The Mental Element Required for Accomplice Liability: A Topic Note

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COMMENT

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I. INTRODUCTION

To be guilty of a crime the offender must meet the act requirement (actus reus) and have the specific state of mind (mens rea) necessary to commit the offense. In the realm of accomplice liability, one is liable as an accomplice to the crime of another if he gave assistance with the required mental state. Yet, for an accomplice the act requirement is much less stringent, as the primary actor's act is imputed to the accomplice as long as the accomplice gave some assistance. Moreover, there has been considerable debate about the level of intent required for accomplice liability.

This article will focus on the second element of accomplice liability—the mental element. Its purpose is to give a general analytical survey of the law of accomplice liability regarding the requisite mental element. Usually the courts' substantive analysis as to these decisions is confusing. Nevertheless, since the actions of the primary actor are imputed to the accomplice and the degree of assistance of the accomplice minimal, a clear rule about the sufficiency of the mental element of the accomplice is needed to limit the theory within justifiable bounds.

First, this article will explore the origins and competing policies behind accomplice liability. Second, it will review what theories other jurisdictions and
the Model Penal Code have imposed on accomplice liability. Third, it will address the theories that Louisiana has employed in fashioning accomplice liability. Fourth, the theory of accomplice liability with regard to recklessness/negligence crimes will be discussed. In conclusion, the author will review suggestions for clarifying the law.

II. ORIGINS AND POLICIES OF ACCOMPlice LIABILITY

Under the common-law, parties to crime were divided into different degrees. An aider and abettor who was actually or constructively present at the crime was classified as a principal in the second degree. This party either had to act with the intent required for the underlying crime or with guilty knowledge. Thus, at common law, an accomplice that assisted the perpetrator with knowledge of the perpetrator’s criminal purpose could be held liable for the substantive offense.

The two major policies which underlie accomplice liability are deterrence and personal culpability. Reasons given for holding an accomplice liable are 1) to punish him for his actions and 2) to prevent/deter him from committing this type of crime again. Since the aider and abettor lends his assistance to the perpetrator, his actions help to bring about the prohibited result. Society recognizes that this dangerous aider and abettor’s conduct should be deterred and that he or she should be punished. Some suggest the deterrence policy applies better to accomplices than to perpetrators because “[w]hen the crime is ... committed by a third person, the usual strain and immediacy involved in the decision-making is not present.” Therefore, the “accomplice ... [can] calculate deliberately the consequences of his actions.”

However, critics of the deterrence policy argue that “[n]ot all accomplices should be treated alike.” Not all accomplices present as much danger as the

7. Parties were divided into four categories: “(1) principal in the first degree, (2) principal in the second degree, (3) accessory before the fact, and (4) accessory after the fact.” Perkins, supra note 1, at 727.
8. Id. at 738.
9. Id. at 743. (Perkins states: “If the charge is first degree murder based upon an alleged deliberate and premeditated killing, the abettor is not guilty of this degree of the crime unless he either acted upon a premeditated design to cause the death of the deceased or knew that the perpetrator was acting with such an intent, and the same may be said of an assault with an intent to kill.” (emphasis added) (footnotes omitted)).
11. Id.
14. Id.
15. Dressier, supra note 12, at 113.
perpetrator. Since "accomplices [vary] in their type of involvement in group crime, a model based on specific deterrence or rehabilitation is unlikely to be generally effective." The interest of society in deterring criminals must be balanced against the "interest of the individual in being free unless found legally blameworthy." In criminal law, a "deeply rooted" principle exists that one should be liable only for one's personal guilt. Accomplice liability "skirts the boundaries" of this principle. Thus, theorists have endeavored to reconcile accomplice liability and personal liability. Two rationales for holding the accomplice liable even though he did not commit the act are: (1) the rules of agency, and (2) the forfeited personal identity doctrine. Under civil agency theory, the principal "agrees" to be bound by the acts of the agent and to be personally liable for those acts. Similarly, "the accomplice authorizes the primary actor's conduct ... [and] accepts it as her own." However, civil agency "requires a party to consent to being subjected to the control of another, whereas criminal liability does not." In criminal law there is no requirement of consent between the principal and the accomplice. The lack of consent in criminal agency theory ignores the fundamental premise upon which civil agency is based, and for this reason, the analogy has its limits.

The second theory underlying accomplice liability, the forfeited personal identity doctrine, provides that a person who chooses to aid in a crime forfeits his or her personal identity and that his or her identity becomes bound up in that of the principal. Under this theory, "[w]e pretend the accomplice is no more than an incorporeal shadow" of the main perpetrator. However, critics have argued that by molding one person's identity into another's as justification for accomplice liability, this doctrine "permits society to ignore the potentially numerous levels of personal culpability and personal involvement of wrongdoers," thus punishing one for harm that he may not have intended or caused.

16. Id. at 112-13. For example, in a juvenile gang, the leader may be the most dangerous, and therefore "less easily deterreable than other accomplices." This type of accomplice may need "greater punishment" than his or her followers in order to be deterred.
17. Id. at 113.
18. Westerfield, supra note 10, at 177.
20. Westerfield, supra note 10, at 176.
21. Id. See also Dressler, supra note 12; Mueller, supra note 3.
22. See Dressler, supra note 12, at 111. See also Glanville Williams, Criminal Law: The General Part § 126, at 381-83 (2d ed. 1961).
24. Dressler, supra note 12, at 110.
25. Id. (footnotes omitted).
26. Id. at 111.
27. Id.
28. Id. at 116 ("Yet, it is precisely because the criminal justice system stigmatizes the guilty and metes out punishment for wrongdoing that the common law usually rejects forfeiture, and instead evaluates legal guilt and apportions punishment based on the degree of personal responsibility . . . .")
Moreover, accomplice liability may not be linked to causation.\textsuperscript{29} Even though the accomplice may not have caused the harm, he can be treated as severely as the perpetrator who did.\textsuperscript{30} These theories may help explain the rationale behind accomplice liability to some extent; however, there are moral problems with treating the accomplice as a “mere incorporeal shadow.”\textsuperscript{31} It would be better to recognize that “moral intuition” tells society that those who “[willfully participate] in crime should be punished.”\textsuperscript{32} Then, instead of molding the accomplice’s identity into that of the perpetrator, the accomplice’s own personal culpability could be examined to determine the degree of punishment he deserves.

