Accomplice Liability: American Jurisprudence
Injecting Mens Rea Under False Hopes of
Criminal Deterrence

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Criminal law is the product of societal demands that certain conduct be condemned and punished. Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order. As a moral or political issue the punishment of offenders provokes intemperate emotions, deeply conflicting interests, and intractable disagreements. The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of

3 Id.
the penal system. The Eighth Amendment of the United States Constitution does not mandate adoption of any one penological theory. Rather, it merely mandates that, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Considering this, the principles which have guided criminal sentencing have varied with the times. The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.

Answers about why and how criminals are punished may take different shapes over time; however, at least there are answers. A question that is seemingly without a justifiable answer is: Why are accomplices, who may not intend the ultimate result, punished to the same degree as the principal perpetrator? This article will explore this question by analyzing accomplice liability and its application in four different States.

The doctrine of accomplice liability seeks to hold everyone who assists in a crime responsible for the entire crime, even if their actions do not directly aid in the commission of the crime. The hope is that this allows liability even when the actions taken do not directly assist the crime and the State is deterring people from assisting in the commission of the crime. This form of accomplice liability is deeply rooted in most

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4 Id.
6 U.S. CONST. amend. VIII.
7 Id.
10 Id.
of the United States.\textsuperscript{11} My analysis reveals the idea that states not only “hope” to deter people from assisting in commissions of a crime but are vigorously pursuing harsh convictions without justification simply because they can.\textsuperscript{12} It is argued that mens rea searches for a particular kind of intent, that is, the intent to commit a crime.\textsuperscript{13} This concept is deserving of attention in that it sets the framework for accomplice liability but also sheds light on different requirements of mens rea for accomplice liability, which ultimately leads to the question: Why do we charge accomplices with crimes that they did not have the required mens rea to commit?

There are vast amounts of people that are not aware of the principle of accomplice liability at all. This is surely important because many individuals might expose themselves to criminal liability without any idea that their actions permit the State to charge them as if they were the principle actor. Part II of this article explores the development of accomplice liability. Part III looks to the intent and ‘natural and probable consequences’ doctrine in the scope of accomplice liability. Part IV will analyze Indiana’s accomplice liability statute through the lens of relevancy in comparison to its other criminal statutory provisions. Parts V, VI, and VIII will provide a basic structural insight into three other states’ ideas on accomplice liability to serve as a comparison to the current law of accomplice liability in Indiana. Part VIII will provide a framework for how accomplice liability should be treated pursuant to principles of fairness, judiciousness, and pertinence in today’s society.

\textsuperscript{11} Id.
\textsuperscript{12} Andrew Sickmann.
\textsuperscript{13} Robinson & Grall, \textit{Supra}, note 26, at 682.
II. Development of Accomplice Liability

Early Anglo-American accomplice law was quite different than the form it has taken today. The common law classification of parties to a felony consisted of 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.\textsuperscript{14} This gave rise to many procedural problems.\textsuperscript{15} It was eventually recognized that the accessory after the fact, by virtue of his involvement only after the felony was completed, was not truly an accomplice in the felony.\textsuperscript{16} The distinctions between the remaining three categories have been largely abrogated over time.\textsuperscript{17}

Even though these categories have faded over time, an understanding of them is important in order to properly analyze the current accomplice liability scheme. A principle in the first degree may simply be defined as a criminal actor.\textsuperscript{18} He is the one who, with the requisite mental state, engages in the act or omission which causes the criminal result.\textsuperscript{19} Principals in the second degree were required to be present at the scene of the crime and aid, counsel, command, or encourage the principal in the first degree in

\textsuperscript{14} Wayne R. LaFave, Modern Criminal Law, 789 (Thomson 2001) (1978); See also Joshua Dresller, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem, 37 HASTINGS L.J. 91, 94-95 (1985).
\textsuperscript{15} Lafave, supra, note 8, at 789.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id. (The author states that there can be more than one principle in the first degree when more than one actor participates in the actual commission of the offense. His example is one man beating a victim and another shooting the victim. Both may be principle’s in the first degree to murder).
the commission of the offense.\textsuperscript{20} Common law allowed for the principal in the second degree to be constructively present, which allowed the secondary actor to be physically absent from the scene of the crime but aid and abet the primary actor from a distance.\textsuperscript{21} This may happen when one is standing watch and signaling from a distance to indicate when a victim is approaching.\textsuperscript{22}

An accessory before the fact is one who orders, counsels, encourages, or otherwise aids and abets another to commit a felony and who is not present at the commission of the offense.\textsuperscript{23} This shows that the distinction between an accessory before the fact and the principal in the second degree is presence.\textsuperscript{24} Thus, if a person was actually or constructively present at the scene of a crime, due to his participation he is a principal in the second degree.\textsuperscript{25} If he was not present at the scene of the crime, he is an accessory before the fact.\textsuperscript{26} Although the accessory before the fact may be the originator of the crime, the accessory before the fact may be enlisted by the principal to lend assistance towards the commission of the crime.\textsuperscript{27}

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\textsuperscript{20} Id. at 790.
\textsuperscript{21} Id. (While it may seem that principles in the first degree must be present, this is not so. A principle in the first degree may be constructively present when some instrument which he left or guided caused the criminal result).
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\end{flushright}
A shift in accomplice law began when many felt it was difficult to explain the rules for distinguishing some accomplices from others. Ultimately, legislatures closed the gap between perpetrators and all secondary criminals. This brings one to the current system where, in most cases, all parties to a crime are treated alike. Whether or not the accomplice is present at the scene of the crime, she is a party to a crime perpetrated by another if she assists the perpetrator to commit the crime or influences his conduct. As a matter of theory, secondary parties are usually said to be accountable for the acts of the primary actor. Their liability is derivative of the latter’s conduct; they generally are not considered to be guilty of a separate crime of aiding. By definition, accomplice liability is derivative in nature since the actor is removed from direct involvement in the commission of the crime.

28 Dressler, supra, note 8, at 91. (For example, A and B discuss stealing the Mercedes that has been parking in front of their office for the last two weeks. Finally, B decides to carry out the plan and does steal the car while A watches from the 5th story office window. A, however, never told B he would act as a lookout. In fact, B hastily decided to steal the car without first consulting A. This, however, does not change the fact that A discussed and watched the event carefully. It is not likely that A would have been charged as the principal in the first degree. However, is he an accessory before the fact or a principal in the second degree?)

