't come out we are coming in to get you."[752] When the victim opened the door, he fired and wounded his assailant, who returned fire and shot the victim in the chest.[753] The trio, deciding not to rob the victim, hurriedly left in a truck.[754] The trial court provided the jury an "aider and abettor" instruction.[755]

The thrust of the defendants' appeal was that in order "to be convicted of . . . assault with intent to kill, the person . . . must have a specific intent to take the life of the victim."[756] They contended that although they may have "plotted burglary and theft or perhaps robbery, there [was] no evidence that

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done which followed directly and immediately in the execution of the common purpose as one of its probable and natural consequences.").

741. *Bosnick*, 454 S.W.2d 311.

742. *Id.* at 312–13.

743. *Id.* at 313.

744. *Id.*

745. *Id.*

746. *Id.* at 312–13.

747. *Id.* at 314 (internal quotation marks omitted) (quoting Clark v. State, 276 S.W. 849, 853 (Ark. 1925)).

748. *Id.* at 315.

749. No. CR 76-103, 1976 WL 139 (Ark. Oct. 11, 1976).

750. *Id.* at *1.

751. *Id.*

752. *Id.*

753. *Id.*

754. *Id.*

755. *Id.* at *2.

756. *Id.* at *1.

they, themselves, intended any harm or violence to [the victim]."[757] The Arkansas Supreme Court responded by saying, "As to the complicity of those acting in concert . . . : '[e]ach conspirator or participant is responsible for everything done which followed directly and immediately in the execution of the common purpose as one of its probable and natural consequences.'"[758] In this case, the court ruled there was ample evidence to support the jury's verdict.[759]

3. California

Although California's accomplice provision is silent as to a mental state,[760] California courts follow the natural and probable consequences doctrine and repeat this language in case after case.[761] If the accused ultimately commits some different or additional crime other than the one the accused meant to aid and abet, "the natural and probable consequences doctrine is triggered."[762] Under this doctrine, a court can convict the defendant of the charged crime if the defendant:

> (1) [H]ad knowledge of a confederate's unlawful purpose; (2) intended to commit, encourage, or facilitate the commission of any target crime; . . . (3) aided, promoted, encouraged, or instigated the target crime . . . . his confederate (4) committed the charged crime; and (5) the charged crime was a natural and probable consequence of the target crime.[763]

Moreover, the jury need not agree on which offense was the target crime, and even "a misdemeanor can support a 'natural and probable consequences' aiding and abetting murder conviction."[764]

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757. *Id.* at *2.

758. *Id.* (quoting Johnson v. State, 482 S.W.2d 600, 605 (Ark. 1972)).

759. *Id.*

760. *See* CAL. PENAL CODE § 27(a)(3) (West 1999) ("The following persons are liable to punishment under the laws of this state: . . . All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state . . . ."); *id.* § 31 (West Supp. 2008) ("All persons concerned in the commission of a crime, whether it be a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed.").

761. *See, e.g.*, People v. Culuko, 92 Cal. Rptr. 2d 789, 802 (Cal. Ct. App. 2000).

762. *Id.*

763. Donaghe v. Galaza, 4 Fed. App'x 338, 340 (9th Cir. 2001) (citing Solis v. Garcia, 219 F.3d 922, 927 (9th Cir. 2000)).

764. *Id.* at 341 (citing Spivey v. Rocha, 194 F.3d 971, 977 (9th Cir. 1999)).

In *People v. Culuko*,[765] where the defendant's child's death was a consequence of criminal child abuse inflicted by either the defendant or her boyfriend, the court upheld the defendant's conviction for second degree murder, among other crimes, based on the natural and probable consequences doctrine.[766] The California Court of Appeals commented:

> [T]he test of natural and probable consequences is an objective one. . . . [T]he issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant.[767]

The defendant claimed the State was obliged to identify each particular "act" of child abuse the perpetrator inflicted.[768] The court responded that the "aider and abettor may intend or expect the perpetrator to commit the crime in the form of a single, well-defined criminal 'act,'" or "the aider and abettor may have only the vaguest idea of the precise 'act' by which the perpetrator will commit the crime."[769] Thus, it was sufficient that the accused was an accomplice to child abuse of some form.[770] Finally, the court pointed out that "[t]he natural and probable consequences doctrine operates independently of the second degree felony-murder rule. It allows an aider and abettor to be convicted of murder, without malice, even where the target offense is not an inherently dangerous felony."[771]

In *People v. Hammond*,[772] the California Court of Appeals affirmed the superior court's conviction of the defendant for murder, attempted murder, and robbery, again using a Category III analysis.[773] In this case, the defendant drove the getaway car after the principal robbed a jewelry store and shot the store's owner and an employee, killing the owner.[774] Defendant contested the charge of attempted murder, claiming he did not have the requisite intent to kill, supported by the fact the prosecutor conceded at trial that there was no evidence of such

765. *Culuko*, 92 Cal. Rptr. 2d 789.
766. *Id.* at 801–03.
767. *Id.* at 802 (alterations in original) (internal quotation marks omitted) (quoting People v. Smith, 67 Cal. Rptr. 2d 604, 609 (Cal. Ct. App. 1997)).
768. *Id.*
769. *Id.* at 803.
770. *Id.*
771. *Id.* at 799.
772. 226 Cal. Rptr. 475 (Cal. Ct. App. 1986).
773. *Id.* at 477–78.
774. *Id.* at 476.

intent on the defendant's part.[775] The court of appeals disagreed, concluding that defendant's act of driving the getaway car was evidence of his intent to assist or facilitate the principal in perpetrating the robbery, and that as an aider and abettor, the defendant was then liable not only for the robbery which he intended to assist but also for any resulting "natural and probable consequences," including the attempted murder.[776]

People v. Laster[777] involved two defendants the State had charged with four counts of attempted murder, allegedly the natural and probable consequences of their target crimes of discharging or permitting the discharge of a firearm from a motor vehicle.[778] In this case, the defendant–driver set out with the defendant–passenger in a car to avenge a gang beating of the defendant–passenger's cousin.[779] Defendants then claimed they picked up two more men, one being the principal.[780] At a stop sign in the gang's neighborhood, they claimed the principal drew a gun and shot into a group playing basketball, presumed to include the gang members that beat the defendant–passenger's cousin.[781] Defendants claimed they knew the principal had a gun but did not know that the principal intended to shoot into the group of basketball players.[782]

The appellate court acknowledged that the prosecution (1) "selected target offenses with the fewest possible elements, so that they would be the easiest to prove,"—discharging or permitting the discharge of weapons from a motor vehicle—(2) claimed that the defendants had "knowingly and intentionally aided and abetted . . . these target offenses," (3) argued that "it was reasonably foreseeable that, as a consequence, the [principal] would commit attempted murder," and (4) concluded "that defendants were therefore guilty of attempted murder."[783] Nonetheless, the court concluded that the prosecution's theory of the case, reflected in the jury instructions, was an appropriate use of the natural and probable consequences doctrine.[784] The defendants also argued that the attempted murder and the discharge of the firearm were the same act so that one could not be the consequence of the other, but the court disagreed because it could not see "why the fact that the target offense and the offense ultimately committed . . . consisted of the same act lessened defendants' culpability."[785]

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775. *Id.* at 477.
776. *Id.* at 477–78.
777. 61 Cal. Rptr. 2d 680 (Cal. Ct. App. 1997).
778. *Id.* at 682–83.
779. *Id.* at 685–86.
780. *Id.* at 685.
781. *Id.* at 686.
782. *Id.* at 685–86.
783. *Id.* at 687–88 (referring to CAL. PENAL CODE § 12034(b), (d) (West 1999)) (criminalizing discharging and permitting the discharge of a firearm from a motor vehicle).
784. *Id.* at 689.
785. *Id.* at 688.

Thus, the California Court of Appeals affirmed the superior court's convictions of both defendants for the four counts.[786]

4. Delaware

Delaware is another state whose statute follows the Category I model.[787] Nevertheless, its case law appears to follow a broad Category III approach.[788] In *Claudio v. State*, the defendant appealed his conviction as an accomplice to robbery, murder, and attempted murder.[789] In this case, the defendant and the principal robbed two victims at knifepoint.[790] The defendant stabbed one victim, wounding him, and the principal stabbed the other, killing him.[791] The trial court convicted the defendant of the murder on an accomplice liability theory.[792] On appeal, the defendant argued that he did not have the requisite specific intent to be liable for the murder.[793] However, the Supreme Court of Delaware disagreed with the defendant's contentions, stating:

> The inquiry under [the Delaware accomplice statute] is not whether each accomplice had the specific intent to commit murder, but whether he intended to promote or facilitate the principal's conduct constituting the offense. The defendant[] did not have to specifically intend that the result, a killing, should occur. As long as the result was a foreseeable consequence of the underlying felonious conduct their intent as accomplices includes the intent to facilitate the happening of this result.

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786. *Id.* at 694.

787. *See* DEL. CODE ANN. tit. 11, § 271(2) (2007) ("A person is guilty of an offense committed by another person when: . . . Intending to promote or facilitate the commission of the offense the person: . . . Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or . . . Aids, counsels or agrees or attempts to aid the other person in planning or committing it; or . . . Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.").

788. In *Collins v. State*, 1995 WL 120655 (Del. Mar. 10, 1995), the trial court instructed the jury to find "the defendant guilty if it found that the result of the ancillary crime (assault) was a 'foreseeable consequence' and in furtherance of the primary crime (robbery) for which [defendant] intended to be an accomplice." *Id.* at *2. The Supreme Court of Delaware held that the instruction was "well within the constricts of the law of complicity in Delaware." *Id.* (citing Claudio v. State, 585 A.2d 1278, 1281–82 (Del. 1991); Hooks v. State, 416 A.2d 189, 197 (Del. 1980)). Here, the court found evidence which established that "it was foreseeable that during the armed robbery of a bar/package store, an onlooking patron of the bar might be seen as a threat to the success of the robbery and might be assaulted by one of the robbers." *Id.* at *3.

789. *Claudio*, 585 A.2d at 1279.

790. *Id.* at 1280.

791. *Id.*

792. *Id.* at 1282.

793. *Id.* at 1281–82.

> Thus, Delaware law requires the jury to unanimously find that a principal-accomplice relationship existed between the participants with respect to a particular charge, e.g., in this case, robbery at knife point. However, the jury is not required thereafter to find that the defendants specifically intended the result of a consequential crime which occurs, e.g., in this case, murder and attempted murder.[794]

Here, the evidence revealed that the defendant agreed to rob the victims at knifepoint and was responsible for the principal's murder.[795] The court pointed out that, in Delaware,

> all persons who join together with a common intent and purpose to commit an unlawful act which, in itself, makes it not improbable that a crime not specifically agreed upon in advance might be committed, are responsible equally as principals for the commission of such an *incidental or consequential crime*, whenever the second crime is one in furtherance of or in aid to the originally contemplated unlawful act.[796]

In *Chance v. State*,[797] the defendant appealed his conviction for second degree murder, but the Supreme Court of Delaware upheld the conviction on an accomplice liability theory.[798] In this case, the defendant taunted the victim at a party and eventually instigated a general fight among the guests.[799] When the victim attempted to leave, the defendant and three other party guests began to beat him.[800] The victim died as a result of the beating.[801] The trial court instructed the jury that the defendant could be responsible as an accomplice for second degree murder or any of four lesser included offenses, stating:

> It is the law that all persons who join together with a common intent and purpose to commit an unlawful act which, in itself, makes it foreseeable that a crime not specifically agreed upon in advance might be committed, are responsible equally as principals for the commission of such an incidental or consequential crime, whenever the second

794. *Id.* at 1282 (quoting Hooks v. State, 416 A.2d 189, 197 (Del. 1980)) (citing Probst v. State A.2d 114, 123 (Del. 1998)).
795. *Id.*
796. *Id.* at 1281–82 (emphasis added).
797. 685 A.2d 351 (Del. 1996).
798. *Id.* at 352.
799. *Id.* at 352–53.
800. *Id.* at 353.
801. *Id.*

> crime is one in furtherance of or in aid to the originally contemplated unlawful act.[802]

The jury found the defendant guilty of second degree murder based on a theory of accomplice liability.[803] On appeal, the defendant claimed, *inter alia*, that the "instruction with regard to accomplice liability for an offense that is consequential to the originally contemplated unlawful act should only be given in a felony-murder situation."[804] The court disagreed and stated that if the jury found that a "principal-accomplice relationship existed" between the defendant and the others regarding the assault of the victim, "then each of them could be held responsible for the consequential death of [the victim] without the jury having to find that [the defendant] specifically intended the result of the consequential offense, *i.e.*, homicide."[805]

5. *Illinois*

The Illinois accomplice statute requires specific intent to promote or facilitate the commission of a crime.[806] However, the Illinois case law reflects what its courts commonly refer to as the "common design rule,"[807] which they have interpreted as holding a person accountable not only for intended crimes but also for any natural and probable consequence of the common purpose.[808] This rule holds that "when two or more people engage in a common criminal design, *any* acts in furtherance thereof committed by one party are considered the acts of all parties,"[809] and applies even if the intended crime is a misdemeanor.[810] For instance, where the defendant may have intended only that he and his cohorts commit an aggravated assault against the victim, and his cohort later shoots and kills, the defendant is responsible for murder.[811]

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802. *Id.* at 353–54.

803. *Id.* at 352.

804. *Id.* at 357–58.

805. *Id.* at 358.

806. *See* 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2002) ("A person is legally accountable for the conduct of another when: . . . [e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.").

807. People v. Kessler, 315 N.E.2d 29, 32 (Ill. 1974).

808. *See* People v. Morgan, 364 N.E.2d 56, 60 (Ill. 1977) (quoting People v. Morgan, 350 N.E.2d 27, 34 (Ill. App. Ct. 1976)).

809. People v. Hicks, 676 N.E.2d 725, 728–29 (Ill. App. Ct. 1997) (emphasis added) (citing People v. Martin, 648 N.E.2d 992, 998 (Ill. App. Ct. 1995)), *rev'd on other grounds*, 639 N.E.2d 373 (Ill. 1998).