III. KNOWLEDGE V. INTENT—THE SEARCH FOR THE PROPER STANDARD

There has been a long, ongoing debate about the requisite mental standard for an accomplice. An accomplice must really have two mental states: 1) to assist the principal, and 2) to commit the substantive offense.\textsuperscript{33} The difficulty lies in determining the standard for the mental element that the accomplice must have with respect to the core offense. Historically at common law, knowledge of the perpetrator’s criminal intent was sufficient to hold the accomplice liable for the underlying crime.\textsuperscript{34} Today, many argue that the accomplice must himself have the intent required for the substantive crime so as not to subvert the principle of criminal law that one should be punished only to the extent of one’s personal culpability.\textsuperscript{35} Thus, standards range from 1) mere knowledge that the accomplice’s assistance will help in the commission of the offense, to 2) the accomplice’s own intent to commit the offense. These standards are not merely theoretical. The Model Penal Code provides examples of difficult situations in which the standard will make a difference in determining the liability of the accomplice. For example: “[a] lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in the commission of the crime. A doctor

\textsuperscript{29} See supra text accompanying notes 7-9.
\textsuperscript{30} Id. at 102.
\textsuperscript{31} Id. at 108. See also Sanford H. Kadish, \textit{Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine}, 73 Calif. L. Rev. 323, 329-36 (noting that causation cannot be used to blame the accomplice as the perpetrator’s free will is the cause of the harm).
\textsuperscript{32} Dressler, \textit{ supra} note 12, at 111.
\textsuperscript{33} Dressler, \textit{ supra} note 12, at 108.
\textsuperscript{34} Mueller, \textit{ supra} note 3, at 2174-76.
\textsuperscript{35} See \textit{ supra} text accompanying notes 7-9.
counsels against an abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist. In all of these situations, if the knowledge standard were used the accomplices would be liable for the substantive crime as they knew of the principal's intent to commit the core offense and assisted the principal in committing the offense. However, as none of the accomplices intended to commit the substantive offense, they would not be liable if the intent standard is used.

These different standards also affect the policies behind accomplice liability. As previously mentioned, one of the major policies behind accomplice liability is deterrence. The proponents of the knowledge standard argue that this standard better serves this policy concern. They argue that crime prevention should be the main consideration in determining the mens rea requirement under accomplice liability. One big problem with this argument is the determination of what degree of knowledge and assistance will be sufficient to deter criminal conduct. The drafters of the Model Penal Code rejected the theory of knowing facilitation by requiring "that the actor have a purpose to promote or facilitate the offense in question." Only when the accomplice has as his true purpose the advancement of the criminal end will he face punishment for the substantive offense. Therefore, courts face the dilemma of either holding the accomplice liable on a mere knowledge standard, or letting the accomplice go free because he did not intend to commit the underlying crime. This either/or situation does not always provide a just outcome and has led to confusing decisions among the courts, including the federal courts.

IV. FEDERAL CASES

Federal statute 18 U.S.C. § 2 provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." There is no clear federal standard for the mental element of an accomplice, and the circuits are split on this issue. However, the prevailing view is that the accomplice must have the intent to commit the underlying offense.

37. See supra text accompanying notes 10-18.
38. Westerfield, supra note 10, at 177.
39. Id.
42. Model Penal Code § 2.06 commentary at 318 (1985) (The Institute favored this narrow formulation over a broad standard of knowledge "in order not to include situations where liability [would be] inappropriate.").
44. See, e.g., infra text accompanying notes 53-66.
A. The Knowledge Standard

One early case suggested that a seller with knowledge of the buyer's criminal purpose would be liable as an aider and abettor.\(^{45}\) In *Backun v. United States*, the seller sold stolen goods (that he had hidden in his closet) to a buyer for an extremely low price knowing that the buyer would transport the goods across the state line to find a better market. The seller was convicted of the "crime of transporting stolen merchandise of a value in excess of $5,000 in interstate commerce, knowing it to have been stolen, in violation of the National Stolen Property Act, 18 U.S.C.A. § 415."\(^{46}\) The court distinguished the facts of this case from "an ordinary sale made with knowledge that the purchaser intends to use the goods purchased in the commission of a felony" because there was "evidence of direct participation of [the seller] in the criminal purpose."\(^{47}\) However, strong language in dicta suggested that an ordinary sale made with knowledge of the buyer's intent would be sufficient to hold the accomplice liable because of one's "moral obligation to prevent the commission of a felony."\(^{48}\) "The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise."\(^{49}\)

The Fourth Circuit in *United States v. Eberhardt*,\(^{50}\) also suggested that knowledge of the primary actor's crime would be a sufficient standard under which to hold the accomplice liable. In protest of the Vietnamese war, a group of four men mixed part of their blood with animal blood. Then, while one man remained in the lobby, the three other men poured the blood over selective service files. The nonparticipating accomplice was charged as an aider and abettor and convicted of willfully mutilating records in a public office of the United States. Although this accomplice's acts of giving blood and accompanying the others to the building were sufficient to indicate that he had the requisite intent for the crime, the court went even further in dicta suggesting that: "[the accomplice's] mere giving of blood with the knowledge that it would