29 Id.

30 Id.; See Generally Adam Kurland, To “Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense”: A Critique of Federal Aiding and Abetting Principles, 57 S.C. L. REV. 85, 2005); See also 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).

31 Id.

32 Id.

33 Id.

34 Rogers, supra note 1, at 1354. (While derivative in nature, accomplice liability is often predicated on the ‘natural and probable consequences’ doctrine. Courts must differentiate between acts that the accomplice intends to aid and those that are merely a foreseeable consequence of the aid. Rogers
It is undisputed that from the earliest days of civilized society, aiding someone in the commission of a criminal act with the intent that a crime be committed has been deemed blameworthy and deserving of punishment. This idea was born from an innate sense of justice. One who willingly participates or aids in the commission of a crime deserves punishment. This, however, raises some questions: Whose innate sense do we rely on? What level of punishment is deserved?

III. Intent and the ‘Natural and Probable Consequences’ Doctrine

A man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it. Early Anglo-American criminal law merely searched for general immorality and motive. Mens rea has been described as a general notion of moral blameworthiness, an evil-meaning mind, and a vicious will. It is now understood that a crime generally consists of two elements, a physical, wrongful deed (the “actus reus”) and a guilty mind that produces the act (the “mens rea”). Mens rea refers to a mental argues that only the former should lead to liability. This leads to holding an accomplice liable for crimes based on recklessness or negligence. Rogers states that courts should limit liability to those acts that the accomplice intended to promote).

35 Id. See also U.S. v. Gooding, 25 U.S. 460, 472 (1827) (advancing the principle that those who are present, aiding and commanding, or abetting, are deemed principals; and, if absent, in treason and in misdemeanors, they are still deemed principals).

36 Id.


39 Id. at 686.

state, often an element of the offense, which expresses intent necessary for a particular act to constitute a crime.\footnote{In Interest of G.T., 597 A.2d 638 (Pa. 1991); 21 AM. JUR. 2D Criminal Law § 117 (2009).} Mens rea is generally an essential element of any criminal offense, and exceptions to this rule normally occur only where the legislature clearly determines otherwise.\footnote{U.S. v. Salazar-Gonzalez, 458 F.3d 851 (9th Cir. 2006); 21 AM. JUR. 2D Criminal Law § 117 (2009).} A crime ordinarily is not committed if the mind of the person doing the act is innocent.\footnote{U.S. v. Spy Factor, Inc., 960 F. Supp. 684 (S.D.N.Y 1997); 21 AM. JUR. 2D Criminal Law § 117 (2009).}

Since its inception, accomplice liability has required some concept of intent.\footnote{Rogers, \textit{supra} note 1, at 1354.} However, considerable confusion exists as to what the accomplice’s mental state must be in order to hold one accountable for an offense committed by another.\footnote{\textit{Id.} See generally Dressler, \textit{supra}, note 8.} Essentially, the accomplice must act with the intent to aid in the commission of an offense.\footnote{\textit{Id.}} Most agree that this definition actually involves two mens reas: first, the accomplice must have the intent to aid the principal in the commission of the offense; and second, the accomplice must have the mens rea required by the underlying offense.\footnote{\textit{Id.}} This definition, however, is often applied without rigid application.\footnote{\textit{Id.}}

In order to qualify as an accomplice, most statutory provisions require that the accomplice aid or abet the principle. The terms “aid” and “abet” are legal terms of art not
commonly used, nor even understood by lay persons.\textsuperscript{49} The “aiding” element requires conduct by the accomplice that results in the accomplice becoming somehow involved in the crime.\textsuperscript{50} This is often through assistance, promotion, encouragement, or instigation of the criminal action.\textsuperscript{51} Once a party becomes involved in the commission of the crime, the aiding component has been satisfied, no matter how slight the assistance.\textsuperscript{52}

“Abetting” searches for the required mental state to justify the imposition of criminal liability.\textsuperscript{53} This is the mens rea of the crime. Thus, accomplice liability may require for the actus reus and mens rea of the accomplice.\textsuperscript{54} When a defendant has both the requires actus reus and mens rea to complete a crime her actions are sufficient for conviction. Note, however, that Indiana’s statute on the subject does not use the word “abet”.\textsuperscript{55} This shows that while a state may search for the required mens rea, it need not do so.\textsuperscript{56}

Traditionally, when searching for actus reus, courts required both actual and proximate cause.\textsuperscript{57} In the criminal law, causation has two requirements, namely, cause in fact, or actual cause, and proximate cause. Unless there is a statutory provision to the contrary, conduct described in a statutory definition of a crime must be causally related to

\textsuperscript{49} Lawrence, supra, note 9 at 1526
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id. See Generally Vance v. State, 620 N.E.2d 687, 690 (Ind. 1993); Osborne v. State, 904 N.E.2d 393, 393 (Ind. App. 2009).
\textsuperscript{53} Id.
\textsuperscript{54} See Lawrence, supra, note 9 at 1526.
\textsuperscript{55} See IND. CODE ANN. § 35-41-2-4 (West 2009).
\textsuperscript{56} Id. (The statute provides that, “a person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense…”).
\textsuperscript{57} Lawrence, supra note 9, at 1527.
prescribed criminal consequences. Such result must have been the natural and probable
consequence of the accused's conduct, which result would not have occurred but for such
conduct.\textsuperscript{58} Where events are foreseeable and the natural result of criminal conduct, the
chain of legal causation is unbroken.\textsuperscript{59}

When looking for actual cause, the traditional test used is the "but for" test and
this becomes a problem when applied to accomplice liability.\textsuperscript{60} Larry Lawrence provides
the following example in his article: If the accomplice’s efforts to aid are somehow
thwarted or have a negligible effect on the criminal actor, does this satisfy the causation
requirement?\textsuperscript{61} Despite a lack of actual cause, courts are frequently willing to hold an
accomplice liable, which is seemingly at odds with traditional notions of causation that
require both actual and proximate cause.\textsuperscript{62}

The current form that accomplice liability has taken casts a wide net in most
states, catching those that provide some form of assistance to a crime.\textsuperscript{63} Assistance is
broadly defined and can take many forms: physical participation, solicitation, mere
advice, encouragement, planning, procuring supplies, and even the smallest amount of
any of these will suffice, no matter how trivial.\textsuperscript{64} In most cases of trivial assistance, the