810. *See* People v. Terry, 460 N.E.2d 746, 749–50 (Ill. 1984).

811. People v. McCoy, 786 N.E.2d 1052, 1056 (Ill. App. Ct. 2003).

Similarly, even if the defendant's original intent is the commission of misdemeanor battery, but the principal kills the victim, the defendant is responsible for the killing.[812] Thus, where the principal "told [a] group, which included defendant, that they should 'kick [the victim's] ass'" while a codefendant "displayed a gun," the fact that the defendant was part of a common design to hurt the victim also made him responsible for the principal's shooting of the victim and resulted in his murder conviction.[813]

In *People v. Morgan*,[814] the defendant was part of a group planning a robbery of an individual, and one of his cohorts struck the victim with a two-by-four while another hit him with a hammer.[815] The court held the defendant accountable for murder because it was a natural and probable consequence of the group's common design to commit armed robbery, notwithstanding the defendant's claim that he did not possess the specific intent to murder.[816]

In *People v. Green*,[817] the defendant, on the pretext of purchasing drugs, convinced an eventual murder victim to open the burglar gates leading into his apartment in order to allow two codefendants to rush in and demand money from the victim.[818] The codefendants murdered the victim and three others in the apartment, and the court of appeals held the defendant responsible for four counts of murder as well as burglary, home invasion, and armed robbery because the murders were a natural and probable consequence of the common purpose to commit robbery.[819]

In *People v. Kessler*,[820] the defendant and two cohorts embarked on a plan to burglarize an unoccupied tavern.[821] As the defendant waited outside the tavern in a vehicle, his two unarmed cohorts entered the tavern.[822] While inside, the tavern owner arrived,[823] at which point, one of the defendant's cohorts shot the tavern owner with a gun he had found in the tavern during the course of the burglary.[824] The defendant's cohorts exited the tavern, entered the defendant's vehicle, and sped off, but the defendant lost control of the vehicle.[825] As the defendant's cohorts fled on foot, one of them shot at a pursuing officer, but the

812. *Terry*, 460 N.E.2d at 749–50 (Ill. 1984).
813. People v. Duncan, 698 N.E.2d 1078, 1083 (Ill. App. Ct. 1998).
814. 364 N.E.2d 56 (Ill. 1977).
815. *Id.* at 72.
816. *Id.* at 59–60.
817. 535 N.E.2d 413 (Ill. App. Ct. 1988).
818. *Id.* at 422.
819. *Id.*
820. 315 N.E.2d 29 (Ill. 1974).
821. *Id.* at 30.
822. *Id.*
823. *Id.*
824. *Id.*
825. *Id.* at 31.

defendant remained seated in the vehicle.[826] The Illinois Supreme Court upheld convictions for not only one count of burglary but also two counts of attempted murder.[827] Notwithstanding the defendant's claim he had no specific intent to commit attempted murder of either the tavern owner or the officer, the court affirmed his conviction for these offenses in accordance with common design principles.[828]

6. Indiana

Although the Indiana accomplice statute appears to demand a "knowingly or intentionally" basis for accomplice liability,[829] the Indiana courts have construed it to follow a Category III "natural and probable consequences" analysis for liability.[830] In *Johnson v. State*,[831] the defendant and the principal formulated a plan to rob the victim, the defendant's father-in-law, which resulted in the principal murdering the victim and the victim's wife while defendant watched and did nothing.[832] The defendant argued that his conviction as an accomplice for felony murder was inappropriate because the principal's actions exceeded the scope of the plan to rob the victim.[833] The Indiana

826. *Id.*

827. *Id.* at 33.

828. *Id.* at 31–33.

829. *See* IND. CODE ANN. § 35-41-2-4 (LexisNexis 2004) ("A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person: (1) Has not been prosecuted for the offense; (2) Has not been convicted of the offense; or (3) Has been acquitted of the offense.").

830. In *Richardson v. State*, 697 N.E.2d 462 (Ind. 1998), the Indiana Supreme Court held that "[a]n accomplice who acts in concert with another who actually committed the direct acts constituting the elements of the crime is equally as liable as a principal for all natural and probable consequences of the plan." *Id.* at 465. Here, the defendant and principal beat the victim for not paying for cocaine supplied to him, during which beating the principal dropped a boulder on the victim's head causing the victim's death. *Id.* at 464. Because this was a natural and probable consequence of the attack on the victim, the defendant was liable for murder. *Id.* at 465.

In *Porter v. State*, 743 N.E.2d 1260 (Ind. Ct. App. 2001), the Indiana Court of Appeals employed the same language as the *Richardson* court. *Id.* at 1266 (quoting Tynes v. State, 650 N.E.2d 685, 687 (Ind. 1995)). In this case, following an argument with the victim, defendant handed a firearm to the principal, who shot the victim and wounded her, which ultimately was the basis for upholding the defendant's criminal recklessness conviction. *Id.* at 1262, 1266.

Finally, in *Berry v. State*, 819 N.E.2d 443 (Ind. Ct. App. 2004), the Indiana Court of Appeals held that "an accomplice is criminally responsible for all acts committed by a confederate which are a probable and natural consequence of their concerted action." *Id.* at 450. Here, the defendant drove the principal to and from the location where the principal shot the victim to death and, as such, was an accomplice to murder. *Id.* at 447–48, 451.

831. 687 N.E.2d 345 (Ind. 1997).

832. *Id.* at 346.

833. *Id.* at 348.

Supreme Court disagreed, stating that the principal's commission of a more severe offense than planned does not negate an accomplice's liability if the resulting offense is a probable and natural result of the planned offense.[834] The court held that planning to rob a person in his "own home is bound to create a risk that violence may ensue when the homeowner predictably attempts to protect himself and his family."[835]

7. Louisiana

Louisiana's criminal code provision addressing accomplice liability does not contain any language concerning liability for natural and foreseeable consequences.[836] However, a review of the state's case law reveals the use of this doctrine. For example, in *State v. Smith*,[837] the defendant and two codefendants set out to burglarize the home of the victim, their former employer.[838] Upon the sudden, unexpected arrival of the victim and his wife, the defendant and one codefendant fled the scene; the second codefendant, however, remained to confront the victim.[839] The codefendant shot and killed the victim and fled on foot.[840] At trial, the codefendant–shooter took full responsibility for the death of the victim.[841] Regardless, a jury convicted all three defendants of murder.[842] The three defendants appealed the conviction, with the defendant and codefendant seeking "to distance themselves from the fatal shots fired by [the codefendant shooter]" by suggesting that they had not "even been aware that their companion was armed."[843] In reviewing the trial court's decision, the Supreme Court of Louisiana applied not only felony murder but also accomplice law, stating that "under general principles of accessorial liability, 'all parties [to a crime] are guilty for deviations from the common plan which are the foreseeable consequences of carrying out the plan.'"[844] In addition to this theory, the court went on to cite an earlier opinion,

834. *Id.* at 349–50 (citing *Tynes*, 650 N.E.2d at 687).

835. *Id.* at 350.

836. *See* LA. REV. STAT. ANN. § 14:24 (2007) ("All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.").

837. 748 So. 2d 1139 (La. 1999).

838. *Id.* at 1140.

839. *Id.* at 1141.

840. *Id.*

841. *Id.*

842. *Id.* at 1140.

843. *Id.* at 1143.

844. *Id.* (alteration in original) (citation omitted) (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW, § 7.5, at 212 (1986)).

where it held that, when "[a]cting in concert, each man . . . be[comes] responsible not only for his own acts but for the acts of the other."[845] Based on its own precedent and accepted accomplice liability theory, the supreme court affirmed the trial court's decision, reasoning that "[t]he risk that an unauthorized entry of an inhabited dwelling may escalate into violence and death is a *foreseeable consequence* of burglary which every party to the offense must accept no matter what he or she actually intended."[846]

On at least one occasion, the Louisiana Court of Appeals has shown it is willing to consider its "foreseeable consequences" theory in a case that does not rely on the felony murder rule. In *State v. B.J.D.*,[847] two defendants and the principal went to a neighbor's home to visit a classmate.[848] Although no one was home, the defendants entered into the backyard without permission and began swimming in an aboveground pool.[849] The principal "later admitted that he cut the pool's liner with a box cutter."[850] The State subsequently charged the defendants with and convicted them of felony criminal damage to property.[851] On appeal, the defendants argued, *inter alia*, that "the evidence was insufficient to support the trial court's adjudication of delinquency as principals to the [crime]."[852] The court reasoned that because "the State failed to prove that [d]efendants directly committed the act in this case, the State then had the burden of proving that [d]efendants either aided and abetted [the principal's actions] or that [d]efendants counseled or procured [the principal's actions]."[853] The court determined that the principal's "cutting of the pool's liner was a deviation from the trio's plan to trespass and swim in the pool."[854] Citing the "foreseeable consequences" language from *Smith*, the Louisiana Court of Appeals concluded that "the State did not prove that [d]efendants could have reasonably foreseen [the principal's] cutting of the pool's liner."[855] On this reasoning, the court overturned the defendant's conviction.[856]

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845. *Id.* (internal quotation marks omitted) (citing State v. Anderson, 707 So. 2d 1223, 1224 (La. 1998)).

846. *Id.* (emphasis added) (citing State v. Cotton, 341 So. 2d 362, 364 (La. 1976)).

847. 799 So. 2d 563 (La. Ct. App. 2001).

848. *Id.* at 565.

849. *Id.*

850. *Id.*

851. *Id.*

852. *Id.* at 568.

853. *Id.* at 569.

854. *Id.*

855. *Id.* (referring to State v. Smith, 748 So. 2d 1139, 1143 (La. 1999)).

856. *Id.*

8. Maryland

The Maryland "accessory" statute offers only definitions of parties and the abrogation of common law distinctions.[857] The Maryland case law, however, appears to follow a Category III analysis.[858] In *Johnson v. State*,[859] the Maryland Court of Special Appeals—using a Category III approach—affirmed the defendant's conviction for robbery with a deadly weapon and assault with intent to murder.[860] In this case, the defendant and his confederate robbed a drugstore.[861] As they were leaving, the pharmacist turned to head to the rear of the store and was shot in the back and injured.[862] The pharmacist could not identify his shooter, and neither the defendant nor his confederate admitted to the shooting.[863] The trial court convicted the defendant of robbery with a deadly weapon and assault with intent to murder.[864]

On appeal, the Court of Special Appeals of Maryland held that, as a participant in the robbery, the defendant was "responsible for all the natural or probable consequences that flowed from the common purpose to rob the pharmacist."[865] The court then explained that the question regarding who may have actually shot the victim did "not affect the legal sufficiency of the evidence to support [the defendant's] conviction of assault with intent to murder."[866]

In 1988, Maryland decided to distance itself from the natural and probable consequences nomenclature while still employing an analysis that holds defendant–accomplices responsible for incidental crimes that flow from the intended crime.[867] In *Sheppard v. State*, the defendant and two confederates

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857. *See* MD. CODE ANN., CRIM. PROC. § 4-204(a)–(b) (LexisNexis 2007) ("[T]he words 'accessory before the fact' and 'principal' have their judicially determined meanings. . . . Except for a sentencing proceeding under § 2-303 or § 2-304 of the Criminal Law Article [death sentences and life sentences without the possibility of parole, respectively]: (1) the distinction between an accessory before the fact and a principal is abrogated; and (2) an accessory before the fact may be charged, tried, convicted, and sentenced as a principal.").

858. *See, e.g.*, Owens v. State, 867 A.2d 334, 342 (Md. Ct. Spec. App. 2005) ("[W]hen the defendant participates in the main thrust of the criminal design, it is not necessary that he aid and abet in the *consequential crimes* in order for him to be criminally responsible for them.") (emphasis added).

859. 262 A.2d 325 (Md. Ct. Spec. App. 1970).

860. *Id.* at 327.

861. *Id.*

862. *Id.*

863. *Id.*

864. *Id.*

865. *Id.* at 327 (citation omitted).

866. *Id.*

867. Sheppard v. State, 538 A.2d 773, 775 & n.3 (Md. 1988) ("While we disagree that the natural and probable consequence rule predicates liability on a negligence *mens rea*, we do agree

robbed two women in a store.[868] Though police captured the defendant during the getaway, the police continued to pursue the three confederates, during which one of them shot at the police officers in pursuit.[869]

The Court of Appeals of Maryland upheld the defendant's conviction for assault with intent to murder the police officer even though the defendant was in police custody by the time the principal's crime of shooting at the police occurred.[870] The court stated:

> [A]ccomplice liability[] takes two forms: (1) responsibility for the planned, or principal offense (or offenses), and (2) responsibility for other criminal acts incidental to the commission of the principal offense. . . . In order to establish complicity for other crimes committed during the course of the criminal episode . . . , the State must establish that the charged offense *was done in furtherance of the commission of the principal offense or the escape therefrom*. . . .
>
> . . . [T]he principal offense was the armed robbery of the two women at the liquor store. The aggravated assaults against the police officers, perpetrated during the escape from the commission of the robbery, were secondary or incidental offenses. . . . [C]ontrary to [the defendant's] contention that his responsibility for the aggravated assaults is dependent upon proof that he aided and abetted the commission of those offenses, [the defendant's] complicity rests on the fact that he aided and abetted the armed robbery.[871]

Thus, although the Court of Appeals of Maryland has softened its language by inquiring whether the unintended crimes committed by another were "done in furtherance of the commission of the principal offense or escape therefrom," it appears to remain a member of the Category III jurisdictions.

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that tort standards of foreseeability have no place in criminal complicity law. Thus, consistent with the rules of complicity in conspiracy law and under the felony murder doctrine, we prefer the language 'in furtherance of the commission of the offense and the escape therefrom.'"), *abrogated on other grounds by* State v. Hawkins, 604 A.2d 489, 501 (Md. 1992).

868. *Id.*

869. *Id.*

870. *Id.*

871. *Id.* at 775 (emphasis added) (citations omitted) (footnote call numbers omitted).