45. *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940). See also *Bacon v. United States*, 127 F.2d 985 (10th Cir. 1942) (affirming Bacon's conviction for transporting intoxicating liquor). Bacon was the owner of a liquor store which sold whiskey to Fox, a bootlegger. The court specified the degree of knowledge required of the seller by stating that: "Mere possibility or suspicion that goods lawful in themselves might be used unlawfully is not enough to make one an aider and abettor. More is required than that. He must know or have reason to know that the goods which he sells are and will be used in an unlawful venture." *Id.* at 987.
46. *Id.* at 636.
47. *Id.* at 638.
48. *Id.* at 637.
49. *Id.* at 637. See also *Borgia v. United States*, 78 F.2d 550, 555 (9th Cir. 1935); *Vukich v. United States*, 28 F.2d 666, 669 (9th Cir. 1928); *Anstess v. United States*, 22 F.2d 594, 595 (7th Cir. 1927); *Pattis v. United States*, 17 F.2d 562, 566 (9th Cir. 1927).
be used for an unlawful purpose would be enough to convict him as an aider and abettor.\textsuperscript{51}

These cases found that the societal goals of crime prevention and deterrence outweighed the negative aspects of the knowledge standard. Although the court found that the aiders and abettors possessed the requisite intent, underlying these cases is the idea that people were “under [a] moral obligation to prevent the commission of felony”;\textsuperscript{52} and thus guilty knowledge may be enough to satisfy the mens rea requirement. These courts found societal safety more important than: (1) the possibility of subverting personal culpability, or (2) interference with business practices of a merchant.

B. Intent Required for Underlying Crime

Another line of cases has held that the accomplice must possess the required mental element for the substantive offense. The Second Circuit’s decision in United States v. Peoni\textsuperscript{53} is one case decided before Backun which many opinions cite as supporting the idea that the accomplice must intend to promote or facilitate the offense. In Peoni, Judge Learned Hand, after interpreting common law definitions of accomplice liability, stated:

It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory’s conduct; and that they all demand that he 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. All the words used—even the most colorless, “abet”—carry an implication of purposive attitude towards it.\textsuperscript{54}

This “purposive attitude” standard is the prevailing view of the federal courts today.\textsuperscript{55} However, modern federal courts continue to recognize the ambiguity that still exists with respect to the requisite mental element; they have commented that new complex statutory crimes are “causing disparate results based on conflicting ideas of accomplice liability.”\textsuperscript{56} In fact, many courts have encountered difficulty in interpreting the federal “aiding and abetting” statute,\textsuperscript{57} and while purporting to follow Peoni, use terminology that suggest that their analysis is based on a knowledge standard.

\begin{itemize}
\item \textsuperscript{51} Id. at 1013.
\item \textsuperscript{52} Backun, 112 F.2d at 637.
\item \textsuperscript{53} 100 F.2d 401 (2d Cir. 1938).
\item \textsuperscript{54} Id. at 402 (emphasis added).
\item \textsuperscript{55} See Lafave, supra note 2, at 583 (stating that other courts “have tended to accept the Peoni limitation on accomplice liability”).
\item \textsuperscript{56} United States v. Hill, 55 F.3d 1197, 1200 (6th Cir. 1995).
\item \textsuperscript{57} 18 U.S.C. § 2 (1994).
\end{itemize}
One case where it seems clear that the accomplice had the intent for the substantive offense is *United States v. Raper.* Here, Raper was convicted for aiding and abetting in the possession of heroin with the intent to distribute. In this case, Raper and a friend had a scheme by which Raper would collect money for drugs from the buyer. The buyer would then collect the drugs from Raper's friend, who had the drugs concealed in his underwear. It was clear that the two men had a plan, and that both acted with the required intent. However, before citing the "purposive attitude" language from *Peoni,* the court listed as one of the elements for aiding and abetting the offense "guilty knowledge on the part of the accused." This dicta, like that of *Backun,* is very confusing and could potentially mislead others in their search for the correct mental element required for an accomplice.

In *United States v. Andrews,* Ivan Andrews' conviction under the aiding and abetting statute for a murder committed by his sister was reversed by the court. Ivan himself shot a man named Lowery. Then, Ivan's sister killed a passenger who was in Lowery's car. Ivan was convicted as an aider/abettor to the murder committed by his sister. This court listed as a necessary element under the aiding and abetting statute "that Ivan 'had the requisite intent' for [the crime].'" The court found that the jury could not infer the necessary intent from these circumstances as Ivan's mere presence and agreement to "get" Lowery was insufficient. The court then concluded that the jury could not have inferred Ivan's intent "under the natural and probable consequences doctrine," which holds the accomplice liable for all natural and probable consequences that flow from the commission of the crime, as his sister's actions were impulsive and "went beyond that scope." By recognizing the natural and probable consequences doctrine, it appears that the court was willing to apply a lesser standard for the mental element, although it listed as one of the elements for aiding and abetting the intent to commit the underlying crime. Even so, the court was unwilling to find that Ivan's intent could be inferred under the circumstances.

Courts have struggled with the requisite mental element for an accomplice. Federal courts moving from requiring knowledge to a greater degree of intent may signify that a higher degree of personal responsibility should be required to convict an accomplice. However, the accomplice's lesser degree of culpability

58. 676 F.2d 841 (D.C. Cir. 1982).
59. *Id.* at 849 (citing United States v. Staten, 581 F.2d 878, 886-87 (D.C. Cir. 1978)) (emphasis added).
60. *See supra* text accompanying notes 45-49.
61. 75 F.3d 552 (9th Cir. 1996).
62. *Id.* at 555.
63. *Id.* at 556. Under the natural and probable consequences doctrine the accomplice is liable for all natural and probable consequences of the criminal scheme which he encouraged or aided. Lafave, *supra* note 2, at 590.
64. *Id.*
65. *See supra* text accompanying notes 45-63. This move takes place chronologically from earlier cases such as *Backun* and *Eberhardt* (which suggested that knowledge of the
should be balanced with the fact that an accomplice who assists with guilty knowledge should be deterred (even if to a lesser extent than one who intends the crime be committed).  