\textsuperscript{58} 22 C.J.S CrimLaw § 46 (2009).
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Lawrence, supra note 9, at 1528.
\textsuperscript{62} Id.
\textsuperscript{63} Id. The author highlights this point through People v. Wood, id., where a
defendant was convicted of aiding and abetting statutory rape after he rented
his room to a young couple. People v. Wood, 56 Cal. App. 431, 431-33, 205 P. 698, 698
(Cal. App. 2d Dist. 1922). Through the act of renting the room, the
court found that this was enough to constitute facilitation. Id.
\textsuperscript{64} Richard A. Bierschbach and Alex Stein, Mediating Rules in Criminal Law,
\textsuperscript{Id.}
consequences are severe.\textsuperscript{65} An accomplice is typically subject to the same punishment as the principal of the crime.\textsuperscript{66} What is troubling, in most jurisdictions, a person encouraging or facilitating the commission of a crime may be held criminally liable not only for that crime, but for any other offense that was a ‘natural and probable consequence’ of the crime aided and abetted.\textsuperscript{67}

Relatively few jurisdictions have expressly rejected the ‘natural and probable consequences’ doctrine, and many States and the Federal Government apply some form or variation of that doctrine or permit jury inferences of intent.\textsuperscript{68} A person who encourages or facilitates the commission of a crime is criminally liable not only for that crime, but also for any other crime that is a natural and probable consequence of the target crime.\textsuperscript{69} Under this doctrine, when an aider and abettor or a conspirator chooses to become a part of the criminal activity of another, he or she is, in some ways, forfeiting his or her personal identity.\textsuperscript{70} In essence, he or she says, ‘your acts are my acts.’\textsuperscript{71}

The requirement that the jury determine the intent with which a person tried as an aider and abettor has acted is not designed to ensure that his conduct constitutes the

\begin{footnotes}
\item\textsuperscript{65} Id.
\item\textsuperscript{66} Id.
\item\textsuperscript{67} Id.
\item\textsuperscript{68} Gonzales v. Duenas-Alvarez, 549 U.S. 183, 184 (2007).
\item\textsuperscript{69} People v. Hoang, 51 Cal. Rptr. 3d 509, 513 (2006).
\item\textsuperscript{71} People v. Luparello, 231 Cal. Rptr. 832, 849 (Cal. App. 4 Dist. 1986); \textit{for an in depth discussion on this principal see generally} Kimberly R. Bird, \textit{The Natural and Probable Consequences Doctrine: “Your Acts Are My Acts”}, 34 W. St. U. L. Rev. 43 (2006).
\end{footnotes}
offense with which he is charged.\textsuperscript{72} His liability is vicarious.\textsuperscript{73} Like the conspirator whose liability is predicated on acts other than and short of those constituting the elements of the charged offense, if the acts are undertaken with the intent that the actual perpetrator's purpose be facilitated thereby, he is a principal and liable for the commission of the offense.\textsuperscript{74} Also like a conspirator, he is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets.\textsuperscript{75}

It is important to bear in mind that an aider and abettor's liability for criminal conduct is of two kinds.\textsuperscript{76} First, an aider and abettor is guilty of the intended crime.\textsuperscript{77} Second, under the ‘natural and probable consequences’ doctrine, an aider and abettor is guilty not only of the intended crime, but also “for any other offense that was a ‘natural and probable consequence’ of the crime aided and abetted.”\textsuperscript{78}

Why does the judicial system and legislature impose strict obligations on its citizens to refrain from permitting their presence during a criminal act, less they be charged with committing that offense? This question defeats the central premise of our inherent understanding of a criminal action, which is that a criminal code, more than any other body of law, should be rational, clear, and internally consistent.\textsuperscript{79} It is important that a criminal code be specific and effectively define criminal conduct to achieve its

\textsuperscript{72} People v. Croy, 710 P.2d 392, 398 (Cal. 1985).
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} People v. McCoy, 24 P.3d 1210, 1213 (Cal. 2001).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Robinson & Grall, supra note 2, at 682.
goals of condemnation and deterrence. This provides citizens with fair warning of what actions will constitute a crime and limit governmental discretion in determining whether a particular individual has violated the criminal law.

IV. Indiana Accomplice Liability

Indiana’s statutory provision concerning accomplice liability is unambiguous and concise. It provides:

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.

Analysis shows that accomplice liability cuts against the intuitive grain of what constitutes culpability. This is because accomplice liability holds no cohesive bond to the doctrine of causation. For example, the crime of attempted murder requires the intent to kill; but in many states because an accomplice is criminally responsible for all acts committed by his confederate, the intent to kill is imputed to the accomplice regardless of his degree of culpability. In Vance v. State, Vance admitted to participating in a

\[\text{\textcircled{80}}\] See Id.
\[\text{\textcircled{81}}\] Id.
\[\text{\textcircled{82}}\] IND. CODE ANN. § 35-41-2-4 (West 2009).
\[\text{\textcircled{83}}\] Id. (Accomplice liability strays from actual causation in that the accomplice, by definition, does not complete the physical elements of the crime).
\[\text{\textcircled{84}}\] Vance v. State, 620 N.E.2d 687, 690 (Ind. 1993); People v. Martinez, 64 Cal. Rptr. 3d 580, 595 (Cal. Ct. App. 2007 (discussing accomplice liability by stating that sometimes it happens that an accomplice assists or encourages a confederate to commit one crime, and the confederate commits another, more serious crime. Id. Whether the accomplice may be held responsible for that non-target offense turns not only upon a consideration of the general principles of accomplice liability, but also upon a consideration of the ‘natural and probable consequences’ doctrine. Id.).
robbery.\textsuperscript{85} Vance did not, however, maintain the requisite intent to execute a murder and though his acts were suggestive of a forceful robbery, they did not provide intent for murder.\textsuperscript{86} The court provided that because the defendant participated in the robbery and was holding the victim at the time he was unexpectedly stabbed, that there was a plethora of evidence to convict him of felony-murder.\textsuperscript{87}

Considering the utilization of accomplice liability within the scope of felony murder, it is clear that if the crime is committed by the principal, the accomplice is guilty of that crime, not of a separate and lesser offense of “aiding and abetting” even though these elements are required to qualify as an accomplice.\textsuperscript{88} This becomes a way of committing a crime without actually committing the crime. The effects are exacerbated by the felony-murder doctrine.