9. Michigan

Like Louisiana, Michigan's criminal code does not contain natural and probable consequences language.[872] The Michigan Supreme Court, however, has looked to legislative intent to support its application of the

> common-law theory that a defendant can be held criminally liable as an accomplice if: (1) the defendant intends or is aware that the principal is going to commit a specific criminal act; or (2) the criminal act committed by the principal is an "incidental consequence[] which might reasonably be expected to result from the intended wrong."[873]

In *People v. Robinson*, the Supreme Court of Michigan reinstated a second degree murder conviction that the Michigan Court of Appeals had previously reversed.[874] In this case, the defendant and the principal went to the victim's house under the principal's direction to "f* * * [the victim] up."[875] The principal knocked on the victim's door and the defendant struck the victim when he answered.[876] The victim fell to the ground and the defendant hit him again.[877] When the principal began to kick the victim, the defendant told the principal that "that was enough, and walked back to the car."[878] The principal then shot and killed the victim.[879]

In reviewing the trial court's decision, the Michigan Court of Appeals had held that "the trial court improperly convicted defendant of second-degree murder because there was no evidence establishing that defendant was aware of or shared [the principal's] intent to kill the victim."[880] The Supreme Court of Michigan then reversed the court of appeals' decision and held that "a defendant who intends to aid, abet, counsel, or procure the commission of [a] crime, is liable for that crime as well as the natural and probable consequences of that crime."[881] The supreme court cautioned that "[t]here can be no criminal

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872. *See* MICH. COMP. LAWS ANN. § 767.39 (West 2000) ("Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.").

873. People v. Robinson, 715 N.W.2d 44, 49 (Mich. 2006) (alteration in original) (footnote call numbers omitted) (citing PERKINS & BOYCE, *supra* note 30, at 745).

874. *Id.* at 46.

875. *Id.*

876. *Id.*

877. *Id.*

878. *Id.*

879. *Id.*

880. *Id.* at 47.

881. *Id.* at 46.

responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if the occasion should arise for any one to do it."[882] The court concluded,

> The victim's death is clearly within the common enterprise the defendant aided because a homicide "might be expected to happen if the occasion should arise" within the common enterprise of committing an aggravated assault. . . . [A] "natural and probable consequence" of leaving the enraged [principal] alone with the victim is that [the principal] would ultimately murder the victim.[883]

10. Nebraska

Although there is no statutory law that speaks to the liability of accomplices with regard to unintended secondary crimes committed by principals,[884] Nebraska case law supports the proposition that "one who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act."[885] In *State v. Trackwell*, the defendant and the principal, both collection agents, drove to the victim's home for the purpose of repossessing the victim's pickup truck.[886] The defendant dropped the principal off to take the truck while the defendant waited in his car at the end of the victim's driveway.[887] As the principal drove the truck away, the victim, believing that her truck was the target of theft, attached herself to the rear of the truck.[888] The principal continued to drive away and dragged the victim with him.[889] At the end of the driveway, the victim fell to the ground and suffered lacerations and injuries from being dragged by the truck.[890] A jury subsequently convicted the defendant of third degree assault

882. *Id.* at 49 (internal quotation marks omitted) (quoting People v. Knapp, 26 Mich. 112, 114 (1872)).

883. *Id.* at 50–51 (footnote call numbers omitted).

884. *See* NEB. REV. STAT. § 28-206 (1995) ("A person who aids, abets, procures or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.").

885. State v. Trackwell, 458 N.W.2d 181, 184 (Neb. 1990) (citing State v. Ivy, 350 N.W.2d 622, 627 (Wis. 1984)).

886. *Id.* at 181–82.

887. *Id.* at 182.

888. *Id.*

889. *Id.*

890. *Id.*

after a trial in the county court.[891] The district court affirmed the conviction, and the defendant appealed to the Supreme Court of Nebraska.[892]

On appeal, the defendant claimed the evidence was insufficient to convict him of third degree assault.[893] The Supreme Court of Nebraska noted that the trial court found accomplice liability on a theory that the defendant and the principal "were engaged in a 'criminal enterprise'" of theft of personal property they knew remained in the truck.[894] Therefore, according to the trial court, the defendant would "automatically be liable for any subsequent criminal act committed by [the principal]."[895] Upon review, the Supreme Court of Nebraska looked to accomplice liability common law from other states.[896] Citing the Alabama opinion of *Hollingsworth v. State*,[897] the court noted that "an accomplice is criminally responsible for the proximate, natural, and logical consequences of the common criminal undertaking."[898] Furthermore, the court, referring to the "natural and probable consequence" language from the Wisconsin opinion of *State v. Ivy*,[899] held that the defendant's conviction for third degree assault was erroneous, reasoning that:

> It was not a foreseeable consequence, nor was it a natural and probable consequence, that [the victim], whose presence was unknown to [the defendant], would attach herself to the rear of the pickup and allow herself to be dragged the length of the driveway, where she would eventually lose her grip and fall to the ground.[900]

In *State v. Jackson,*[901] an opinion from the Supreme Court of Nebraska, the defendant was waiting for a taxicab with his friend outside of a mini-mart when two individuals walked out of the mini-mart.[902] After a hostile verbal exchange between the two pairs of men, the two individuals crossed the street and continued to direct hostile remarks toward the defendant and his cohort.[903] The defendant's cohort followed the two men across the street and began fighting

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891. *Id.*
892. *Id.*
893. *Id.* at 182.
894. *Id.* at 183.
895. *Id.*
896. *Id.* at 183–84.
897. 366 So. 2d 326 (Ala. Crim. App. 1978); *see supra* notes 724–32 and accompanying text.
898. *Trackwell*, 458 N.W.2d at 184 (quoting *Hollingsworth*, 366 So. 2d at 332).
899. 350 N.W.2d 622, 627 (Wis. 1984); *see supra* note 706 and accompanying text.
900. *Trackwell*, 458 N.W.2d at 184.
901. 601 N.W.2d 741 (1999).
902. *Id.* at 745–46.
903. *Id.*

with one of them, at which point the defendant followed his friend across the street.[904] According to the defendant, he attempted to break up the fight but was accosted by the second individual.[905] The defendant later asserted that he fought back in self-defense.[906] During the confrontation, his cohort killed one of the individuals.[907] As a result of his involvement in the fight, the defendant was charged with manslaughter on the theory of accomplice liability of one individual and first-degree assault of the other.[908]

At trial, the defendant argued that he could not be held liable for aiding and abetting the manslaughter committed by the principal because the defendant did nothing more than follow his cohort across the street.[909] The Supreme Court of Nebraska disagreed, stating that the defendant could be held liable for the "natural and probable consequences of the intended criminal act."[910] Although "mere presence, acquiescence, or silence is not enough" to find one liable under accomplice liability, the court found that, if the defendant, by "some word, act or deed," evidenced his participation, he could be found liable.[911] The court reasoned that a defendant who participates in the "common purpose of assaulting" the victims shall be held liable for any "natural and probable consequences of the intended criminal act."[912] Accordingly, the court held that a jury could reasonably find that the defendant's actions evidenced his participation in the criminal conduct and, therefore, the charge of manslaughter under an accomplice theory was proper.[913]

11. North Carolina

North Carolina's accomplice liability statute makes no reference to a mental state.[914] However, the following cases suggest that North Carolina applies the

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904. *Id.*
905. *Id.*
906. *Id.*
907. *Id.* at 747.
908. *Id.*
909. *Id.* at 751.
910. *Id.* at 750. *See also* People v. Simmons, No. A-00-1201, 2002 WL 377085 (Neb. Ct. App. Mar. 12, 2002) (holding that the fact that the defendant did not shoot the victim did not preclude his conviction for attempted murder and use of a firearm to commit a felony where the defendant and the principal, both armed with handguns, entered a bank with the intention of robbing it and the principal shot the victim).
911. *Id.*
912. *Jackson*, 601 N.W.2d at 750.
913. *Id.* at 751.
914. *See* N.C. GEN. STAT. § 14-5.2 (2007) ("All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony.").

Category III model. In *State v. Barnes*,[915] the defendant and codefendants had discussed the possibility of robbing someone.[916] The defendant and codefendants went to the home of the two victims.[917] The codefendants shot and killed the victims, and the defendant and his codefendants then robbed the victims' home of jewelry and other valuables.[918] The defendant and codefendants then went to another home where they gave the occupants information about the crime.[919] The occupants shortly thereafter informed the police.[920] The police arrested all three perpetrators, and in their subsequent statements to police, each denied having been involved in the murder of the victims.[921] Physical evidence, including gunshot residue on the persons of all three perpetrators, tied them to the crime.[922] The defendant and codefendants were convicted of two counts of first degree murder and counts of armed robbery and burglary.[923]

On appeal, the defendant argued, *inter alia*, that the trial court committed prejudicial error in instructing the jury on the "acting in concert" rule with regard to premeditated and deliberate first degree murder.[924] The trial court's jury instruction included the following language:

> If two or more persons act together with a common purpose to commit a crime, each of them is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the others in pursuance of their common purpose or as a natural or probable consequence of the common purpose.[925]

The defendant argued that this instruction was contrary to the "acting in concert" rule espoused in the North Carolina Supreme Court's earlier decision of *State v. Blankenship*,[926] which held that "the acting in concert doctrine did not encompass a defendant who was at the scene of a murder acting in concert with another with whom he shared a common plan to commit a crime, but who did not have the specific intent to kill the victim."[927]

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915. 481 S.E.2d 44 (N.C. 1997).
916. *Id.* at 52.
917. *See id.*
918. *Id.* at 52–53.
919. *Id.* at 52.
920. *Id.*
921. *Id.* at 53.
922. *Id.*
923. *Id.* at 51.
924. *Id.* at 69.
925. *Id.* at 68.
926. 447 S.E.2d 727 (N.C. 1994), *overruled by Barnes*, 481 S.E.2d at 70.
927. *Barnes*, 481 S.E.2d at 70 (citing *Blankenship*, 447 S.E.2d at 738–39).

However, the North Carolina Supreme Court explicitly overruled *Blankenship* and held that the jury instructions on the "acting in concert" doctrine given in the case at hand were correct.[928] In overruling *Blankenship*, the court also noted that they had previously applied the doctrine, quoting language from their 1837 opinion of *State v. Haney*,[929] which held "where a privity and community of design has been established, the act of any one of those who have combined together for the same illegal purpose, done in furtherance of the unlawful design, is, in the consideration of law, the act of all."[930] The court concluded that, the North Carolina "acting in concert" rule should be understood as follows:

> [I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that *particular* crime, but he is also guilty of any other crime committed by the other in *pursuance of the common purpose* . . . or as a *natural or probable consequence thereof*.[931]

In *State v. Littlejohn*,[932] a North Carolina Court of Appeals opinion, the victim met the defendant, the principal, and a third individual and drove to a house in order to purchase false identification for use in the purchase of alcohol.[933] While standing near their vehicle outside the house, the principal "cut [the victim's] throat . . . and ran away . . . with [the victim's] money. [The victim] opened the . . . door [of the vehicle] and screamed for help," but the defendant told the victim to exit the vehicle.[934] The defendant and the third individual then drove off.[935] A jury subsequently convicted the defendant of armed "robbery . . . and assault with a deadly weapon with intent to kill [while] inflicting serious injury."[936]

On appeal the defendant argued, *inter alia*, that the evidence adduced at trial was insufficient for his conviction for "assault with a deadly weapon with intent to kill inflicting serious injury."[937] The trial court gave an "acting in concert" instruction as follows:

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928. *Id.*

929. 19 N.C. 373 (3 & 4 Dev. & Bat.) (N.C. 1837).

930. *Barnes*, 481 S.E.2d at 71 (quoting *Haney*, 19 N.C. at 378).

931. *Id.* (alteration in original) (emphasis added) (internal quotation marks omitted) (quoting State v. Erlewine, 403 S.E.2d 280, 286 (N.C. 1991)).

932. No. COA05-802, 2006 WL 539393 (N.C. Ct. App. Mar. 7, 2006).

933. *Id.* at *1.

934. *Id.*

935. *Id.*

936. *Id.* at *2.

937. *Id.*

> If two or more persons join in a common purpose to commit a robbery with a dangerous weapon, each of them, if actually or constructively present, is not only guilty of that crime, if the other person committed a crime, but is also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a dangerous weapon; or the natural or probable consequence thereof. [938]

The court found that the trial court's jury instruction was consistent with the North Carolina Supreme Court's prior decision in *State v. Westbrook*,[939] which had held,

> [I]f two persons are acting together, in pursuance of a common plan and common purpose to rob, and one of them actually does the robbery, both would be equally guilty within the meaning of the law and if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits the crime, but *he is also guilty of any other crime committed by the other in pursuance of the common purpose; that is, the common plan to rob, or as a natural or probable consequence thereof.*[940]

The court also looked to its previous decision in *State v. Joyner*,[941] where the court stated that under "the concerted action" principle

> [i]t is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime . . . so long as [the defendant] is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.[942]

The *Littlejohn* court concluded that there was no error.[943] It noted that the evidence at trial showed that the "defendant was both physically present . . . and acted together with [the codefendants] to accomplish the common plan of

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938. *Id.* at *4.

939. 181 S.E.2d 572 (N.C. 1971), *vacated on other grounds*, Westbrook v. North Carolina, 408 U.S. 939, 939 (1972).

940. *Littlejohn*, 2006 WL 539393, at *4 (quoting *Westbrook*, 181 S.E.2d at 586).

941. 255 S.E.2d 390 (N.C. 1979).

942. *Littlejohn*, 2006 WL 539393, at *5 (emphasis omitted) (quoting *Joyner*, 255 S.E.2d at 395).