V. OTHER JURISDICTIONS

Much like the federal courts, states have struggled with accomplice liability and split along the same lines. Few states have kept the knowledge standard. A majority of states, in line with the Model Penal Code, require that the accomplice have the “intent to promote or facilitate the offense.”

In the 1980’s, California courts were split on what the mental element for an accomplice should be. During this period, the courts divided over jury instructions which defined principals as those who aided the crime with knowledge of the perpetrator’s criminal purpose. One line of cases made it clear that the test for aider/abettor liability was the accomplice’s knowledge of the perpetrator’s intent. These courts found that the accomplice’s “intent is implicit in the act of aiding with knowledge of the perpetrator’s guilty state of mind.”

An opposite line of authority developed requiring “that [the accomplice] share the intent of the perpetrator,” and disagreeing with the “implicit intent” standard. They argued that instead of setting up a presumption where knowledge equals intent, the jury should be given the facts to decide if the prosecution had proven the accomplice’s criminal intent. One justice gave an example of a situation illustrating how inequity could result under the knowledge standard:

A abducts a young woman with the intent to rape her, forces her into a car and starts to drive off. B, the woman’s brother, rushes to his car intending to rescue his sister. C, the woman’s boyfriend, jumps into

accomplice would be sufficient) to later cases like *Raper* (where accomplice had to intend the crime).

66. See Westerfield, *supra* note 10, at 182.

67. Wash. Rev. Code Ann. § 9A.08.020(3)(a)(ii) (West 1988) provides that “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 . . . aids or agrees to aid such other person in planning or committing it.” See also 17 Cal. Jur. 3d (Rev.) Part I, Criminal Law § 105.


70. Id. at 510; People v. Standifer, 113 Cal. Rptr. 653 (Cal. Ct. App. 1974); People v. Germany, 116 Cal. Rptr. 841 (Cal. Ct. App. 1974).


73. *Green*, 181 Cal. Rptr. at 515 (Miller, J., concurring).
the passenger seat of B’s automobile, pulls out a gun and says to B, “Hurry up, I’m going to kill A.” B’s car pursues A’s vehicle with C shooting through the window at A. Clearly, B has knowledge of C’s intent to murder A and is aiding in the commission of the offense by driving C. Can he be convicted of aiding and abetting in the attempted murder when his only intent is to rescue his sister? I think not. 4

Rejection of the implicit intent approach was necessary to assure just results under all circumstances.

A few states still find knowledge to be sufficient. 5 In Washington, the mens rea required for an accomplice is “general knowledge that the principal intends to commit a crime.” 6 In Michigan, the courts explicitly recognize “two types of aiding and abetting: (1) where the aider and abettor himself possesses the requisite specific intent for the underlying crime and (2) where the aider and abettor knows that the principal has the requisite intent.” 7 In these states, the legislature made a determination that one who assists with guilty knowledge should be punished as a principal. 8 The courts express this element as “merely a general intent requirement imposed to prevent an innocent participant from becoming an aider and abettor.” 9

Most states however, follow the scheme of the Model Penal Code. The Model Penal Code specifies that one becomes an accomplice if he aids “with the purpose of promoting or facilitating the offense.” The commentary states that this language “requires that the actor . . . have as his conscious objective the bringing about of conduct . . . [which is] criminal.” 10 Although this definition does not explicitly state that an accomplice must have the intent for the underlying crime, a majority of states adopting this language interpret this to be the meaning. 11

In finding the proper standard to apply, the state courts face the same dilemma as the federal courts. 12 Most states are concerned about protecting those less culpable from facing the same penalty as the actual perpetrator. 13

74. Id. at 515 (Miller concurring).
77. King, 534 N.W.2d at 536-37.
78. Mas, 1997 WL 258450 at 8.
79. King, 534 N.W.2d at 538 (citing People v. Karst, 360 N.W.2d 206 (Mich. 1984)).
82. See supra text accompanying notes 43-66.
83. See supra text accompanying notes 72-74.
This rule is more in line with general principles of criminal law. This intent requirement aids in the fact finder’s determination, as once intent is found, courts do not have to quibble over the level of assistance rendered. Today, most jurisdictions prefer this rule, and Louisiana falls in line with these jurisdictions.

VI. LOUISIANA

A. Generally

In Louisiana, the legal standard is that the accomplice have the intent for the underlying crime. An early Supreme Court decision which addressed the problem of setting the standard for the mental element of the accomplice was State v. Holmes. In Holmes, the defendant, Holmes, assisted in the planning and execution of a robbery by providing the car for his threesome of criminals and helping to obtain a shotgun and shells. Holmes and a friend (with the shotgun under his coat) entered a store wearing ski masks. As Holmes tried to remove the security guard’s pistol, the guard reached for his gun. Holmes’ friend shouted, “[d]on’t try it,” and then shot the guard in the face. Holmes unholstered the pistol, retrieved the money from the store safe, and pistol whipped a customer. They then escaped and split the money.