The felony murder doctrine holds that any death resulting from the commission or attempted commission of a felony is murder.\textsuperscript{89} The principal does not hold the requisite intent to commit murder; however, when felony-murder is imputed upon him, the accomplice liability doctrine will forcefully attach itself to an accomplice, making him guilty of murder as well.\textsuperscript{90} This means that the principle, while not guilty under

\textsuperscript{85} Vance, 620 N.E.2d at 690.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{89} BLACKS LAW DICTIONARY 651 (8th ed. 2004).
\textsuperscript{90} Many arguments can be made for the abolition of the felony-murder doctrine as the actor does not hold the mens rea of wanton, unlawful, premeditated, deliberate, and malicious conduct. If the principal acts with extreme indifference to human life, yet is charged with murder it seems that the line has been stretched far enough. However, Indiana pulls this line past
traditional notions of murder, may be prosecuted under the felony-murder doctrine. The accomplice, even though there is no true principal to murder, may be convicted for murder as well through the application of both the felony-murder and accomplice liability doctrines.

Suppose \( A \) and \( B \) conduct a robbery in a convenient store and during the commission of the robbery a bystander attempts to flee the store; however, trips in the chaos and receives a blow to his head that kills him. \( A \) and \( B \) acted in concert during the commission of a felony that resulted in the bystander’s death. The felony murder rule would apply to both \( A \) and \( B \). Now suppose that \( A \) lends \( B \) his vehicle so that \( B \) may go rob the convenient store and that the bystander is killed in the same manner in the first example. The felony murder rule will apply to \( B \); however, because \( A \) will be considered an accomplice via his aid, the felony murder rule now attaches to \( A \) making him guilty of murder. This is true even though \( A \) was not at the scene of the crime and did not participate in the robbery.

To gain a clear understanding of Indiana’s accomplice liability statute, it is important to view it in direct relation to another Indiana criminal statute. Indiana’s statute concerning robbery provides:

A person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant, and a Class A felony if it results in serious bodily injury to any person other than a defendant.  

its breaking point by imputing this state of mens rea via coupling felony-murder and accomplice liability to charge an accomplice with murder as well.  

\[ \text{IND. CODE ANN. § 35-42-5-1 (West 2009).} \]
This statute when compared to Indiana’s accomplice liability statute creates a paradox within the law. The direct comparison of these two statutes serve as validity that Indiana law treats all secondary parties alike despite their varied levels of contribution to the crime. This idea can be advanced further by stating that the person who renders minor encouragement or trivial assistance is treated the same as the principal criminal behind the crime.\textsuperscript{92} While Indiana’s statute requires that the accomplice “knowingly or intentionally” aid the principal in the commission of the crime, Indiana courts have construed it to follow the ‘natural and probable consequences’ doctrine.\textsuperscript{93} This turns the words, “knowingly or intentionally” meaningless concepts because an accomplice does not need to “knowingly” aid the principle to be found liable when the ‘natural and probable consequences’ of the principle’s acts will become those of the accomplice. The following case highlights the misfortunes of trivial assistance.

The facts as compared to the charges of a very recent Indiana case shed light on what should be an example of when the accomplice liability doctrine should not be applied. However, the doctrine is so forcefully pursued by the State that this the situation became one of tragic circumstances. \textit{Osborne v. State} details how three teenagers were involved

\footnote{\textit{See Generally} Dresller, \textit{supra} note 8.}\footnote{John F. Decker, \textit{The Mental State Requirement for Accomplice Liability in American Criminal Law}, 60 S.C. L. Rev. 237, 336 (2008). Decker analyzes Johnson v. State where defendant and the principal concocted a plan to rob the victim, which resulted in the principal murdering the victim and the victim’s wife. Johnson v. State, 687 N.E.2d 345 (Ind. 1997). The defendant argued that his conviction as an accomplice for felony murder was inappropriate because the principal’s action exceeded the scope of the plan to rob the victim. \textit{Id}. The Indiana Supreme Court relied on the ‘natural and probable consequences’ doctrine to affirm the defendant’s conviction. \textit{Id}.}
in a murder. Osborne possessed a gun that night. Osborne’s friend told him to pull into a Kroger’s parking lot, Osborne did, and his friend robbed, shot, and killed a man. It is uncontested that Osborne asked, “Why did you shoot him?” Osborne was as alarmed at what transpired as any unsuspecting 17 year-old would be. The State charged Osborne with murder, attempted murder, felony attempted robbery, and carrying a handgun without a license. The prosecutor utilized the accomplice liability doctrine charged Osborne with both murder and attempted murder. Osborne was convicted by a jury of attempted robbery and carrying a handgun without a license; however, acquitted him of the attempted murder charge. On Appeal, the court affirmed the contested attempted robbery charge, stating that Osborne was present at the scene of the crime and

95 Id.
96 Id.
97 Id. (The principal’s response to this question was, “He tested a gangster.” What if Osborne would have asked a different question? Possibly, “Why did you rob him?” This would show opposition to the act of robbery and served as a valid argument for the defense. However, as can be expected, Osborne chose to inquire as to the murder instead of the robbery. While all charges against Osborne were frivolous, it is unfortunate that his conviction may have been largely predicated on his omission of a follow up question).
98 Id.
99 Id. (Understanding the Accomplice Liability Statute, the State of Indiana sought horrendous charges against Osborne. If two steps of simple logic are followed, it can be shown that the charges in their entirety are hollow. The Appellate Court opined that Osborn allowed his friend to step out of the car with his gun and watched him rob the victim. If this progression of events is enough to qualify Osborne as aiding, inducing, or causing the robbery then the jury’s not guilty verdict of murder and attempted murder was incorrect. The rift between the two levels of our judicial system was constructed and perpetuated by the loose applications of Indiana’s Accomplice Liability Statute. This leaves us with two choices: convict Osborne on all charges or allow his innocence to surface. The answer is innocence and this can be accomplished by a complete abrogation of the Accomplice Liability Statute).
100 Id.
101 Id.
did not oppose it.\textsuperscript{102} Further, his conduct before, during, and after the attempted robbery is consistent with that of an accomplice even though the trier of fact rejected the accomplice liability doctrine as to the attempted murder charge.\textsuperscript{103}

The \textit{Osborne} case shows the differences between Indiana’s statute on accomplice liability and how it is interpreted, or possibly disregarded is more befitting, in the courtroom.\textsuperscript{104} The \textit{Osborne} Court provided that in order for the state to convict Osborne as an accomplice, it must prove that he knowingly or intentionally aided, induced, or caused another person to commit attempted robbery, regardless of whether that other person had been prosecuted, convicted, or acquitted of that offense.\textsuperscript{105} Thus, it must be asked: Did the young teenage driver knowingly or intentionally cause, aid, or induce the attempted robbery of the victim in a manner that warranted formal charges?