943. *Id.* at *7.

robbery."[944] The court concluded that defendant's conviction on the secondary crime of assault with a deadly weapon with intent to kill inflicting serious injury was proper because the assault grew out of the concerted action of committing robbery.[945]

12. South Carolina

The South Carolina accomplice liability statute makes no mention of a mental state for its accomplice law.[946] However, South Carolina case law states that where multiple actors commit an unlawful act and one of the actors commits a homicide, all of the actors are guilty of the homicide so long as it was a "probable or natural consequence of the acts done in pursuance of the common design."[947] An illustration of this reasoning appears in *State v. Dickman*, where a murder victim's body was found and linked to the defendant and his confederate, but each claimed that the other had shot the victim.[948] The trial judge's instructions were that "the hand of one is the hand of all," which the South Carolina Supreme Court felt was consistent with the principle that if a homicide is committed as the natural and probable consequence of acts done in pursuance of a common design, all involved are as guilty as the one who committed the homicide.[949] Although the defendant himself apparently did not have the "nerve" to shoot the victim, the South Carolina Supreme Court affirmed the conviction, stating that the evidence showed that the defendant and the principal were acting according to a plan to murder the victim.[950]

State v. Curry[951] involved a drug deal gone awry, where one of the buyers was shot and died, and there was doubt about which codefendant shot him.[952] In appealing his murder conviction to the Court of Appeals of South Carolina, the defendant argued that the trial court's instruction based on the "hand of one is the hand of all" theory was in error.[953] Verbatim, the trial court's instructions were:

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944. *Id.* at *5.

945. *Id.* at *6.

946. *See* S.C. CODE ANN. § 16-1-40 (2003) ("A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon.").

947. State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (S.C. 2000) (citing State v. Crowe, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (S.C. 1972)).

948. *Id.* at 294, 534 S.E.2d at 268.

949. *Id.* at 295, 534 S.E.2d at 269.

950. *Id.*

951. 370 S.C. 674, 636 S.E.2d 649 (S.C. Ct. App. 2006).

952. *Id.* at 678, 636 S.E.2d at 650–51.

953. *Id.* at 682, 636 S.E.2d at 653.

> It is my duty to charge you now that if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. If a person joins with another to accomplish an illegal purpose, he is criminally responsible for everything done by the other person which occurs as a *natural consequence* of the acts done in carrying out the common plan and purpose.[954]

The defendant claimed the instruction was deficient because it did not include "*natural and probable* consequence" language.[955] In finding the instructions adequate, the court quoted two earlier South Carolina Supreme Court decisions.[956] The first decision stated: "[O]ne who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose."[957] The second opinion held "if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both."[958] Thus, in the case at hand, the thrust of the jury instruction correctly conveyed South Carolina law regarding the "hand of one is the hand of all" rule.[959]

13. Tennessee

While the Tennessee statute addressing "conduct of another" makes no mention of the natural and probable consequences rule,[960] it is reflected in the *Tennessee Pattern Jury Instructions—Criminal*[961] and Tennessee case law.[962] In

954. *Id.* at 683, 636 S.E.2d at 654 (emphasis added).

955. *Id.*

956. *Id.* (citing State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999); State v. Kelsey, 331 S.C. 50, 76–77, 502 S.E.2d 63, 76 (1998)).

957. *Id.* (quoting *Langley*, 343 S.C. at 648, 515 S.E.2d at 101).

958. *Id.* (quoting *Kelsey*, 331 S.C. at 76–77, 502 S.E.2d at 76).

959. *Id.*

960. *See* TENN. CODE ANN. § 39-11-402(2)–(3) (2006) ("A person is criminally responsible for an offense committed by the conduct of another, if: . . . (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.").

961. TENN. PATTERN JURY INSTRUCTIONS—CRIMINAL § 3.01 ("A defendant who is criminally responsible for an offense may be found guilty not only of that offense, but also for any other offense or offenses committed by another, if you find beyond a reasonable doubt that the other offense or offenses committed were natural and probable consequences of the original offense for which the defendant is found criminally responsible, and that the elements of the other

State v. Howard,[963] the Supreme Court of Tennessee reversed and remanded the case for the trial court's failure to instruct the jury of the natural and probable consequences rule.[964] In this case, the defendant and three individuals developed a scheme to rob a restaurant.[965] The men entered the restaurant through the back door, instructed the restaurant employees to lie down on the ground, and entered the manager's office and demanded money.[966] Although the manager "complied and gave the men the money they demanded, one man ordered, 'Shoot his ass. Shoot the mother----r.'"[967] He was then shot and killed.[968] Another employee was also shot and wounded during the robbery.[969]

The State charged the defendant with various offenses including murder, especially aggravated robbery, and conspiracy to commit aggravated robbery.[970] At trial,

> the court admitted into evidence a signed statement wherein [the defendant] admitted that he had accompanied [the codefendants] to the restaurant knowing that they intended to rob it. In his statement he admitted that all three of the other men had guns, but he neither admitted nor denied that he carried a gun himself. [The defendant] claimed that when [the codefendants] went into the restaurant he stayed "all the way in the back." Once he heard gunshots, he ran to the car. [The codefendants] followed him to the car and one stated, "I shot him, man, I shot him."[971]

At trial, the prosecution did not present any evidence that the defendant shot either victim.[972] The court instructed the jury that the defendant would be "criminally responsible for an offense committed by the conduct of another if, acting with the intent to promote or assist the commission of the offense," he

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offense or offenses that accompanied the original offense have been proven beyond a reasonable doubt.").

962. *See, e.g.*, State v. Winters, 137 S.W.3d 641, 657 (Tenn. Crim. App. 2003) ("A defendant is criminally responsible not only for the intended, or target crime, but also for those collateral crimes committed by a co-participant in the criminal episode that are the natural and probable consequence of the target crime.").

963. 30 S.W.3d 271 (Tenn. 2000).

964. *Id.* at 277–78.

965. *Id.* at 273.

966. *Id.* at 273–74.

967. *Id.* at 274.

968. *Id.*

969. *Id.*

970. *Id.*

971. *Id.*

972. *Id.*

aided or attempted to aid another person to commit the offense; it made no mention of the natural and probable consequences rule.[973] Moreover, it explicitly instructed the jury it could not find the defendant guilty under the felony murder rule if it convicted him of premeditated murder.[974] The jury "convicted [the defendant] of premeditated murder, especially aggravated robbery, and conspiracy to commit aggravated robbery."[975]

On appeal, the defendant contended that there was not sufficient evidence to establish deliberation or premeditation.[976] The Tennessee Court of Criminal Appeals "recognized that because the State had offered no proof that [the defendant] fired the shots that killed the victim, [the defendant's] conviction" was therefore "based upon his criminal responsibility for the conduct of the shooter."[977] The court concluded that the defendant was criminally responsible based on the natural and probable consequences rule and affirmed his convictions even though the trial court had not instructed the jury on the rule.[978]

The defendant appealed the Tennessee Court of Criminal Appeals' decision on three grounds:

> (1) the rule should not apply to an offense requiring an intentional mental state; (2) the rule as applied to homicides is already codified in the felony-murder statute; and (3) there is no factual basis for a finding that premeditated murder is the natural and probable consequence of aggravated robbery.[979]

The Supreme Court of Tennessee concluded that the trial court erred by not instructing the jury on the natural and probable consequences rule.[980] In reversing and remanding for a new trial, the supreme court explained:

> [T]he natural and probable consequences rule survived the codification of the common law into the criminal responsibility statutes even though it is not explicitly included in the statutes. The rule underlies the doctrine of criminal responsibility and is based on the recognition that aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put into motion. The doctrine extends the scope of criminal liability to the target crime intended by a

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973. *Id.* at 275.
974. *Id.* at 274.
975. *Id.* at 275.
976. *Id.*
977. *Id.*
978. *Id.*
979. *Id.*
980. *Id.* at 277.

> defendant as well as to other crimes committed by a confederate that were the natural and probable consequences of the commission of the original crime. . . .
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> . . . .
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> . . . [T]o impose criminal liability based on the natural and probable consequences rule, the State must prove beyond a reasonable doubt and the jury must find the following: (1) the elements of the crime or crimes that accompanied the target crime; (2) that the defendant was criminally responsible pursuant to Tennessee Code Annotated section 39-11-402; and (3) that the other crimes that were committed were natural and probable consequences of the target crime.[981]

The Supreme Court of Tennessee determined the instruction on natural and probable consequences to be an "essential element that the State must prove beyond a reasonable doubt."[982] Though the court reversed for failure to provide this instruction, it was quick to explain that, unlike reversal for insufficiency of evidence, the reversal for procedural error permitted the State to retry the defendant for the same charges.[983]

14. Virginia

Virginia has no statute referring to a mental state for accomplices.[984] Its case law and the *Virginia Model Jury Instructions—Criminal* have a "concert of action" instruction which provides that

> [i]f there is concert of action with the resulting crime one of its *incidental probable consequences*, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime.[985]

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981. *Id.* at 276 (citing State v. Carson, 950 S.W.2d 951, 954–55 (Tenn. 1997)).

982. *Id.* at 277.

983. *Id.*

984. *See* VA. CODE ANN. § 18.2-18 (2004) ("In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree . . . .").

985. 1 VA. MODEL JURY INSTRUCTIONS—CRIMINAL, Instruction No. 3.160 (2008) (emphasis added).

In *Spradlin v. Commonwealth*,[986] the defendant and codefendant both appealed convictions of two counts of assault and battery, but the Virginia Court of Appeals affirmed.[987] In this case, the victim testified that "while he and [the second victim] were sitting in a booth at [a restaurant] . . . the defendant[] . . . came to the booth and asked [the victim] why he had cursed him."[988] When the victim, who did not know and had never seen the defendant, replied that he did not do so, the defendant struck him.[989] A fight broke out in which a group of men, including the defendant and codefendant, joined in pushing and shoving the victims outside into a parking lot.[990] One victim later testified that the defendant and another continued to beat him in the parking lot, while three other men beat the second victim.[991]

The defendant contended that he could not be liable for the crimes involving the second victim, and the codefendant contended he could not be liable for the crimes involving either victim.[992] Each defendant argued that conviction of the crimes charged in the indictments must be supported by evidence of actual violence inflicted by each defendant.[993] Holding both defendants responsible, the Virginia Supreme Court stated:

> Every person who is present lending countenance, aiding or abetting another in the commission of an offense is liable to the same punishment as if he had actually committed the offense. . . .
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> . . . .
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> If there is concert of action with the resulting crime one of its *incidental probable consequences*, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime. The question of whether the offense is the natural and probable result of the intended wrongful act is usually for the jury.[994]

After addressing the fact that the defendant started the fight and that defendant and codefendant were involved in its progression to the parking lot, the court explained that the defendant and codefendant were "present and

986. 79 S.E.2d 443 (Va. 1954).
987. *Id.* at 446.
988. *Id.* at 444.
989. *Id.*
990. *Id.*
991. *Id.*
992. *Id.*
993. *Id.* at 444–45.
994. *Id.* at 445 (emphasis added) (citations omitted).

associated in this concerted action and participated in bringing it about."[995] Affirming the convictions, the court concluded that the defendant and codefendant aided and abetted the commission of each of the crimes charged and that "it [was] immaterial whether they actually inflicted the specific injuries received by [the victims]."[996]

In *Rollston v. Commonwealth*,[997] the victim and a friend had provided information to the police concerning the defendant and his associate's involvement in a series of burglaries.[998] While detectives were building the case, the victim and his friend's brother were shot and killed in the victim's home.[999] Later, the defendant's former girlfriend implicated the defendant as having information about these murders, namely, that when she went for a ride with the defendant, he had told her that two associates

> had done something he could not believe; that on the previous evening he had taken them to [the victim's] house and dropped them off; and that when he picked them up they told him they had "offed" two guys. [The defendant] went on to tell her he had returned to the house earlier that morning because he did not believe them; that he had seen that the two guys were, in fact, murdered; . . . that he was not part of any plan to commit the murders; and that he had heard [the codefendants] saying they would like to kill [the victims] prior to dropping them off, but he thought they were just kidding.[1000]

While riding in the car, according to the former girlfriend, the defendant retrieved a knife and a gun from a ditch, claimed the gun was the murder weapon, and then discarded the gun and knife by throwing them off a bridge.[1001]

The Virginia trial court found the defendant guilty of two counts of first degree murder and two counts of use of a firearm in those murders, and the defendant appealed.[1002] On appeal, the defendant first challenged the trial court's use of an instruction on the liability of the principal in the second degree.[1003] It read:

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995. *Id.* at 446.
996. *Id.*
997. 399 S.E.2d 823 (Va. Ct. App. 1991).
998. *Id.* at 824.
999. *Id.* at 825.
1000. *Id.* at 829.
1001. *Id.*
1002. *Id.* at 824.
1003. *Id.*

> A principal in the first degree is the person who actually commits the crime. A principal in the second degree is a person who is present, *sharing the criminal intent of the perpetrator or* aiding and abetting, by helping in some way in the commission of the crime. Presence or consent alone is not sufficient to constitute aiding and abetting. It must be shown that the defendant intended his words, gestures, signals or actions to in some way encourage, advise, or urge, or in some way help the person committing the crime to commit it.[1004]

However, the defendant contended that to be convicted the law required the State to prove that he shared the "specific intent to murder."[1005]

The Virginia Court of Appeals disagreed with the defendant, however, and stated that "[s]pecific intent is not required to convict the defendant" of first degree murder "as a principal in the second degree."[1006] Instead, the court explained, to "share the criminal intent" meant that "the accused must either know or have reason to know of the principal's criminal intention and must intend to encourage, incite, or aid the principal's commission of the crime."[1007]

The defendant also challenged the trial court's use of the Virginia model jury instruction on "concert of action," which was the basis of his liability on the firearms charge.[1008] Again, however, the Virginia Court of Appeals disagreed with the defendant:

> While a concert of action instruction may be proper in a felony murder case, it may also be proper to use when any unlawful enterprise is intended. The intended wrongful act could be any crime and need not be a felony. The only qualification is that the resulting crime be an *incidental, probable consequence* of the original enterprise, plan or purpose. Under the [State's] theory, [the defendant and codefendants] planned the murders of [the victims]. This was the wrongful concerted action and [the defendant] was vicariously responsible under this principle for the firearm offenses. Even if he did not know that a firearm would be the murder weapon, he would be vicariously culpable

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1004. *Id.* at 825 (quoting 1 VA. MODEL JURY INSTRUCTIONS—CRIMINAL, Instruction No. 3.100 (1989)).