At trial, the court first had to define the legal requirement for an accomplice’s mental state. The court found that the prosecution misstated the law when it intimated that “all that was necessary to establish the defendant’s guilt of first degree murder was proof that the defendant was knowingly involved in the armed robbery.” The court found that “an individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state.” Since the mental element for first degree murder is “specific intent to kill or to inflict great bodily harm[,]” Holmes himself must have had the specific intent to kill the guard, and his friend’s intent could not be transferred to him. The court then concluded that the factual circumstances were sufficient to find that Holmes had the specific intent required. Later cases state that

84. See supra text accompanying note 19.
85. State v. Holmes, 388 So. 2d 722 (La. 1980). See also State v. McAllister, 366 So. 2d 1340 (La. 1978). In State v. McAllister the court affirmed the defendant’s conviction of manslaughter and disagreed with the defendant’s challenge that Louisiana Revised Statutes 14:24 was vague, over broad, and denied equal protection and due process. The court reiterated the fact that the person is not charged with violating Louisiana Revised Statutes 14:24 as this statute merely defines principals; however, the person is charged with the substantive offense. The statute defining the substantive offense determines the mental element.
86. Holmes, 388 So. 2d at 725.
87. Id. at 726.
89. Holmes, 388 So. 2d at 728 (“[S]pecific intent is a state of mind and, as such, it need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions
they are following the same standard. Since the mental requirement of a given crime affects the analysis, these cases will be divided by looking at those crimes which, under Louisiana law, require "specific intent," and those which require "general intent."

B. Specific Intent Crimes

"Specific intent" is defined in Louisiana Revised Statutes 14:10(1) as "that state of mind which exists when . . . the offender actively desired the prescribed criminal consequences to follow his act or failure to act." Therefore, "specific intent is present when from the circumstances the offender must have subjectively desired the prohibited result. . . ." In order to determine the defendant's mental state his actions will have to be scrutinized, thereby making this a fact-intensive inquiry.

In State v. Pierre, the Supreme Court reversed the defendant's conviction for manslaughter after finding that he did not have the specific intent to kill the victim. Here, defendant was tried for the second degree murder of a thirteen year old boy. The facts surrounding the victim's rape and murder were sketchy, and contradictory testimony was given about the defendant's involvement. All that could be proven was that defendant was at the scene (there was contradictory testimony about whether defendant was in the house where the victim was raped or remained in a van), and there was no evidence that he aided in the murder (he did not participate in the victim's beating death). The court found there were no acts from which intent could be inferred,

of the defendant." (citing State v. Williams, 383 So. 2d 369 (La. 1980)). La. R.S. 15:438 (1992) provides: "The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."

Holmes, 388 So. 2d at 728 (Marcus, J., concurring in the result) (Marcus, without reasoning, questioned the legal standard imposed by the majority of requiring the principal to have the intent of the substantive statute.) (Dennis, J., dissenting) (Dennis agreed with the legal standard imposed by the majority but found that under the facts Holmes did not have the requisite specific intent. He found that Holmes' act of "attempting to unholster the guard's pistol" was more consistent with sparing his life. Also, Holmes had no time to object to his friend's actions. Lastly, Holmes would not have wanted the shot fired since Holmes was standing right beside the guard.). The disagreement between the majority and the dissent show just how difficult it can be to infer a person's mental element from the surrounding circumstances even if one agrees with the legal standard.

91. Holmes, 388 So. 2d at 726 (quoting State v. Daniels, 109 So. 2d 896, 899 (La.1959)).
92. State v. Pierre, 631 So. 2d 427 (La. 1994). Compare to State v. Jasper, 677 So. 2d 553 (La. App. 2d Cir. 1996), writ denied, 688 So. 2d 521 (1997),reh'g denied, 693 So. 2d 790 (1997), where court found that the defendant did have the specific intent to kill required for second degree murder. The court distinguished Pierre by finding that there, the defendant grabbed a weapon and went looking for the victim. More importantly, witnesses saw defendant shooting into the car in which the victim was a passenger.
and that the "jurors could only speculate about the defendant's role" in the murder.\textsuperscript{94}

Compare Pierre to State v. Meyers.\textsuperscript{95} This case involved the drive-by shooting of a street corner drug dealer. The driver and the backseat passenger appealed their convictions of second degree murder, claiming that they lacked the specific intent to kill. The court once again defined the legal standard as the intent required for the underlying crime. Next, the court looked at the circumstances surrounding the crime and determined that the defendants did have the specific intent to kill. However, given the facts of the case the court's holding might be questioned.

In analyzing the case, the court found the following facts sufficient to infer the defendants' intent:

neither [the driver] nor [the passenger] tried to assist the victim . . . after the shooting. They did not call the police to report the shooting or give any statement regarding the murder to anyone. [The driver] drove the Cutlass to the scene and [the passenger] watched the incident [through] the car window.\textsuperscript{96}

The court acknowledged that there was "no direct evidence presented that either [man] knew that [the perpetrator] was armed"; however, it found that in the life of drug dealers this was a common event and that "the participants here all knew that [the perpetrator] intended to shoot [the victim]."\textsuperscript{97}

In affirming the jury's decision, the court emphasized the fact that the defendants did not offer the victim assistance after the shooting as evidence of the defendants' intent. Such an inference of intent from nonaction could lead to troubling results, given that other inferences can also be drawn from the facts. For example, the defendants could have neglected to make a report for fear of prosecution. The state presented no evidence that either Meyers or Davis knew that the shooter was armed. Meyers and Davis could have merely intended to participate in a drug deal. Even if they knew of the perpetrator's intent to kill this is different from having the intent themselves. As the court itself stated, "it is not enough to find merely that [the perpetrator] had the necessary mental state, since this intent cannot be imputed to the accused."\textsuperscript{98} However, the court found the circumstantial evidence sufficient to support the jury's finding of guilt.