If one were to engage in even a cursory examination of accomplice liability in the United States, she would find three basic approaches. The \textit{Osborne} case would fall into the third category.\textsuperscript{106} The first approach is the “narrow category.” This is where the court only finds accomplice liability when the sole purpose of the accomplice was to act significantly with strong purpose in furtherance of the act.\textsuperscript{107} The second approach is the “intermediate category.” This looks for the required mens rea in furtherance of the act.\textsuperscript{108}

\textsuperscript{102} \textit{Id.} at 295 (The court’s rationale for affirming the attempted robbery charge was that Osborne owned the gun, watched the victim put his hands in the air, sped away, and hid the gun. The comparison of robbery and accomplice liability is particularly relevant here as the paradox becomes lucidly clear through the lens of the court’s analysis).

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.} at 293.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} Decker, supra, note 69, at 337.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}
Lastly, the third approach is the “broad category.” This holds an accomplice liable for the ‘natural and probable’ consequences of the main actor’s conduct that the accomplice somehow encourages, with mental state given no consideration. Viewing accomplice liability in three distinct categories allows the observer to place a name on the doctrine’s application in various States.

The three categories of accomplice liability focus on the intent of the accomplice. The intent of the accomplice determines her culpability, which in turn, determines her ultimate category. Depending on the state in which she resides, she may or may not be charged with the same crime as the principal actor. The problem, however, is that many courts hold mixed views about whether a person can be held liable for a crime they had no intent on furthering. Indiana law does mandate knowledge or intent to be eligible for accomplice liability. Indiana, however, is more than flexible in its definition of, “intent.”

Perhaps the teenager in Osborne did nothing to stop the robbery and murder or perhaps he was indifferent to the robbery and murder. This extensive spectrum of accomplice liability places Osborne somewhere in a conundrum, in between zero culpability and fully intentional. This allows for a broad range of what might secure a conviction. The Indiana legislature and prosecutors, created a quandary of what is actually required to be considered an accomplice. The legislature drafted the statute to

109 Id.
110 Id.
111 Rogers, supra note 1, at 1365 (This article explores the boundaries of intent in accomplice liability. While holding that an accomplice contained the intent to further a crime that was unintentional seems oxymoronic, there are instances when this is appropriate. While this may be true, many courts are extending culpability far beyond the reach of accomplice liability.)
serve as a deterrent to general criminal conduct at the expense of others. To further evince that Indiana has created and permits ad hoc application of the accomplice liability doctrine, consider that Indiana may convict on evidence of aiding or inducing even though the State charged the defendant as the principal actor. This undoubtedly serves as a safety net in the event that Indiana finds it difficult to convict on the defendant’s principal actions.

Accomplice liability may also be utilized when the principle merely attempts to commit a crime. Indiana’s “Attempt” statute reads:

(a) A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step towards the commission of the crime...[A]n attempt to commit murder is a class A felony. (b) It is no defense that, because of misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted.

Indiana’s Supreme Court has held that a separate jury instruction is warranted for accomplice liability for attempted murder. The elements of the accomplice liability

113 It is clear that Indiana permits convictions on a theory of accomplice liability without clear guidelines of what actually constitutes an accomplice. The statute utilizes key words discussed above; however, it seems that these words are often paid little attention.


116 Hopkins v. State, 759 N.E.2d 633, 637 (Ind. 2001) (Defendant and his friend entered the house of two people that he had sold drugs to in the past. Defendant and his confederate tricked the occupants of the house into believing they merely wanted to store a gun at the house; however, they had plans to commit a robbery. While the defendant was upstairs rummaging for drugs and money, his confederate held the occupants of the house in the basement at gunpoint. His confederate, without consulting the defendant, shot one of the occupants. The defendant later shot the other occupant. Both occupants survived and the defendant was convicted of attempted murder for both; however, the first occupant’s charge was predicated on the theory of accomplice liability. The trial court neglected to sufficiently instruct the jury
statute alone will not suffice for the crime. Rather, the instruction must contain: 1) the accomplice, acting with specific intent to kill, took a substantial step towards the commission of murder, and 2) that the defendant, acting with the specific intent that killing occur, knowingly or intentionally aided, induced, or caused the accomplice to commit the crime of attempted murder. This places the crime of accomplice liability for attempted murder into the “narrow” category of the classifications discussed above because the accomplice must act significantly with strong purpose in furtherance of the act, while lesser offenses remain in the “broad” category.

In Indiana, if the crime of robbery and the crime of attempted murder are viewed under the same accomplice liability scope, it is clear that two very different tests are applied. The crime of attempted murder requires that the jury be instructed about the intent of the accomplice. The crime of robbery, however, only requires that the accomplice meet the test of accomplice liability, which can be manipulated to allow a less stringent standard under the common law guidelines. While the word “intent” finds its way into both crimes, attempted murder requires a bar for the prosecution to clear. The policy implies if someone has the burning desire to be an accomplice in a crime, do it in an attempted murder because the chances of acquittal are greater than

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about the specific intent necessary to convict for attempted murder as the charge was overshadowed by accomplice liability. The appellate court reversed this accomplice liability conviction because of this sweeping application of the accomplice liability doctrine.

117 Id. “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,” IND. CODE ANN. § 35-41-25-1 (West 2009).

118 Hopkins, 759 N.E.2d 633 at 637.


120 IND. CODE ANN. § 35-41-2-4 (West 2009).
those of any lesser crime. Indiana’s legislature and prosecutor’s application of accomplice liability serves as an invitation for uneven treatment and confusion that further obfuscates the understanding of accomplice liability law in Indiana.