1005. *Id.* at 825.

1006. *Id.* at 826.

1007. *Id.* (quoting McGhee v. Commonwealth, 270 S.E.2d 729, 732 (Va. 1980); Cirios v. Commonwealth, 373 S.E.2d 164, 167 (Va. 1988)).

1008. *Id.* at 827 (quoting 1 VA. MODEL JURY INSTRUCTIONS—CRIMINAL, Instruction No. 3.160 (1989)).

for the firearm offenses because they were "incidental probable consequences" of the murders.[1009]

Finally, the defendant contended in his appeal that the evidence was insufficient to sustain the murder and firearm convictions.[1010] The Virginia Court of Appeals disagreed again, concluding that while there was "no direct evidence that the defendant was present at the scene" or actively participating in the murder, the circumstantial evidence pointed to his guilt as an aider and abettor of the offense.[1011] The court further stated that the evidence allowed for a reasonable inference that, while the murder was in progress, the defendant was serving as a "lookout" and consequently acted as the driver of the "getaway" car.[1012] The court then held that the defendant was properly convicted as a principal in the second degree.[1013]

VI. STATES WITH AMBIGUOUS, NOVEL, OR UNIQUE APPROACHES TO ACCOMPLICE LIABILITY

Courts in several states reveal unclear, uneven, or unusual approaches to accomplice liability. In some of these states a discrepancy or ambiguity in reasoning surfaces that is not present in more easily categorized jurisdictions. In turn, it becomes difficult to reconcile these states with the three approaches outlined in this article.

However, within these states that appear to follow a novel, inconsistent, or even an unidentifiable approach to accomplice liability, some patterns emerge. These jurisdictions can be broken down into several subcategories: (1) states with unresolved issues due to (a) insufficient case law or (b) divergent case law; and (2) states with nonuniform rules.

A. Unresolved Issues

1. Insufficient Case Law

States with very limited numbers of cases relating to accomplice liability often display some ambiguity; yet one or more of the three approaches appears to influence many of these states, which include Alaska, Montana, North Dakota, and South Dakota.

1009. *Id.* at 828 (emphasis added).
1010. *Id.*
1011. *Id.* at 830 (citing Grant v. Commonwealth, 217 S.E.2d 806, 808 (Va. 1975)).
1012. *Id.* at 831.
1013. *Id.*

a. Alaska

Alaska has insufficient case law to determine which approach prevails. In a case that predates the current Alaska accomplice liability statute, *Tarnef v. State*,[1014] the Alaska Supreme Court stated, "It is well established at common law and in Alaska that a person cannot be convicted of 'aiding and abetting' a crime unless it is shown that he had the specific criminal intent to bring about the illegal end."[1015] Later, the Alaska legislature revised its complicity statute consistent with Model Penal Code section 2.06(3), which follows the Category I model.[1016] Moreover, the legislature did not include subsection (4) of section 2.06, which follows the Category II model.[1017]

In *Echols v. State*,[1018] the Alaska Court of Appeals considered a case where a wife was charged with being an accomplice to a first degree assault committed by her husband.[1019] The state's evidence revealed that the defendant–wife asked her husband to discipline their child and then stood by and watched her husband inflict serious injury on their child by whipping the child with an electric cord.[1020] Looking to the revised Alaska legislation, the *Echols* court ruled that the wife's accomplice liability could not be premised on recklessness because intent to commit the crime was an element of the substantive offense.[1021] Rather, the court held that the wife could only be accountable for first degree assault if the State could establish that she *intended* the child suffer physical injury through the use of a weapon.[1022] In other words, because the Alaska statute contained only the "purpose of promoting or facilitating the commission of the offense" language found in section 2.06(3) of the Model Penal Code, the court felt compelled to follow the Category I approach.[1023]

1014. 512 P.2d 923 (Alaska 1973).

1015. *Id.* at 928.

1016. *See* ALASKA STAT. § 11.16.110 (2006) ("A person is legally accountable for the conduct of another constituting an offense if (1) the person is made legally accountable by a provision of law defining the offense; (2) with intent to promote or facilitate the commission of the offense, the person (A) solicits the other to commit the offense; or (B) aids or abets the other in planning or committing the offense; or (3) acting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct.").

1017. *See id.*

1018. 818 P.2d 691 (Alaska Ct. App. 1991), *overruled by* Riley v. State, 60 P.3d 204 (Alaska Ct. App. 2002).

1019. *Id.* at 691.

1020. *Id.* at 692.

1021. *Id.* at 695.

1022. *Id.*

1023. *Id.*

In *Riley v. State*[1024] the Alaska Court of Appeals rejected its previous approach requiring the accomplice to have a mental state of criminal purpose to achieve a particular criminal result.[1025] In *Riley*, the defendant and another individual opened fire on an unsuspecting crowd but there was no evidence to show who fired the shots that ultimately wounded the victims.[1026] A jury convicted the defendant of, among other crimes, first degree assault, which required proof that he recklessly caused serious physical injury with a dangerous instrument.[1027] The defendant claimed on appeal that the State needed to prove he intended to inflict injuries on the victims.[1028] The appellate court disagreed and held that the law requires the *same culpable mental state* of all participants whether they act as principals or accomplices.[1029] The *Riley* court held, contrary to the holding in *Echols*, that the law did not require intent to inflict injury.[1030] In a less than convincing argument, the court concluded that the Alaska legislature omitted language following section 2.06(4) of the Model Penal Code "because they considered it superfluous."[1031] Even though the Alaska law contains no provision like section 2.06(4), the *Riley* court cited subsection (4) and its commentary to support the accomplice's conviction for crimes requiring recklessness on the part of the actual perpetrator.[1032] In other words, even though the plain reading of the Alaska statute follows the Category I approach, the *Riley* court applied the Category II model to justify its result.

If one considers this apparent flip-flop on the part of the Alaska Court of Appeals and the absence of any statement about the mental state requirement for accomplice liability from the Alaska Supreme Court since the Alaska legislature's revisions to the statute, Alaska's approach cannot be neatly categorized. Thus, like Montana, Alaska's mental state requirement for accomplice liability is not entirely apparent.

b. Montana

Montana is perhaps the best example of this subcategory. The Montana courts have only looked at accomplice liability in a handful of narrow settings.

1024. 60 P.3d 204 (Alaska Ct. App. 2002).
1025. *Id.* at 206–07.
1026. *Id.* at 205–06.
1027. *Id.* at 205.
1028. *Id.* at 206–07.
1029. *See id.* at 221.
1030. *Id.*
1031. *Id.* at 220.
1032. *Id.*

Although Montana's statute reflects both Category I and Category II language,[1033] its case law is less clear.

In *State v. Powers*,[1034] the trial court had convicted four defendants of deliberate homicide in the death of a five-year-old child.[1035] The defendants were members of a church that believed in severe physical discipline of children.[1036] The State relied upon accountability principles in finding criminal responsibility on the part of each of the defendants, including the mother of the victim who stood by while her defendant–husband repeatedly beat their child with a belt.[1037] Specifically, the State claimed "they need not prove a specific intent to kill . . . , reasoning that the defendants engaged in a common design or course of conduct to accomplish an unlawful purpose"—child abuse or assault.[1038] The State further contended that the Montana accountability law was patterned after the Illinois accountability statute and its interpretations, which "indicate that where codefendants undertake a course of conduct or common design which results in a person's death, all can be held criminally responsible."[1039] The Montana Supreme Court agreed with the State and followed the Illinois common design theory of accomplice liability.[1040] Illinois's theory follows the Category III model.[1041] Here, the court found that the respective defendants' adherence to a church's policy of imposing severe discipline, which led to the child's death, was sufficient to show a common design between the church members.[1042] As to the victim's mother, she "aided and abetted the other defendants in causing the victim's death by her failure or refusal to perform her duties as a parent, terminate the beatings and discipline, and provide the victim with needed medical care and attention."[1043] Obviously, the *Powers* court relied on a Category III analysis in their resolution of this case.

1033. *See* MONT. CODE ANN. § 45-2-302 (2007) ("A person is legally accountable for the conduct of another when: (1) having a mental state described by the statute defining the offense, he causes another to perform the conduct, regardless of the legal capacity or mental state of the other person; (2) the statute defining the offense makes him so accountable; or (3) either before or during the commission of an offense with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense.").

1034. 645 P.2d 1357 (Mont. 1982).

1035. *Id.* at 1359.

1036. *Id.* at 1362.

1037. *Id.*

1038. *Id.* at 1362.

1039. *Id.* (citing People v. Johnson, 221 N.E.2d 662, 663 (Ill. 1966); People v. Richardson, 207 N.E.2d 478, 481 (Ill. 1965); People v. Spagnola, 260 N.E.2d 20, 27 (Ill. App. Ct. 1970)).

1040. *Id.*

1041. *See supra* notes 806–28 and accompanying text.

1042. *See id.*

1043. *Id.*

However, in *State ex rel. Keyes v. Montana Thirteenth Judicial District Court*,[1044] the Montana Supreme Court avoided the common design theory while stating that it was faced with a case of first impression.[1045] In this case, the defendant and the first victim exchanged gunfire from their respective vehicles in a parking lot.[1046] The second victim killed in the shootout was a passenger in the vehicle driven by the first victim.[1047] The State did not have conclusive evidence that the bullet from the defendant's gun killed the second victim.[1048] The court charged the defendant with, among other things, "deliberate homicide by accountability."[1049] In concluding that this charge was not an offense under Montana law, the court did not state clearly what mental state the law requires for accomplice liability.[1050] The court did, however, state that "Montana's accountability statute does not extend criminal liability to unintended, yet reasonably foreseeable deaths, such as the death of [the victim], that result as a consequence of committing the agreed upon offense. In other words, Montana's accountability statute does not provide for transferred intent."[1051] Thus, it appears *Keyes* rejects the Category III approach. After reviewing the few Montana decisions on the subject, the actual mental state requirement in Montana is unclear due to a lack of definitive case law.

c. North Dakota

The North Dakota statute contains both Category I and Category II language.[1052] As to case law, one North Dakota case involving a novel evidentiary issue clearly reflects North Dakota's adherence to the specific intent requirement for accomplice liability. In *State v. Deery*,[1053] a jury convicted the principal of driving with a suspended license primarily on the testimony of the

1044. 955 P.2d 639 (Mont. 1998).
1045. *See id.* at 640.
1046. *Id.* at 639.
1047. *Id.*
1048. *Id.*
1049. *Id.* at 642.
1050. *See id.* at 642–43.
1051. *Id.* at 640.
1052. N.D. CENT. CODE § 12.1-03-01(1) (1997) ("A person may be convicted of an offense based upon the conduct of another person when: . . . [a]cting with the kind of culpability required for the offense, he causes the other to engage in such conduct; . . . [w]ith intent that an offense be committed, he commands, induces, procures, or aids the other to commit it, or, having a statutory duty to prevent its commission, he fails to make proper effort to do so; or . . . [h]e is a coconspirator and his association with the offense meets the requirements of either of the other subdivisions of this subsection.").
1053. 489 N.W.2d 887 (N.D. Ct. App. 1992).

witness who had loaned him the vehicle he was driving when arrested.[1054] On appeal, the issue was whether the witness was an accomplice whose testimony the State needed to corroborate.[1055] The Court of Appeals of North Dakota concluded that the record did not establish that the witness allowed the principal to drive the vehicle with the "intent" that the principal commit the offense of driving while his license was under suspension.[1056] Accordingly, the court held that the witness was not an accomplice and, as such, the witness's testimony did not have to be corroborated.[1057] Consequently, the court upheld the principal's conviction.[1058]

By contrast, in an earlier North Dakota Supreme Court opinion, *State v. Pronovost*,[1059] a jury convicted the defendant of aiding the principal in delivering cocaine to an undercover agent in a vehicle driven by the defendant to and from the location where the delivery was to occur.[1060] In upholding the defendant's conviction as an accomplice to delivering a controlled substance, the court held that a court could predicate a finding of accomplice liability on the fact that a defendant was "acting with the kind of culpability required for the offense and sharing the criminal intent of the principal."[1061]

In examining North Dakota case law, it is evident that decisions on the issue this Article examines are rare. Further, while *Deery* follows a Category I approach, *Pronovost* appears to rely on Category II thinking. Like an uncertain election projection, this state is "too close to call" and, as such, is not categorized.

d. South Dakota

South Dakota has an accountability statute that follows a Category I model.[1062] However, case law construing the statute is sparse and somewhat conflicting. In *State v. Tofani*,[1063] the defendant, the victim (the defendant's fiancée), and a male companion traveled from Florida to South Dakota and rented a motel room.[1064] Defendant and his companion left the victim at the

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1054. *Id.* at 887–88.
1055. *Id.*
1056. *Id.* at 889.
1057. *Id.*
1058. *Id.*
1059. 345 N.W.2d 851 (N.D. 1984).
1060. *Id.* at 852.
1061. *Id.* at 853 (citing Zander v. S.J.K., 256 N.W.2d 713, 715 (N.D. 1977)).
1062. *See* S.D. CODIFIED LAWS § 22-3-3 (2006) ("Any person who, with the intent to promote or facilitate the commission of a crime, aids, abets, or advises another person in planning or committing the crime, is legally accountable, as a principal to the crime.").
1063. 719 N.W.2d 391 (S.D. 2006).
1064. *Id.* at 393.

motel and encountered the principal, whom they did not know, at a local casino.[1065] The defendant's companion observed the principal winning a large sum of money at a casino game; the companion approached the principal and engaged him in conversation.[1066] During this conversation, the defendant described his dissatisfaction with the victim and that he wanted to get away from the victim.[1067] During the course of the conversation, the terms "beaten" and "raped" were used to describe the appropriate way of treating the victim.[1068] The defendant's companion subsequently urged the defendant to go to Sioux Falls, and the principal agreed to drive them.[1069] The three men traveled to Sioux Falls, whereupon the principal left the defendant and his companion at a truck stop.[1070] The principal then returned to the motel and picked up the victim.[1071] Later, on a country road, the principal pulled the victim from the car, forced her to perform oral sex, and "struck her without provocation."[1072] The principal then choked the victim until she feigned unconsciousness.[1073] After an argument and a brief struggle, the principal eventually agreed to drive the victim to a location closer to her motel.[1074] When the principal stopped the vehicle to "relieve himself," the victim escaped to a nearby farmhouse and called the police.[1075] Meanwhile, the defendant and his companion had hitchhiked back to the motel.[1076] The victim subsequently called the defendant from the hospital and claimed that she had been raped.[1077]