The mere presence of a passenger in Meyers is especially similar to Pierre in which the defendant's mental state was not sufficient to hold him liable as an aider and abettor. There, the crime committed was just as heinous, but the court did not consider the defendant's failure to assist the victim or file a report. In

\textsuperscript{94} Pierre, 631 So. 2d at 429.
\textsuperscript{95} State v. Meyers, 683 So. 2d 1378 (La. App. 5th Cir. 1996).
\textsuperscript{96} Id. at 1384.
\textsuperscript{97} Id. at 1384 (emphasis added).
\textsuperscript{98} Id. at 1382 (citing State v. Holmes, 388 So. 2d 722 (La. 1980)).
Meyers, the court offers little justification for its failure to reverse the jury's determination. This is another example of a court confusing the legal standard by suggesting that knowledge of the perpetrator's intent is sufficient, while giving contradictory statements about requiring intent for the underlying crime. The court was willing to allow the jury to infer the defendant's "implicit intent" from his knowledge of the perpetrator's conduct. In Meyers, the court used the defendant's knowledge as a factor in determining intent, an analysis which would be more appropriate in finding accomplice liability for a general intent crime.

C. General Intent Crimes

Different proof of the mental state of the accomplice is required for general intent crimes. General intent is defined as the state of mind which exists "when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act." Therefore, "general intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result." Since the consequences only have to be "reasonably certain" to occur in general intent crimes, it will be less difficult to find that an accomplice has the requisite mental state for these types of crimes.

Two cases which illustrate how accomplice liability works with general intent crimes are State v. Smith and State v. Hebert. In Smith, the court reversed the defendant's conviction for armed robbery. Two brothers were robbing a shoe store when one found a hammer behind a counter and used it to threaten the clerks. The brother who did not wield the hammer was convicted by the lower court as a principal to armed robbery. The appellate court focused on the fact that this brother did not aid or abet the other's use of the hammer.

However, in Hebert, the court upheld the defendant's conviction for armed robbery, finding the defendant did have the requisite mental element. There, the second circuit found the perpetrator's use of a gun was planned or reasonably expected to follow from the plan to rob the store. As Smith and Hebert illustrate, as long as some act points towards assistance given by the accomplice
to the perpetrator, courts will generally hold that the accomplice has the requisite mental element.

VII. SUGGESTIONS/SOLUTIONS

A. Type of Knowing Aid Given by the Accomplice

Many solutions have been given for providing a balance between deterrence and personal culpability. One solution would involve taking into account the degree to which the accomplice knowingly aided in the criminal scheme. The initial drafters of the Model Penal Code made this suggestion, but it was rejected. The benefit of taking into account the amount of aid given by the accomplice would be to limit the liability of the minor actor. However, critics of this standard have argued that it is too vague. Dressler argues that it will be hard for a jury to determine what "substantial" help is and thus, the intent requirement for the accomplice will remain a hazy one.

B. Sentencing Guidelines

One way to avoid penalizing the less culpable accomplice to the same degree as the principal is through sentencing guidelines. The jury must find the elements of the core offense present. Yet, the judge in his discretion applies the sentencing guidelines to determine the defendant's punishment.

Federal courts follow the Federal Sentencing Guidelines Manual promulgated by the United States Sentencing Commission. Under these guidelines, "each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward." A judge begins with the offense level, and then adds or subtracts points from it according to the aggravating or mitigating circumstances in order to determine the punishment. Under the guidelines, an aider and abettor's

104. See Dressler, supra note 12, at 121-24.
106. Id. at cmt. 3. See also Lafave, supra note 2, at 583.
107. See Lafave, supra note 2, at 584 (citing Model Penal Code § 2.06, cmt. 6(c) n.58 (1985)).
108. Dressler, supra note 12, at 122. However, difficult determinations are left to the common sense of the jury all of the time. Dressler instead has suggested that the test should be whether the accomplice caused the crime. Id. at 140. "A causal accomplice is one but for whose acts of assistance the social harm would not have occurred when it did." Id. at 124-25. If the accomplice did not cause the crime, then he would receive a lesser punishment. Dressler proposes that the element of causation be added to the test in order to "make persons guilty of the harm they cause." Id. at 125-26. However, this formulation does not clarify the requisite mental element of the accomplice as the degree of culpability must still be determined.
110. Id.
111. Id. at Ch. 2, intro. comment (1995).
“offense level is the same level as that for the underlying offense.” However, the judge may consider as a mitigating factor whether the defendant was a minimal or minor participant in determining whether to decrease the offense level.

In Louisiana, the trial judge must consider Louisiana Code of Criminal Procedure article 894.1, which contains general sentencing guidelines, before imposing a sentence. Where there is no mandatory minimum sentence, “[t]he trial judge is to be afforded wide discretion in the imposition of the sentences within statutory limits, and the sentence imposed should not be set aside in the absence of a manifest abuse of his discretion.” The purpose of this article is to provide the trial court with standards so that it may individualize the sentence to fit the particular defendant . . . .” Therefore, the judge may consider the mitigating fact that the defendant was only an accomplice.

A major criticism of accomplice liability is that the accomplice is being punished to the same extent as the actual perpetrator. Under the sentencing guidelines, the judge in his discretion may determine that the accomplice was less blameworthy and therefore should receive a lesser punishment. One problem with sentencing guidelines may be that they allow the judge too much discretion if no mandatory minimum sentence exists. However, such guidelines give standards for sentencing “through a system that imposes appropriately different sentences for criminal conduct of differing severity.”