In the face of uneven treatment some Indiana courts actually seem to apply the doctrine in a logical manner as was the case in Blakney v. Indiana. Blakney and Alves drove to another’s property and Alves exited the car and climbed up on a fence with a “No Trespassing” sign clearly marked. Blakney remained in the driver’s seat of the car. Robert Adams, a friend of the property owner, was driving by and decided stop. He wrote down their license plate number and the state subsequently charged both Blakney and Alves with criminal trespass, a Class A misdemeanor. They were both found to be guilty as charged.

On appeal the state argued that Blakney’s conviction may be sustained on a theory of accomplice liability. The appellate court, however, strayed from the many Indiana courts that have applied traditional notions of accomplices in Indiana. The court’s reasoning mirrored that of the definition of accomplice liability according to the “narrow” category. The court stated that the facts simply show that Blakney was seated behind the

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122 Id. (Blakney drove Alves to the property where the trespass occurred. It is not my position that Blakney should receive the same criminal charge as Alves; however, her involvement clearly shows that she aided Alves in the commission of the crime. While the reversal in this scenario is an anomaly in Indiana cases it still delivers the potent message that Indiana’s interpretation of the guidelines for accomplice liability remains just that – a broad interpretation).
123 Id.
124 Id.
125 Id.
126 Id. at 545.
wheel of the car and Alves was on the gate.\textsuperscript{127} The court reasoned that Alves did not open the gate, thus there is no way that Blakney could know if his body would enter the airspace over the property.\textsuperscript{128} This decision certainly gives some clarity to the confusion of the imperceptible interpretations and applications of Indiana’s accomplice liability doctrine.\textsuperscript{129}

The Indiana common law has crafted four factors in determining whether accomplice liability exists.\textsuperscript{130} In determining whether there is sufficient evidence for accomplice liability, the court considers such factors as: (1) presence at the scene of the crime; (2) companionship with another at the scene of the crime; (3) failure to oppose commission of the crime; and (4) course of conduct before, during, and after the occurrence of the crime.\textsuperscript{131} Of course, the more factors that are present, the more likely they will advocate for the application of accomplice liability. However, it is unclear of what exactly is required under these four elements to show accomplice liability. The elements may seem to serve as bright line tests when determining accomplice liability but are actually broad principles that remain open for interpretation by prosecutors, judges, and juries.

For example, if a defendant is at the scene of the crime and did nothing to oppose the commission of the crime, he has met elements one and four. Assume that his conduct does meet the standards for conviction under the accomplice liability doctrine under

\textsuperscript{127} Id. at 546.
\textsuperscript{128} Id.
\textsuperscript{129} Finding that accomplice liability did not exist where someone drove the car to another’s property is defeating of the general application whereby prosecutors beg for an open interpretation of the elements of accomplice liability. The fact that some officials of the judicial system endeavor to apply a more closed approach to the doctrine is promising. However, this counsels for the idea that a uniform application is necessary.
\textsuperscript{130} Bruno v. State, 774 N.E.2d 880, 882 (Ind. 2002).
\textsuperscript{131} Id.
elements two and three. What will the outcome be? Even when all factors exist together and seem to serve as the underlying machinery of the crime the outcome remains factually dependent. This is to state that every case, regardless of the factors, may warrant a different outcome. This is an idea that Indiana’s judicial system should be cognizant of and incorporate the case-by-case analysis into its statutory provision concerning accomplice liability.

The previous idea may be highlighted through an Indiana Supreme Court case. In *Smith v. State* defendants Smith and Lampley were charged with murder. Smith confessed to assisting in the murder and became the principal witness against Smith. The state charged Smith as the principal actor in the crime. The prosecution built a case around the fact that Smith was the principal and Smith built his defense around the evidence that showed that he committed the murder as the principal. Later, however, a witness would testify that Smith denied making the confession and also testified that it was Tommy that committed the murder. The prosecution, worried that it may no longer be able to convict on the theory that Smith was the principal, changed its charges to convict Smith on the doctrine of accomplice liability. He was convicted under that theory and appealed. The appellate court stated that, “There appears to be no direct

133 *Id.*
134 *Id.*
135 *Id.* at 584.
136 *Id.* at 585.
137 *Id.* at 581 (This evidences the unwarranted powerful sword that a prosecutor is capable of wielding to secure a conviction through accomplice liability).
138 *Id.* at 582.
evidence of Smith’s aiding Lampley.” However, on this issue, because another party tested that Tommy admitted to the murder and the appellate court gave deference to the trial court, the appellate court affirmed the conviction under the doctrine of accomplice liability.

It is important to analyze the factors that have been set forth by the Indiana Supreme Court when considering the Smith case. Factor 1: Smith was present during the commission of the crime. Factor 2: Smith knew Lampley on a personal level. Factor 3: It is uncertain which individual actually committed the murder; however, neither person was shown to contest the murder. Factor 4: Smith testified that Lampley committed the murder. Lampley’s version, however, was quite different. He testified that he merely entered Smith’s car and went to another’s place of residence. Upon learning of Smith’s anger, he testified that he walked away. Do the guiding factors provide helpful insight into how to rule on this case? The answer may be stated succinctly. The fact that both defendants were present, knew one another, did not contest the murder, and engaged in less than desirable conduct during and after the murder does absolutely nothing to combat the uncertainty in this case. Which defendant was the principal? Which defendant was the accomplice? Was there an accomplice at all? Based on the lack of information about the principal in the crime, should two men serve a sentence based on Indiana’s guiding principles?

Possibly the foregoing case does not provide the factual scenario necessary to

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139 Id. at 585 (This statement is of sufficient magnitude to stand alone in serving as concrete validity that the accomplice liability doctrine in Indiana is in need of substantial repair. Whether one advocates for the application of this doctrine or not, no individual may state with any degree of certainty that its utilization is consistent across the state).

140 Id. at 588.
highlight the ineffectiveness of Indiana’s guiding principles. The factors may seem to be of little value or might be too vague. A case that clearly shows the ineffectiveness of the guiding principles for accomplice liability is *B.K.C. v. Indiana*.