The State charged the defendant with kidnapping, rape, attempted aggravated assault, and aggravated assault, all as an accessory before the fact.[1078] At a bench trial, the defendant "was found guilty . . . of aiding and abetting [the principal] in the rape and aggravated assault of [the victim]."[1079] The defendant appealed the verdict claiming, among other things, that the trial court had relied upon insufficient evidence that he aided and abetted the principal in the crimes against the victim.[1080] The defendant asserted that (1) the

1065. *Id.* at 393–94.
1066. *Id.* at 394.
1067. *Id.*
1068. *See id.* at 394, 403–04.
1069. *Id.* at 359.
1070. *Id.*
1071. *Id.*
1072. *Id.*
1073. *Id.*
1074. *Id.* at 395–96.
1075. *Id.* at 396.
1076. *Id.*
1077. *Id.*
1078. *Id.* at 397.
1079. *Id.*
1080. *See id.* at 397–98.

evidence was insufficient to show a common design or purpose, and (2) the principal's testimony indicated that he had acted alone and failed to show any shared intent on the part of the defendant and his companion.[1081]

The Supreme Court of South Dakota affirmed the trial court's conviction of the defendant.[1082] The court pointed out that while the accomplice law requires "'the intent to promote or facilitate' the crime, the evidence must show that [the defendant] 'knowingly did something to assist' in its commission."[1083] Here, because the evidence established that the defendant (1) informed the principal that the victim was "alone and vulnerable"; (2) advised the principal of his desire to be rid of the victim and stated the victim was a "'crack whore,'" who was "available for easy sex, someone to be 'roughed up and sent out of town'"; and (3) showed the principal where the victim was staying and gave the principal the victim's room key, the court concluded that the direct and circumstantial evidence supported the trial court's verdict finding that the defendant "knowingly assisted" the principal in the commission of the crimes.[1084]

Other opinions in South Dakota, like *Tofani*, follow the reasoning that though the state accountability law on its face requires "*intent* to promote or facilitate,"[1085] in actuality the State need not establish "specific intent" to promote or facilitate; rather, the State must show the defendant "knowingly acted."[1086] On the other hand, at least one other decision by the Supreme Court of South Dakota reflects a tone more akin to Category III. *State v. Shearer*[1087] held that where a defendant–accomplice who knew the principal wanted to purchase marijuana introduced the principal to a drug source, and where the principal "unexpectedly purchased methamphetamine in addition to marijuana," the defendant was "not absolved[d] of responsibility as an accomplice to the crime of possession of methamphetamine" even though he did not expect the purchase.[1088] Be that as it may, because South Dakota's stance on the *mens rea* requirement for accomplice liability is unusual, if not uncertain, this state is not categorized in this Article either.

1081. *Id.* at 400.

1082. *Id.* at 405.

1083. *Id.* at 400 (quoting State v. Brings Plenty, 490 N.W.2d 261, 268 (S.D. 1992)).

1084. *Id.* at 405.

1085. S.D. CODIFIED LAWS § 22-3-3 (2006) (emphasis added).

1086. *See, e.g.*, *Brings Plenty*, 490 N.W.2d at 268 ("[K]nowingly does not encompass a specific intent or special mental state over and above a doing of the actual act." (citing State v. Barrientos, 444 N.W.2d 374, 376 (S.D. 1989))); State v. Schafer, 297 N.W.2d 473, 476 (S.D. 1980) (stating that when defendant "knowingly did something to assist in the commission of a crime, then his status changes" to an accomplice).

1087. 548 N.W.2d 792 (S.D. 1996).

1088. *Id.* at 797–98.

2. Divergent Case Law

In regards to accomplice liability mental state requirements, a few states show inconsistencies of reasoning between districts. These states, Missouri, Ohio, and West Virginia, form another subcategory.

a. Missouri

Although Missouri's statute reflects a Category I approach,[1089] the case law does not necessarily follow suit. In Missouri, there is an apparent split in reasoning between the two appellate districts that the Missouri Supreme Court has yet to resolve. In *State v. Logan*,[1090] a case from the Missouri Court of Appeals for the Western District, four people decided to rob a service station.[1091] Because the service station employees might have recognized the defendant's van, the defendant's role was to locate another vehicle to use in the robbery.[1092] After an unsuccessful attempt at finding a new vehicle, the group decided to approach the service station on foot, rob the store, and then escape in the service station attendant's car.[1093] Two members of the group then robbed the store, escaped in a customer's vehicle, and met up with the defendant and another member of the group.[1094] The court stated that Missouri's law limited the "defendant's liability for . . . other conduct, however, with its ubiquitous requirement of a 'culpable mental state.'"[1095] The court found that the defendant was liable because he had the "'knowledge' that the second robbery could result from the conduct he purposefully promoted."[1096] The court specifically rejected the defendant's claims that the law required a specific "'purpose to promote'" for the secondary offense but also rejected the State's argument for liability under a "natural and probable consequences" rule.[1097]

However, in *State v. Workes*,[1098] a rape case from the Missouri Court of Appeals for the Eastern District, the court used a broader approach than that of

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1089. *See* MO. ANN. STAT. § 562.041.1(2) (West 1999) ("A person is criminally responsible for the conduct of another when . . . [e]ither before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense.").

1090. 645 S.W.2d 60 (Mo. Ct. App. 1982).

1091. *Id.* at 61.

1092. *Id.*

1093. *Id.*

1094. *Id.* at 61–62.

1095. *Id.* at 65 (citing MO. ANN. STAT. §§ 562.016.1, 562.036 (West 1999)).

1096. *Id.*

1097. *Id.* at 65.

1098. 689 S.W.2d 782 (Mo. Ct. App. 1985).

the *Logan* court.[1099] Here, the defendant and the principal forcibly took the victim into a vehicle and forced her to perform fellatio on the defendant and principal.[1100] Later, they drove her to a park where the principal raped her while the defendant was not present.[1101] The defendant argued that he and the principal intended to commit sodomy in the park, not rape; therefore, the defendant claimed he did not have the requisite intent to aid and abet a rape.[1102] While this Missouri appellate court did not use the "natural and probable consequences" language explicitly rejected in *Logan*, it did comment that the defendant would be responsible for those crimes he could "reasonably anticipate" from the underlying criminal conduct.[1103] The court ruled that the defendant had the intent to assist the principal in the sexual assault despite the fact that he believed the assault would be of a "different orifice."[1104] In any event, the "reasonably anticipate" nomenclature in *Workes* sounds remarkably similar in scope to the "natural and probable consequences" test *Logan* explicitly rejected.[1105]

b. Ohio

Ohio courts that have analyzed the requisite mental state for accomplice liability found in Ohio's "complicity" statute[1106] also seem to have differing approaches. In *State v. Johnson*,[1107] a group from the Crips street gang stole two vehicles to commit a drive-by shooting on a member of the Bloods street gang in retaliation for previous drive-by shootings the Bloods had committed.[1108] While looking for a Bloods gang member, the defendant accompanied the group to an apartment building where one of the Crips shot into an apartment, killing a small girl and injuring three others, despite the fact an individual had told one of the group that the Bloods member did not live there.[1109] A jury convicted the defendant as an accomplice to one count of aggravated murder and three counts

1099. *See id.* at 785.
1100. *Id.* at 784.
1101. *Id.*
1102. *Id.* at 785.
1103. *Id.* (citing State v. Logan, 645 S.W.2d 60, 65–66 (Mo. Ct. App. 1982)).
1104. *Id.*
1105. *See Logan*, 645 S.W.2d at 65.
1106. OHIO REV. CODE ANN. § 2923.03(A) (LexisNexis 2006) ("No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: (1) Solicit or procure another to commit the offense; (2) Aid or abet another in committing the offense; (3) Conspire with another to commit the offense . . . .").
1107. 754 N.E.2d 796 (Ohio 2001).
1108. *Id.* at 797–98.
1109. *Id.*

of attempted aggravated murder.[1110] In this 2001 case, the Ohio Supreme Court held that

> to support a conviction for complicity by aiding and abetting . . . the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and *that the defendant shared the criminal intent of the principal*. Such intent may be inferred from the circumstances surrounding the crime.[1111]

Here, the court concluded that the defendant was part of a "calculated plan to kill" the Bloods gang member but killed and injured others instead; as such, he was criminally "responsible as a complicitor" for the offenses.[1112]

In *State v. Jackson*,[1113] the Ohio Court of Appeals in 2003 attempted to clarify the mental state requirement for complicity for secondary crimes.[1114] Here, the victim agreed to sell marijuana to the defendant in a parking lot.[1115] The defendant approached the victim's car, examined the marijuana, and asked the victim if he could show a portion of it to the principal; the victim agreed, and the defendant then returned with the principal to complete the sale.[1116] The principal entered the victim's vehicle, pulled out a gun, and when the victim went to reach for his own gun, the principal shot him.[1117] The defendant later claimed that the victim was a business associate with whom he shared drug profits, and as such, he had no intention to be involved in a robbery.[1118] Nevertheless, a jury convicted the defendant of aggravated robbery and felonious assault.[1119] The appellate court stated:

> [T]he culpability necessary to sustain the conviction of an aider and abettor "will be presumed where the crime committed by a principal in furtherance of a common design to commit a criminal offense reasonably could have been contemplated by the aider and abettor as a

1110. *Id.* at 798–99.
1111. *Id.* at 801 (emphasis added).
1112. *Id.* at 801–02.
1113. No. 03AP-273, 2003 WL 22511528 (Ohio Ct. App. Nov. 6, 2003).
1114. *See id.* at *7.
1115. *Id.* at *1.
1116. *Id.*
1117. *Id.*
1118. *Id.* at *3.
1119. *Id.* at *4.

> natural and probable consequence of the commission of that criminal offense."[1120]

Here, the appellate court concluded there was evidence to support that (1) defendant had intended to participate in a robbery of the victim, and (2) "the serious physical harm caused to the victim[, the felonious assault,] was a natural and probable consequence of the plan."[1121] Thus, while *Johnson* follows the Category II approach as codified in the Ohio accomplice statute,[1122] the *Jackson* opinion obviously reflects a Category III analysis. Consequently, it is difficult to categorize Ohio.

c. West Virginia

West Virginia's statute does not address an accomplice's mental state.[1123] The Supreme Court of West Virginia has relied on its "concerted action principle," which does not use standard Category III language in describing the scope of its accomplice law but seems to follow a somewhat comparable analysis.[1124] For example, in *State v. Fortner*,[1125] the Supreme Court of Appeals of West Virginia affirmed the defendant's conviction for multiple sexual crimes on a theory of accomplice liability.[1126] In this case, the defendant and four other men were driving around when they spotted a twenty-three-year-old woman using a pay phone.[1127] One participant "grabbed the woman, told her he had a gun, and forced her into the car."[1128] A second participant drove "the group three or four miles to a wooded area at the end of a dirt road."[1129] For around two hours, "the five men forced the woman to engage in multiple acts of sexual

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1120. *Id.* at *7 (quoting State v. Hendrick, No. 53422, 1988 WL 18767, at *4 (Ohio Ct. App. Feb. 18, 1988)).

1121. *Id.*

1122. *See* OHIO REV. CODE ANN. § 2923.03 (2007).

1123. *See* W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005) ("In the case of every felony, every principal in the second degree, and every accessory before the fact, shall be punishable as if he were the principal in the first degree . . . ."). However, the statute does require that the defendant "knowingly aid and abet" a few crimes. *Id.* § 61-2-14e (listing kidnapping, holding hostage, demanding ransom, concealment of a minor child, and several other crimes).

1124. *See* State v. Foster, 656 S.E.2d 74, 80–81 (W. Va. 2007) (stating that under the "concerted action" principle the defendant must have "shared the criminal intent of the principal" but is "not required to have intended the particular crime . . . but only to have knowingly intended to assist . . . the design" of the principal (quoting State v. Fortner, 387 S.E.2d 812, 823 (W. Va. 1989))).

1125. State v. Fortner, 387 S.E.2d 812 (W. Va. 1989)

1126. *Id.* at 822–26, 832.

1127. *Id.* at 817.

1128. *Id.*

1129. *Id.*

intercourse."[1130] The woman begged for release but was "forced back into the car and driven around [the town] while her assailants discussed what to do with her."[1131] Eventually, the group drove to a tavern in another town, where a participant led the woman "to a [nearby] creek bank, sexually assaulted her, and attempted to choke her."[1132] After about an hour the woman succeeded in convincing the participant to take her home.[1133] When they arrived at the woman's apartment, they found her husband waiting and the participants fled.[1134] The police caught the men shortly thereafter.[1135]

At trial, the defendant admitted participating in two separate sexual acts with the victim but insisted "that he had participated only because he feared what his companions might do or say if he intervened on her behalf or refused to go along."[1136] The defendant denied that he "encouraged or assisted the others in committing [the] offenses against the victim."[1137] In addition, the defendant was able to establish that he was not present during several of the later sexual assaults committed by the other participants.[1138] Nevertheless, a jury convicted the defendant of ten counts of sexual assault and ten counts of sexual abuse, with sixteen of these counts as an aider and abettor.[1139]

In affirming the convictions, the Supreme Court of Appeals of West Virginia noted:

> To be convicted as an aider and abettor, the law requires that the accused "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." The State must demonstrate that the defendant "*shared the criminal intent of the principal in the first degree*." In this regard, the accused is *not required to have intended the particular crime committed by the perpetrator, but only to have knowingly intended to assist, encourage, or facilitate the design of the criminal actor*. The intent requirement is relaxed somewhat where the defendant's physical participation in the criminal undertaking is substantial.
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> . . . .