C. Criminal Facilitation Statutes

Some states make “assistance” a distinct criminal offense by promulgating facilitation statutes. "These extend accessorial liability to persons who engage in conduct with the awareness that it will aid others to commit serious crimes, but treat such facilitation as a less grave offense than the crimes that are aided." A statute such as this would “have the advantage of providing means whereby such persons, clearly less culpable than those directly participating in the crime, could be subjected to lesser and different penalties, just as has long been the case for the accessory after the fact.” Also, the Final Report of the National Commission on Reform of Federal Criminal Laws recognized the...
difficulty that the courts were facing by drafting a criminal facilitation statute and commenting that: "This section . . . would provide a legislative solution to the dilemma faced by a court which has to choose between holding a facilitator as a full accomplice or absolving him completely of criminal liability." The standard adopted under this statute is that of the "knowing substantial assistance" of the accomplice. Thus, there is still the problem of determining when assistance has reached a "substantial" level. However, this statute provides a standard that will produce just results by recognizing that the accomplice in this situation should be punished for his guilty knowledge and assistance, but to a lesser degree than the actual perpetrator.

VIII. ASSISTING RECKLESS/NEGLIGENCE CONDUCT

A. In General

Whether to punish someone who assists the perpetrator in committing a criminally negligent crime is another problem that the courts have faced in the context of accomplice liability. This situation often arises in the context of drunken driving offenses where the owner of a car gives the keys to someone obviously intoxicated. Most courts hold that one can be charged as an accomplice to a recklessness/negligence crime; however, a few courts find that this is a legal impossibility and refuse to allow accomplice liability. In a negligence crime, such as negligent homicide, the drunk driver (the principal)
does not necessarily intend to commit the crime, therefore the requirement that the accomplice have the intent to commit the underlying crime seems inconsistent in this type of scenario.

B. Other Jurisdictions

1. Legal Impossibility

In *State v. Etzweiler,* the New Hampshire court found that Etzweiler could not be charged as an accomplice to negligent homicide. Etzweiler loaned his car to a co-employee whom he knew to be drunk. Ten minutes later, the co-employee who was driving recklessly struck a car, killing its two passengers. In rejecting the indictment charging Etzweiler as an accomplice to negligent homicide, the court recognized that the New Hampshire statute is based upon the Model Penal Code. This court read Section III and Section IV of the New Hampshire statute together to find that under the code, "an accomplice's liability ought not to extend beyond the criminal purposes that he or she shares." The court found that it would be a legal impossibility for Etzweiler to be an accomplice to negligent homicide:

To satisfy the requirements of RSA 626:8 III, the State must establish that Etzweiler's acts were designed to aid [the co-employee] 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 Etzweiler could intentionally aid [the

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128. 480 A.2d 870, 875 (N.H. 1984).
129. *See also Echols v. State,* 818 P.2d 691 (Alaska Ct. App. 1991) where the court reversed the defendant's conviction of assault in the first degree. The defendant was charged under Alaska's complicity statute for soliciting the assault. Alaska Stat. § 11.16.110(2) (Michie 1996) requires the accomplice have the intent to promote the commission of the offense. The mental element for the substantive offense of the assault required "that [the] person recklessly causes serious physical injury . . . ." Alaska Stat. § 11.41.200 (a)(1) (Michie 1996). The court started with the premise that "the accomplice must intend the commission of the particular crime charged." *Echols,* 812 P.2d at 692. The court then pointed out that although the Model Penal Code is one of the sources of the Alaska criminal code that their code had no provision similar to the Model Penal Code section 2.06(4). The court admitted that if such a provision was enacted it would support the State's position that the defendant need only act with recklessness towards the conduct causing the result. *Echols,* 818 P.2d at 695.
130. N.H. Rev. Stat. Ann. § 626:8 III (Michie 1996) provides: "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 . . . aids . . . such other person in planning or committing it." *Etzweiler,* 480 A.2d at 873.
131. *Etzweiler,* 480 A.2d at 874.
principal] in a crime that [the principal] was unaware that he was committing.\textsuperscript{132}

So, although Etzweiler loaned his car to an intoxicated person, he faced no consequences for those actions.\textsuperscript{133}

2. Permissible Result

Other states take a differing view and hold that one can be convicted as an accomplice to negligence crimes. The Colorado Supreme Court in \textit{People v. Wheeler}\textsuperscript{134} reversed the trial court's finding that criminally negligent homicide by an accomplice is not a cognizable crime.\textsuperscript{135} The trial court found that since the accomplice must know that the principal intended to commit the crime, it would be impossible for the complicitor to know that the "principal intended to perpetrate an unintentional killing."\textsuperscript{136} However, the supreme court recognized that the complicity statute does not prescribe a separate crime, but is a definitional statute, and that the "intent to promote or facilitate the commission of the offense" of which the statute speaks is the intent to promote or facilitate the \textit{act or conduct} of the principal.\textsuperscript{137}

Therefore, for a person to be guilty of criminally negligent homicide through a theory of complicity, he need not know that death will result from the principal's conduct because the principal need not know that. However, the complicitor must be aware that the principal is engaging in conduct that grossly deviates from the standard of reasonable care and poses a substantial and unjustifiable risk of death to another. In addition, he must aid or abet the principal in that conduct and, finally, death must result from that conduct.\textsuperscript{138}

\textsuperscript{132} \textit{Id.} at 874-75.

\textsuperscript{133} Other Justices found that the accomplice liability statute could be interpreted differently. Justice Souter, concurring, found that Section IV of the statute should be read separately from Section III, therefore providing for liability in a situation where the "accomplice in 'conduct' causing a particular result is also an accomplice in the commission of the offense defined by reference to that result." However, he found that Section IV was too unclear as to "give . . . notice of its intended effect and is thus unenforceable." 480 A.2d at 876.

Chief Justice King, dissenting, found that Section IV was sufficiently clear and that it would permit the State to charge Etzweiler as an accomplice to negligent homicide. He stated that the provision required the accomplice to act "\textit{purposefully with respect to the principal's criminal conduct}," and that the accomplice must have the same state of mind as the principal towards the result (here, criminal negligence). 480 A.2d at 881 (emphasis in original). This Justice felt that this interpretation was the only way to give meaning to both Section III and Section IV.