A fourteen-year-old boy, B.K.C., entered an Indianapolis Dairy Queen with two other men.\footnote{141}{B.K.C. v. Indiana, 781 N.E.2d 1157, 1161 (Ind. App. 2003).} Subsequent to ordering, B.K.C. gave money to his friend, Terry Williams, to pay.\footnote{142}{Id.} Williams however, brandished a weapon and informed the Dairy Queen employee that he was robbing her.\footnote{143}{Id.} B.K.C. ran and hid behind a staircase until he finally asked an employee to open a door so that he could leave.\footnote{144}{Id.} The trial court adjudicated B.K.C. to be a delinquent for committing an act that would be robbery, a class B felony, if committed by an adult.\footnote{145}{Id.} On appeal, the court considered Indiana’s four guiding factors.\footnote{146}{Id.} B.K.C. argued that the evidence showed nothing more than that he happened to be at the Dairy Queen during the robbery.\footnote{147}{Id. at 1164.} His presence, however, fits squarely into the first guiding principle – presence at the scene of the crime. The appellate court stated, “We find that the evidence is sufficient to support the trial court’s adjudication as a delinquent pursuant to a theory of accomplice liability.”\footnote{148}{Id. at 1165.}

One can argue about the intricacies of the trial in the B.K.C. case and the inevitable subjectivity of those governing the proceeding. However, the opinion from the appellate court only provides that B.K.C. was present, hid behind a staircase, and left the scene.

\begin{itemize}
\item \textit{B.K.C. v. Indiana, 781 N.E.2d 1157, 1161 (Ind. App. 2003).}\footnote{141}
\item \textit{Id.}\footnote{142}
\item \textit{Id.}\footnote{143}
\item \textit{Id.} (Apparently these actions, which lead to no more culpability than presence at the scene of the crime, were enough to sustain his conviction under the accomplice liability doctrine).\footnote{144}
\item \textit{Id.}\footnote{145}
\item \textit{Id. at 1164.}\footnote{146}
\item \textit{Id. at 1165.}\footnote{147}
\item \textit{Id.}\footnote{148}
\end{itemize}
This prompts an inquiry into factors one, presence at the scene of the crime, and four, conduct before, during, and after the occurrence of the crime. These factors provided enough foundation for B.K.C.’s charges and ultimate conviction. It is important to consider what constitutes sufficient evidence within these factors to cultivate for conviction beyond a reasonable doubt. In B.K.C. v. Indiana, it cannot be stated that the factors in the previous case lend themselves towards the same charge and sentencing as the principal actor. Thus, this case may be placed into the “broad” category because the ‘natural and probable consequences’ of B.K.C.’s conduct show that he, as an accomplice, somehow encouraged the crime, with his mental state given little to no consideration.\footnote{Decker, supra note 58, at 237.}

It is evident that the Court did not apply the statute under a form of strict interpretation as B.K.C.’s mens rea was given no consideration.

Before venturing into other states and how they apply accomplice liability it will be important to maintain a broad view of Indiana’s application of the doctrine. Indiana mandates that one commits the same offense as the principal actor if she intentionally aids, induces, or causes another person to commit the offense.\footnote{IND. CODE ANN. § 35-41-2-4 (West 2009).} Accomplice liability does not hold a strong connection to the accomplice’s mens rea. Accomplice liability may be utilized even when the “but for” test of causation is lacking; thus, slightly aiding another could suffice in a conviction as if the accomplice were the principal. This is perpetuated by the felony-murder doctrine because not only is one crime created, but two. For example, if X and Y conspire to rob Z’s home and during the commission of the robbery Y unexpectedly begins beating Z, X will be held liable for the battery and strong-armed robbery of Z, even though he did not intend this result. This is the first creation of
a crime because X did not hold the requisite mens rea for the crime. Now assume that Z
dies as a result of the battery that Y issued him. Y will may be prosecuted under the
felony-murder doctrine and X, because he was an accomplice to the initial robbery, may
be prosecuted for felony-murder as well. This is the second fabrication. What should
arguably be a theft charge for X has expanded into a murder charge through the coupling
of accomplice liability and felony-murder.

As stated above, there are three basic approaches to accomplice liability.\textsuperscript{151} Indiana
uses all three. If the prosecution feels that it may not be able to convict on the theory that
an actor was the principal, it has a backup plan – accomplice liability.\textsuperscript{152} A separate jury
instruction is warranted for accomplice liability in the crime of attempted murder
apparently advancing the idea that intent is necessary in this crime, but for no others.\textsuperscript{153}
Lastly, Indiana considers four factors in considering whether accomplice liability is
appropriate for a given case.\textsuperscript{154}

Indiana’s framework for accomplice liability is often unfair and illogical. When this
framework is analyzed, it is blatant that accomplice liability in Indiana is in need of
reform. Indiana should no longer strictly adhere to the Latin proverb, “If you share your
friend’s crime, it becomes your own.”\textsuperscript{155} Our judicial system is capable of seeking justice
in ways that do not permit a broad sweeping statement to govern the participation of all
accomplices. With that goal in mind, it is important to analyze how other States apply
accomplice liability doctrine.

\textsuperscript{151} Decker, \textit{supra} note 58, at 237.
\textsuperscript{152} Whitner v. State 696 N.E.2d 40, 44 (Ind. 1998).
\textsuperscript{153} Hopkins v. State, 759 N.E.2d 633, 637 (Ind. 2001).
\textsuperscript{154} Bruno v. State, 774 N.E.2d 880, 882 (Ind. 2002).
\textsuperscript{155} http://thinkexist.com/quotation
V. California Accomplice Liability

Shouting words of encouragement, acting as a lookout, or merely being present and ready to aid the perpetrator constitute accomplice liability in California.\(^{156}\) California courts have adopted an approach that has repeatedly stressed that the test is whether the accused in any way directly or indirectly, aided the perpetrator by acts or encourages him by words or gestures.\(^{157}\) One example is that once the defendant is charged, statements that he was not aware of a plan to commit a crime is not sufficient to constitute proof that he did not know about the primary actor’s criminal intent.\(^{158}\) California courts allow circumstantial evidence to prove that the accused accomplice had knowledge of the crime, thus reducing the intent requirement.\(^{159}\)

Old common law mandated a distinction between principals in the first degree, principals in the second degree, and accomplice before the fact.\(^{160}\) California, however, like many states has done away with this distinction allowing accomplice liability to be utilized on the aiding and abetting theory.\(^{161}\) Thus, California takes the modern view that accomplice liability is not a distinct crime, but a way of committing a crime.\(^{162}\) With this in mind, accomplice liability in California, like in Indiana, always depends on the occurrence of some other offense, whether or not another person is prosecuted for that

\(^{157}\) Lawrence, *supra* note 9, at 1525.
\(^{158}\) *Id.* at 1531.
\(^{159}\) *Id.*
\(^{160}\) Mueller, *supra* note 152, at 2183.
\(^{161}\) *Id.*
For example, A cannot be prosecuted for accomplice liability in any crime without B physically conducting the crime.