1130. *Id.*
1131. *Id.*
1132. *Id.*
1133. *Id.*
1134. *Id.*
1135. *Id.*
1136. *Id.*
1137. *Id.*
1138. *See id.* at 824–25.
1139. *Id.* at 821–22.

> Thus, under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator.[1140]

Here, the defendant actively participated in the criminal venture including removing the victim's clothes and otherwise "shared the festive and boisterous attitude of his companions towards the entire episode."[1141] Further, the court ultimately concluded that there was "no evidence that the defendant ever disassociated himself from the criminal enterprise, much less expressed any disapproval of or opposition to the acts of his companions."[1142] Accordingly, the Supreme Court of Appeals of West Virginia held the defendant liable for all of the sex crimes committed by the actual perpetrators.[1143]

In a later Supreme Court of Appeals of West Virginia decision, the court relied on a standard Category II "shared intent" analysis. In *State v. Deem*,[1144] the defendant was with a group of people when they allegedly heard a person on the street shout a derogatory term.[1145] The term provoked the defendant's group to pull over, get out of their cars, and grab clubs from their trunks.[1146] Subsequently, one member of the defendant's group assaulted the victim.[1147] A jury convicted the defendant of aiding and abetting the assault based on the State's theory that the defendant provided "moral support" to the codefendant.[1148] While the defendant testified that he had a club with him, there was undisputed testimony that he never spoke to the victim or the principal before the assault.[1149]

The Supreme Court of Appeals of West Virginia indicated in *Deem* that the "State must demonstrate that the defendant '*shared the criminal intent* of the principal in the first degree.'"[1150] Here, the defendant "associated himself with the criminal venture perpetrated" by the principal and "shared in [the principal's] criminal intent by supporting, encouraging and facilitating [the principal's] assault on the victim."[1151] The court concluded that although the

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1140. *Id.* at 823–25 (emphasis added) (citations omitted) (internal quotation marks omitted).
1141. *Id.* at 824.
1142. *Id.* at 826.
1143. *Id.* at 817, 832.
1144. 456 S.E.2d 22 (W. Va. 1995) (per curiam).
1145. *Id.* at 24.
1146. *Id.*
1147. *Id.* at 25.
1148. *Id.*
1149. *Id.*
1150. *Id.* at 26 (emphasis added) (quoting State v. Harper, 365 S.E.2d 69, 74 (W. Va. 1987)).
1151. *Id.* at 27.

defendant did not expect or intend that the victim be assaulted, he "admittedly knew that trouble was likely to occur," and "[r]ather than disassociating himself from the group . . . , the [defendant] chose to participate with the group in the ensuing confrontation which resulted in the assault."[1152]

At first blush, West Virginia seems to be a Category II state. However, when West Virginia courts invoke the "knowingly assist a design of the perpetrator" approach, as they did in *State v. Fortner*[1153] and other opinions,[1154] it is unclear whether they are following a Category I purposive approach or Category III common design thinking, like that found in Illinois.[1155] West Virginia courts have not adopted the classic natural and probable consequences thinking of the Category III model, consistently followed a pure shared intent analysis like the other Category II jurisdictions, or demanded specific intent to aid and abet as in the Category I model. Because of the lack of clarity reflected in the West Virginia decisions, it is impossible to categorize this state.

B. Nonuniform Rules

The final group of cases in this Part of the Article reflects states with novel or unusual approaches in determining their mental state requirement for aiding and abetting—Colorado, Nevada, and Washington.

1. Colorado

Colorado, similar to Nevada (discussed below),[1156] casts a wide net regarding unintended crimes requiring recklessness or negligence, but it follows a narrow approach akin to Category I when the principal offense requires either intent or knowledge.[1157] If one examines the face of the Colorado complicity statute, it requires no less than "intent to promote or facilitate the commission of

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1152. *Id.* at 27–28.

1153. 387 S.E.2d 812, 823 (W. Va. 1989) (citing *Harper*, 365 S.E.2d at 73; State v. West, 168 S.E.2d 716, 721–22 (W. Va. 1969)).

1154. *See* State v. Foster, 656 S.E.2d 74, 84 (W. Va. 2007) (quoting *Fortner*, 387 S.E.2d at 823); State v. Wade, 490 S.E.2d 724, 737 (W. Va. 1997) (quoting State v. Kirkland, 447 S.E.2d 278, 284 (W. Va. 1994)).

1155. *See* People v. Kessler, 315 N.E.2d 29, 33 (Ill. 1974) (quoting People v. Armstrong, 243 N.E.2d 825, 830 (Ill. 1968)).

1156. *See infra* Part IV.B.2.

1157. *Compare* Bolden v. State, 124 P.3d 191 (Nev. 2005) (rejecting the natural and probable consequences doctrine for specific intent crimes, but declining to reject it with respect to general intent crimes), *with* Grissom v. People, 115 P.3d 1280, 1288 (Colo. 2005) (holding that knowledge is the required mental state for reckless manslaughter), *and* People v. Bass, 155 P.3d 547, 551 (Colo. Ct. App. 2006) (holding that intent is the required mental state for attempted robbery).

the offense."[1158] When one studies the Colorado case law, the matter becomes more complicated.

In *People v. Wheeler*,[1159] the Colorado Supreme Court stated the "'intent' referred to in the complicity statute is not defined according to [the statutory provision], which defines 'intentionally' and 'with intent' as those terms are used in the 'offenses' set forth in the criminal code."[1160] Instead, in the context of a negligent homicide prosecution, the court concluded the following:

> This language does not require that the complicitor intend for the principal to cause death. The complicitor also need not intend for the principal to act in a criminally negligent manner. This language only requires knowledge by the complicitor that the principal is engaging in, or about to engage in, criminal conduct. Thus, the jury could find [the defendant] guilty of criminally negligent homicide on a theory of complicity if it believed that she knew . . . the principal[] was about to engage in conduct that was a gross deviation from the standard of care that a reasonable person would exercise.[1161]

One should note that a dissenting justice in *Wheeler* criticized "[t]he majority's statement that the defendant is guilty if she knew the principal was going to engage in *any criminal conduct whatsoever*."[1162]

Later, in *Bogdanov v. People*,[1163] the court clarified that "the rule of *Wheeler* should only be applied to crimes defined in terms of recklessness or negligence, and should not be applied to dispense with the requirement that the complicitor have the requisite culpable mental state of the underlying crime with which he is charged."[1164] For example, the *Bogdanov* court said, "[T]he rule of *Wheeler* does not apply when aggravated robbery is the underlying crime because it is not a crime of recklessness or negligence."[1165] Here, the court was careful to point out that it was not inclined to accept wholesale the Category III approach when it noted, "The Colorado General Assembly chose not to extend accomplice liability to reasonably foreseeable crimes, but rather limited such

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1158. COLO. REV. STAT. § 18-1-603 (2008) ("A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.").

1159. 772 P.2d 101 (Colo. 1989).

1160. *Id.* at 103 (citing People v. R.V., 635 P.2d 892, 894 (Colo. 1981)).

1161. *Id.* at 103–04 (citations omitted).

1162. *Id.* at 107 (Erickson, J., dissenting) (emphasis added).

1163. 941 P.2d 247 (Colo. 1997), *overruled on other grounds by* Griego v. People, 19 P.3d 1, 7–8 (Colo. 2001).

1164. *Id.* at 251.

1165. *Id.* at 251 n.9.

liability to those particular crimes which the accomplice intended to promote or facilitate."[1166]

In *Grissom v. People*,[1167] a Colorado trial court, "after deliberation under a theory of complicity," convicted the defendant of vehicular eluding and first degree murder.[1168] In this case, the principal won a dice game against the victim and then "became angry when [the victim] refused to pay him."[1169] The defendant observed the game, "later agreed to help [the principal] find [the victim] to collect the alleged debt," and, in fact, "drove [the principal] to several locations in the next few days in search of [the victim]."[1170] About "one week after the dice game, [the victim] was fatally shot near the motel where he had been staying. . . . The police responded to the crime scene, saw a [suspect car] and pursued it." Following a car chase, the suspects wrecked their car, the defendant and the principal fled from the vehicle, and the police arrested them during a chase on foot.[1171] The police found two handguns and jewelry, all stained with blood, in the general area.[1172] After testing the clothing of the defendant and the principal, the police determined that the principal had been the shooter.[1173]

At trial, the defendant argued that he "did not know what [the principal] intended and that [he] merely intended to help [the principal] recover his gambling debt."[1174] The defendant also argued that he was "very close" to the victim and consequently would not have helped the principal kill the victim.[1175] The defendant requested an instruction on reckless manslaughter as a lesser included offense of first degree murder, but the trial court refused; instead, it provided instructions on complicity, first degree murder, robbery, and vehicular eluding.[1176]

The defendant appealed his convictions, arguing again for the inclusion of the lesser included offense instruction, but the Colorado Court of Appeals rejected his argument, holding that there "must be evidence that the principal committed the lesser crime" for the defendant to receive the lesser included offense instruction.[1177] Defendant then brought his same argument before the

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1166. *Id.* at 251 n.8.
1167. 115 P.3d 1280 (Colo. 2005).
1168. *Id.* at 1282.
1169. *Id.*
1170. *Id.*
1171. *Id.*
1172. *Id.*
1173. *Id.*
1174. *Id.*
1175. *Id.*
1176. *Id.* at 1282–83.
1177. *Id.* at 1283 (citing People v. Grissom, No. 00CA1407, 2003 WL 22113721, at *1 (Colo. Ct. App. Sept. 11, 2003), *rev'd*, 115 P.3d 1280, 1288 (Colo. 2005)).

Supreme Court of Colorado, which held that the trial court should have included the instruction.[1178] In reaching this conclusion, the court examined liability for unintentional crimes, citing *People v. Wheeler*,[1179] in which the Supreme Court of Colorado held that Colorado's complicity statute "only requires knowledge by the complicitor that the principal is engaging in, or about to engage in, *criminal conduct*."[1180] The court then provided the following explanation:

> *Wheeler* is consistent with cases from other states holding that accomplice liability extends to *unintentional* crimes committed by the principal when the complicitor and the principal are acting in a "common enterprise." . . .
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> . . . .
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> In these "common enterprise" cases, where both parties [act] in concert to commit a threshold crime, but the principal ultimately commits a more serious crime than the complicitor initially intended, the complicitor can be held liable for the crime committed by the principal.[1181]

The court went on to examine the intent requirement expressly written into the Colorado complicity statute:

> We observed in *Wheeler* that the General Assembly defined complicity liability to extend to those acts done with the "intent to promote or facilitate" criminal conduct, but that in the complicity context as articulated in [the complicity statute], "intent" retains its "common meaning" and is not synonymous with the statutory definition of "intent" which applies to other crimes.
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> . . . [W]e do not require that the complicitor himself intend to commit the crime that the principal commits for crimes defined in terms of recklessness and negligence. In those cases, the complicitor must only intend to aid or assist the principal to engage in conduct that "grossly deviates from the standard of reasonable care and poses a substantial and unjustifiable risk of death to another."
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> Some commentators have argued that accomplice liability should extend only to those specific and intentional crimes that the complicitor intended to facilitate and that the principal committed. Under this

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1178. *Id.* at 1288.

1179. 772 P.2d 101 (Colo. 1989).

1180. *Grissom*, 115 P.3d at 1283 (quoting *Wheeler*, 772 P.2d at 104) (emphasis added) (internal quotation marks omitted).

1181. *Id.* at 1284 (emphasis added).

> alternative interpretation, one cannot be a complicitor to the principal's commission of a crime requiring the mental states of recklessness or negligence. One commentator lamented that this court's "extension of accomplice liability for unintended crimes is too broad."
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> The Model Penal Code does not extend accomplice liability to the principal's unintentional acts based on a concern that imposing accomplice liability in this context is only appropriate when the accomplice shares the principal's mental state and facilitates the principal's conduct. . . .
>
> Under the Model Penal Code's formulation, accomplice liability is not imposed even when . . . the party to be charged as an accomplice has actual knowledge that criminal activity will occur. Although the Colorado General Assembly has incorporated many of the Model Penal Code provisions into [the] criminal code, the legislature has adopted a complicity statute that is substantially different from the Model Penal Code formulation. . . .
>
> . . . .
>
> We decline to adopt the theory of complicity liability discussed in the Model Penal Code.[1182]

Thus, the Supreme Court of Colorado established that in Colorado, "accomplice liability tracks that degree of knowledge which the complicitor's actions of aiding and abetting evince and where the complicitor is engaged in a common enterprise with the principal, he or she may be held liable as a complicitor for reckless crimes."[1183] Reiterating *Wheeler*, the *Grissom* court held that in cases of reckless and negligent crimes, the mental state necessary for conviction as an accomplice or complicitor "only requires knowledge by the complicitor that the principal is engaging in, or about to engage in, *criminal conduct*" of some sort.[1184] Here, the court limited the *Wheeler* holding to common enterprise cases, stating that "[u]nder such circumstances, a defendant can be held liable for reckless manslaughter as a complicitor."[1185] The court made the following determination:

> Based on the evidence in this case, the jury could reasonably have accepted the evidence [offered by the defense] that [the defendant] merely intended to help [the principal] find [the victim] to collect the

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1182. *Id.* at 1284–86 (citations omitted).

1183. *Id.* at 1286.

1184. *Id.* at 1283 (quoting People v. Wheeler, 772 P.2d 101, 104 (Colo. 1989)) (emphasis added) (internal quotation marks omitted).

1185. *Id.* at 1288.