\textsuperscript{134} 772 P.2d 101 (Colo. 1989).

\textsuperscript{135} \textit{Id.} at 104-05.

\textsuperscript{136} \textit{Id.} at 105.

\textsuperscript{137} \textit{Id.} at 104 (emphasis added).

\textsuperscript{138} \textit{Id.} at 105.
New York was faced with a similar case in People v. Abbott.\footnote{People v. Abbot, 445 N.Y.S.2d 344 (N.Y. App. Div. 1981). See also State v. Garza, 916 P.2d 9 (Kan. 1996). Garza and another man were shooting at each other when a bullet from the other man’s gun hit the victim. Garza was charged with aggravated battery. The court found that “[g]iving assistance or encouragement to one who it is known will thereby engage in conduct dangerous to life is sufficient for accomplice liability as an aider or abettor as to crimes defined in terms of recklessness or negligence.” Id. at 15.} Here, two men were drag racing down a public road when one of their cars struck a nonparticipating vehicle, killing all of its occupants. The driver of the car that avoided the collision was convicted of criminally negligent homicide. As in Wheeler, the state argued that this driver was liable because he “intentionally aided . . . in the criminally negligent conduct which resulted in the deaths . . . ”\footnote{Abbott, 445 N.Y.S.2d at 346.} The court found that to hold one liable as an accomplice for the crime of criminally negligent homicide, the State must prove: (1) that the accomplice “shares the requisite culpable mental state for the crime” (here criminal negligence), and (2) that he “intentionally [aided] in its commission.”\footnote{Id. at 346-47.} Here, the speed of the driver’s vehicle and the fact that his conduct allowed the events to take place were sufficient to show that the legal standard was met.

C. Louisiana

In State v. Martin,\footnote{539 So. 2d 1235 (La. 1989).} a case factually similar to Abbott, the Louisiana Supreme Court upheld a drag-racing defendant’s conviction for negligent homicide. The court found that the state must prove that the accomplice was: “1) criminally negligent and thereby had the requisite mental state; and 2) ‘concerned’ in the commission of a negligent homicide.”\footnote{Id. at 1238.} The court further found no error with the jury’s conclusion that the requirement of both prongs had been met.\footnote{Id.} Louisiana courts have analyzed this situation by holding the “accomplice” liable for his own conduct. Therefore, the accomplice’s liability lies in his own reckless mental state and action.

Thus, in a case of loaning a car to a drunk driver, the issue would apparently be whether one was grossly negligent in engaging in that conduct. Another factor in the independent liability analysis is causation. The Martin opinion, in an apparently favorable reference to State v. Petersen,\footnote{526 P.2d 1008 (Or. 1974) (manslaughter conviction reversed where victim was a knowing and voluntary participant in drag race).} suggests that the defendant might not be liable for negligent homicide if a co-racer were killed, rather than a third person.\footnote{Martin, 539 So. 2d at 1239.} Similarly, one could determine whether the supplier of the car or the weapon was a substantial cause in producing the result.
D. Solutions

Many of the same policies for and against finding accomplice liability previously discussed apply to negligence crimes. Crime deterrence policies suggest that the accomplice should be held liable. The owner of the car will think twice before recklessly handing over his or her car keys to a drunk. However, there has been criticism that "[b]ecause aiding and abetting so clearly requires knowing and willful participation in an offense with an intent that the offense succeed, expanding the doctrine to reach an offense based on negligence marks a radical departure from precedent."148

Some states look to the actual statute on accomplice liability to find that the accomplice must intend the commission of the offense.149 However, that statute alone does not impose liability. This analysis leads to the anomalous conclusion that the accomplice must intend an unintentional crime—a legal impossibility. The better rule will require courts to examine the underlying crime to define the mental element for the accomplice. The prosecution will have to prove that the accomplice was negligent in aiding the conduct of the perpetrator. In a negligence crime, the state of mind of the accomplice must be a gross deviation from the standard of care of a reasonable man under similar circumstances.150 Another approach would be to bypass the complicity theory and to hold the "accomplice" liable for his own conduct.151

IX. Conclusion

A person may be convicted of a crime he or she did not physically commit or intend to commit. The standard of knowledge versus intent of the accomplice towards the core offense is determinative of accomplice liability in some scenarios. The example in which a merchant sells goods to a buyer knowing that the buyer intends to use the goods to commit a crime can be analyzed under different theoretical bases for imposing accomplice liability. The seller cannot be seen as a consenting party under an agency theory. Neither has the seller "forfeited" his or her personal identity. Nevertheless, the seller has, however remotely, caused harm to society. This harm and the deterrence needed to prevent it has to be balanced with the seller's own personal culpability.

Punishing the less culpable accomplice to a lesser degree could be achieved by legislative enactment of a facilitation statute. With such a statute, the jury

147. See supra text accompanying notes 7-32.
149. Especially those with complicity statutes that have language requiring that the accomplice have the intent to promote/facilitate the commission of the crime. See Echols v. State, 818 P.2d 691, 692 (Alaska Ct. App. 1991).
would get to determine if the accomplice met the elements of this lesser offense. The same result would be achieved through the use of sentencing guidelines where the accomplice's minor role could be considered a mitigating factor. However, with this solution, it is within the discretion of the judge to determine the defendant's punishment. Either method would achieve the goals of deterrence without compromising the principle of personal culpability.

With respect to negligence crimes, the best result would be to hold the accomplice liable if he or she aided the perpetrator's conduct with a reckless state of mind. This solution would have the consequence of holding liable those whose actions show disregard for life but who do not actually commit the crime. As some commentators have argued, this is like holding the person liable for the substantive crime.\footnote{See supra note 151.} When these changes are implemented, both policies of deterrence and holding one liable only for one's own personal culpability will be met.

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