> alleged debt, and that [the defendant] believed he was helping [the principal] collect his debt by a means short of murder. At the same time, the jury could have reasonably believed that both [the defendant] and [the principal] engaged in reckless conduct.
>
> . . . From this evidence, the jury could have concluded that [the defendant] and [the principal] were engaged in a common enterprise to at least assault [the victim] in the course of collecting the debt, thereby exposing [the defendant] to liability for reckless manslaughter . . . .[1186]

Thus, while the Colorado accomplice law accepts a broad approach when it examines unintended crimes requiring recklessness or negligence, post-*Grissom* appellate cases involving crimes requiring specific intent, such as attempted robbery, state that the defendant "must intend for his or her own conduct to further the principal's crime," with no mention made of the *Wheeler–Grissom* doctrine.[1187]

2. *Nevada*

The Nevada accomplice statute contains no explicit mental state.[1188] However, the Nevada case law interprets the state's accomplice law as requiring proof of a mental state that is different for specific intent crimes than it is for general intent crimes.[1189] For example, in *Sharma v. State*,[1190] the State charged the defendant with attempted murder.[1191] At trial, the defendant claimed that although he knew a companion had a gun during a dispute among a group of several men, he never intended that one of the group shoot the victim.[1192] The trial court "failed to inform the jury that to convict [the defendant] of aiding and abetting an attempted murder, [the defendant] must have aided and abetted . . .

1186. *Id.* at 1287.

1187. *See, e.g.*, People v. Bass, 155 P.3d 547, 551 (Colo. Ct. App. 2006) (affirming an attempted robbery conviction).

1188. *See* NEV. REV. STAT. ANN. § 195.020 (LexisNexis 2006) ("Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him.").

1189. *See* Bolden v. State, 124 P.3d 191, 201 (Nev. 2005).

1190. 56 P.3d 868 (Nev. 2002).

1191. *Id.* at 869.

1192. *Id.*

with the specific intent to kill."[1193] The Nevada Supreme Court reversed,[1194] assuming the jury relied on a natural and probable consequence analysis in arriving at its verdict.[1195] The court provided the following reasoning:

> [The natural and probable consequences] doctrine has been harshly criticized by "[m]ost commentators . . . as both 'incongruous and unjust' because it imposes accomplice liability solely upon proof of foreseeability or negligence when typically a higher degree of mens rea is required of the principal." It permits criminal "liability to be predicated upon negligence even when the crime involved requires a different state of mind." Having reevaluated the wisdom of the doctrine, we have concluded that its general application in Nevada to *specific intent crimes* is unsound precisely for that reason: it permits conviction without proof that the accused possessed the state of mind required by the statutory definition of the crime. . . .
>
> . . . [T]he doctrine thus "allows a defendant to be convicted for crimes the defendant may have been able to foresee but never intended."
>
> . . . Because the natural and probable consequences doctrine permits a defendant to be convicted of a specific intent crime where he or she did not possess the statutory intent required for the offense, we hereby disavow and abandon the doctrine.
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> . . . .
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> Accordingly, we . . . hold that in order for a person to be held accountable for the *specific intent crime* of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime.[1196]

Thus, the *Sharma* court was clearly insisting on a Category I analysis for *specific intent* crimes.

In *Bolden v. State*,[1197] the defendant and four other masked men "broke into [a family's] apartment looking for drugs and money."[1198] Some or all of the men robbed the family while brandishing weapons; however, the police apprehended

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1193. *Id.* at 873.

1194. *Id.* at 875.

1195. *See id.* at 873.

1196. *Id.* at 871–72 (second alteration in original) (emphasis added) (citations omitted) (footnote call numbers omitted).

1197. 124 P.3d 191 (Nev. 2005).

1198. *Id.* at 193.

all of the men at the scene.[1199] The State charged the defendant with burglary, home invasion, kidnapping, robbery, and conspiracy.[1200] The State alleged three alternative theories to support the defendant's liability: (1) direct involvement in the crimes, (2) aiding and abetting his cohorts, and (3) vicarious co-conspirator liability.[1201] A jury convicted the defendant of all counts,[1202] but it was unclear upon which theory the jury relied.[1203]

The Nevada Supreme Court began its analysis by pointing out the following:

> When alternate theories of criminal liability are presented to a jury and all of the theories are legally valid, a general verdict can be affirmed even if sufficient evidence supports only one of the theories. When any one of the alleged theories is legally erroneous, however, reversal of a general verdict is [generally] required. . . .[1204]

The supreme court concluded that "the State presented sufficient evidence for the jury to convict [the defendant] under all of its theories of culpability."[1205] First, the court felt that there was evidence that would allow the jury to find liability under a direct involvement analysis.[1206] Second, the court felt there was a basis for finding the defendant had "knowingly and with criminal intent aid[ed] and abet[ted] in [the offense's] commission."[1207] Here, the court noted the trial court's instruction had insisted on proof of specific intent for any aiding and abetting.[1208] However, the court "call[ed] into question the legal viability of the State's remaining theory of vicarious coconspirator liability" because the trial court had instructed the jury on that theory using a "probable and natural consequences of the object of the conspiracy" instruction for the specific intent crimes of burglary and kidnapping.[1209] The Nevada Supreme Court concluded that a court may not hold a defendant criminally liable for a specific intent crime a coconspirator commits because that crime was a natural and probable result of the object of the conspiracy.[1210] The court reached the following conclusion:

1199. *Id.*
1200. *Id.*
1201. *Id.* at 194.
1202. *Id.* at 192–93.
1203. *See id.* at 201.
1204. *Id.* at 194–95 (citing Phillips v. State, 119 P.3d 711, 716 (Nev. 2005)).
1205. *Id.* at 195.
1206. *Id.*
1207. *Id.*
1208. *Id.*
1209. *Id.* at 196 (emphasis omitted).
1210. *Id.* at 200.

> Although we refuse to adopt the natural and probable consequences doctrine in general, our decision is limited to vicarious coconspirator liability based on that doctrine for specific intent crimes only. The mental state required to commit a general intent crime does not raise the same concern as that necessary to commit a specific intent crime. . . . To hold a defendant criminally liable for a specific intent crime, Nevada requires proof that he possessed the state of mind required by the statutory definition of the crime. Although we affirm [the defendant's] conviction for the general intent crimes of home invasion and robbery, we conclude that in future prosecutions, vicarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy.[1211]

Thus, the court felt compelled to reverse the specific intent crimes of burglary and kidnapping but not the general intent crimes of home invasion and robbery.[1212]

In conclusion, in *Sharma*, the Nevada Supreme Court explicitly rejected the Category III approach for aiding and abetting specific intent crimes without comment about its feelings toward general intent offenses.[1213] In *Bolden*, the court rejected the natural and probable consequences approach in connection with vicarious co-conspirator liability in prosecutions of specific intent crimes but accepted it for general intent crimes, which suggests the court would follow the same dichotomy in aiding and abetting cases.[1214]

3. Washington

Washington's accomplice liability law reflects yet another unique approach. Washington's courts appear to follow a traditional Category I approach to accomplice liability with the exception of requiring knowledge on the part of the accomplice rather than intent, which is consistent with Washington's complicity statute.[1215] In *State v. Stein*,[1216] the defendant, a delusional paranoiac,

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1211. *Id.* at 201 (footnote call numbers omitted).

1212. *Id.*

1213. *See* Sharma v. State, 56 P.3d 868, 872 (Nev. 2002).

1214. *See Bolden*, 124 P.3d at 201.

1215. *See* WASH. REV. CODE ANN. § 9A.08.020(3)(a) (West 2000) ("A person is an accomplice of another person in the commission of a crime if: . . . With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it . . . ."); *see also* State v. Roberts 14 P.3d 713, 735 (Wash. 2001) ("The language of the accomplice liability statute establishes a mens rea requirement of 'knowledge' of 'the

asked the principal to "arrange 'accidents' for people [he] believed were depriving him of his inheritance" in exchange for $10,000 for each person eliminated.[1217] One victim was killed, and though another targeted person resigned as caretaker of the defendant's father's estate, the defendant stated he wished to see that person dead anyway.[1218] The court instructed the jury that it could convict the defendant either as (1) an accomplice if he had "knowledge" his actions would facilitate a crime, or (2) as a coconspirator if it was "reasonably foreseeable" his agreement would lead to such a crime.[1219] The jury convicted the defendant of murder and attempted murder but acquitted the defendant of conspiracy.[1220] The trial court's jury instructions allowed the jury to convict him vicariously of his co-conspirators' crimes without proof of knowledge.[1221] The Supreme Court of Washington affirmed an appellate court reversal of the conviction, holding that despite the fact that the crime was reasonably "foreseeable," a court cannot hold a defendant liable under Washington complicity law without a finding of the requisite knowledge.[1222] In this case, the court categorically rejected a Category III analysis for both conspiracy and accomplice liability.[1223]

The Supreme Court of Washington applied this same analysis two years later. In *State v Berube*,[1224] a jury convicted two parents of homicide by abuse when their child died from injuries they allegedly inflicted.[1225] The mother of the child challenged her conviction based on accomplice liability, claiming that evidence of her complicity in the child's death was insufficient to warrant instructions for accomplice liability.[1226] The Supreme Court of Washington

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crime.' The statute's history, derived from the Model Penal Code, establishes that 'the crime' means the charged offense. The Legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge' . . . ." (citations omitted)). Although a footnote in *Roberts* suggests that Washington law is consistent with Model Penal Code § 2.06(4) as well as § 2.06(3), *Roberts*, 14 P.3d at 735 n.13, the *Roberts* court interpreted the Washington accomplice statute as requiring the State to prove the accused knew his conduct would aid and abet the charged offense rather than requiring it to prove he acted with the culpability required for the commission of the offense, *id.* at 736, which offense could conceivably require a lesser mental state such as recklessness. Therefore, the author chose not to categorize Washington as a Category II jurisdiction.

1216. 27 P.3d 184 (Wash. 2001).
1217. *Id.* at 185.
1218. *Id.* at 185–86.
1219. *Id.* at 188.
1220. *Id.* at 186.
1221. *Id.* at 188–89.
1222. *Id.*
1223. *Id.*
1224. 79 P.3d 1144 (Wash. 2003).
1225. *Id.* at 1146–47.
1226. *Id.* at 1151.

disagreed, stating that although an accomplice must know one's assistance might promote a crime, the defendant "need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal."[1227] The court sustained the defendant's conviction, stating that the evidence clearly showed she "knew her actions would promote the abuse and that she encouraged the abusive behavior."[1228] Therefore, it appears Washington essentially follows an approach analogous to Category I in that it requires a mental state carrying a higher degree of culpability than that required under either the Category I or the Category II model, yet this mental state is knowledge rather than specific intent.

VII. CONCLUSION

A study of the criminal accomplice liability statutes and case law interpretations of this legislation in the fifty American states reveals a variety of approaches regarding the mental state required for conviction of the person traditionally described as the aider and abettor. This Article shows that ten states have case law reflecting either (1) a very novel approach not followed elsewhere, (2) conflicting views between appellate districts, or (3) very few opinions, perhaps quite dated, which made generalizations about these states impossible. However, while all fifty states were examined both in terms of their accomplice liability legislation and case law, forty states have a sufficient number of judicial decisions which allow for some conclusions regarding their particular stance on the accomplice's mental state requirement. After a collective study of these forty states, some patterns emerged, reflecting essentially three different approaches to the subject.

The perspective that a person should not be saddled with criminal liability as an accomplice unless that person specifically intended to promote or facilitate the actual perpetrator's commission of the offense charged is not the prevailing view in the majority of states. If one focuses on the accomplice legislation of the respective states, a significant minority of states follow this view, described in this Article as a Category I approach;[1229] however, if one then examines the case law of these as well as the other jurisdictions, one finds that little more than a handful of states follow this view.[1230]

The Model Penal Code defines an accomplice as one who either (1) acts with "the purpose of promoting or facilitating the commission of the [particular]

1227. *Id.* (citing State v. Sweet, 980 P.2d 1223, 1230 (Wash. 1999); State v. Hoffman, 804 P.2d 577, 605 (Wash. 1991)).

1228. *Id.*

1229. *See supra* Part II.A.

1230. *See supra* Part III.

offense" charged, or (2) "[w]hen causing a particular result is an element of an offense," acts with the kind of mental culpability required for conviction of the substantive offense.[1231] However, most states do not follow this dual scheme of accomplice law in their "accomplice," "complicity," or "aiding or abetting" legislation[1232] or in their case law.[1233] On the other hand, a significant minority of states do, in fact, predicate accomplice liability on some variation of the Model Penal Code's second prong—sharing with the principal the mental state required for actual commission of the substantive crime—but on the whole, do not limit this approach to result-based crimes as does the Model Penal Code. Thus, these states, which comprise what this Article describes as the Category II approach, follow a statutorily prescribed mental state model that simply looks to the *mens rea* required of the substantive crime charged.

Finally, there exists a third grouping of states that have the most far reaching mental state requirement for accomplice liability: it neither requires the accomplice to have intended the criminal result carried out by the actual perpetrator nor have shared with the perpetrator the mental state required for commission of the substantive crime charged. Instead, the accomplice laws of these states reach offenses that accomplices did not intend or contemplate but that were "natural and probable," "natural and foreseeable," or "reasonably anticipated" consequences, or the like, of lesser criminal wrongdoing that the alleged accomplice actually had in mind. These twenty states, which make up the Category III jurisdictions for purposes of this Article, have the largest following with regards to this thorny, but critical, component of American criminal law.[1234] While scholars may criticize this approach,[1235] as was the case when the American Law Institute prepared the Model Penal Code,[1236] those who are disciples of the Category III thinking believe substantive criminal law must send a strong message of deterrence. History has shown that those inclined to urge or assist others, perhaps in only some peripheral way, to hop the train traveling in the direction of some form of criminality may eventually find that they have facilitated a runaway train. Consider the now convicted youngster in Illinois who joined another bent on merely "kicking the ass" of someone, only to see the perpetrator lose total control of his emotions and kill another human being.[1237] Thus, the message seems clear: don't hop that train.

1231. MODEL PENAL CODE § 2.06(3)–(4) (1962)
1232. *See supra* Part IV.A.
1233. *See supra* Part IV.B.
1234. *See supra* Part V.
1235. *See* LAFAVE, *supra* note 1, § 13.3, at 688; Rogers, *supra* note 23, at 1360–61.
1236. *See id.* cmt. b n.42.
1237. *See* People v. Duncan, 698 N.E.2d 1078, 1080–81 (Ill. App. Ct. 1998).

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