The pertinent sections of the California statute concerning accomplice liability read as follows:

All 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, or, not being present, have advised...are principals in any crime so committed.164

The California statute is similar to that of the Indiana statute in that both transform an accomplice into a principal actor if the accomplice aids the principal.165 Also similar to Indiana, California does not seem to be rigidly bound by its statute as it permits broad interpretation of what is an actual accomplice. What happens, for instance, when an accomplice assists or encourages a confederate to commit one crime, and the confederate commits another, more serious crime? A California court has recently shed light on this dilemma by stating that, “Whether the accomplice may be held responsible for that non-target offense turns not only upon a consideration of the general principles of accomplice liability but also upon a consideration of the ‘natural and probable consequences’ doctrine.166 Thus, a defendant may be held criminally responsible as an accomplice not only for a crime he or she intended to aid and abet, but also for any other crime that is the ‘natural and probable consequence’ of the target crime.”167

The ‘natural and probable consequence’ doctrine is an injustice to criminal

163 Id.
164 CAL PENAL CODE § 31 (West 2009).
166 Rogers, supra note 1, at 1378.
167 Id.
defendants by extending liability past the accomplice’s intentions to aid in a crime.

Limiting liability is logical because of the distinction between situations where the accomplice actively encourages the principal to engage in specific conduct that causes a specific harm versus situations where the accomplice intends that the principal engage in reckless behavior but does not direct the specific act that causes a specific harm. As Audrey Rogers points out in her article, accomplice liability should not apply in the latter situations because the principal’s culpability stems from conduct that differs or exceeds what the accomplice intended, even if the principal’s acts are foreseeable. In its most basic form, the ‘natural and probable consequences’ doctrine contravenes the most fundamental tenet of criminal law that punishment be based on blameworthiness. An unfortunate utilization of the ‘natural and probable consequences’ doctrine as it pertains to accomplice liability is palpable in People v. Hoang.

On May 31, 2003, Hein Tran, his brother, and four of his friends were at a strip mall when Tran spotted a young woman named Vannie. Vannie was Thai’s girlfriend and Hein and Vannie’s conversation resulted in an argument. Vannie called Thai on her cell phone to explain the situation and Thai naturally made the decision to inquire further. Thai rode with Ziggy, a known gang member, to the strip mall with another car containing five others following close behind. Thai would later testify that he was

\(^{168}\) Id. 
\(^{169}\) Id. 
\(^{170}\) Id. 
\(^{171}\) People v. Hoang, 51 Cal. Rptr. 3d 509, 511 (Cal. Ct. App. 2007). 
\(^{172}\) Id. 
\(^{173}\) Id. at 512. 
\(^{174}\) Id.
unaware that the other car was ever following them.\textsuperscript{175}

Upon arrival a heated argument ensued only to be abruptly ended by Ziggy stabbing Tran in the back.\textsuperscript{176} Thai denied involvement as a gang member, although he knew Ziggy was and stated that he had no idea that Tran would be stabbed and that it surprised Thai.\textsuperscript{177} Thai was charged with attempted premeditated murder and criminal street gang terrorism.\textsuperscript{178} Thai was convicted on both counts and was sentenced to 15 years to life in prison and without parole eligibility for 15 years.\textsuperscript{179}

The appellate court stated that the jury was instructed it could find Thai guilty of attempted murder if it found beyond a reasonable doubt that (1) he aided and abetted the commission of an assault with a deadly weapon, (2) the person who actually committed the assault with a deadly weapon also committed attempted murder, and (3) attempted murder was a natural and probable consequence of assault with a deadly weapon.\textsuperscript{180} The challenge to the instruction was upheld under the following reasoning: (1) The jury could infer that Thai could have expected that the men with him were gang members; (2) the jury could infer that if a group of gang members responded in such an overwhelming fashion to a perceived slight against Thai’s girlfriend, Thai would be aware some of the gang members possessed weapons and would be likely to use them if the occasion arose;

\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.} (A basic examination of the facts of this case would leave most reasonably individuals without any basis on which they may utilize the natural and probable consequences doctrine to hold Thai accountable for premeditated attempted murder. He merely showed up at a strip mall to get his girlfriend. Unfortunately, a creative doctrine has creative followers. The prosecution used the fact that he was with gang members to attach a premeditated attempted murder charge).
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.} at 513.
(3) Thai did not attempt to determine if Tran was seriously injured; (4) did not provide medical assistance; (5) did not call for paramedics; (6) and left before the police arrived. Thus, his actions before, during, and after the incident are consistent with someone aiding and abetting an assault with a deadly weapon, as the jury found.\footnote{Id. at 514.}

The court employed six points to uphold a three-pronged jury instruction.\footnote{Id.} These six points are: 1) Thai may be found guilty of pre-meditated murder through criminal street gang terrorism because he was with gang members; 2) the fact that they all went with him to the strip mall allows us to infer that he knew they had weapons and would likely use them; 3) Thai did not inquire into any injuries; 4) Thai did not actively attempt to aid the victim; 5) he did not call for assistance; 6) he left before the police arrived and people that act in this manner might have aided and abetted an assault with a deadly weapon and that is enough to affirm the conviction.

Two conflicting statements from California’s Supreme Court provide insight into how courts may make ad hoc decisions often on arbitrary grounds such as in \textit{People v. Hoang}. The Supreme Court of California stated: when an accomplice chooses to become a part of the criminal activity of another, she says in essence, “your acts are my acts,” and forfeits her personal identity.\footnote{People v. Prettyman, 926 P.2d. 1013, 1018 (Cal. 1996).} The court may euphemistically impute the actions of the perpetrator to the accomplice; in reality, the court demands that she who chooses to aid in a crime forfeits her right to be treated as an individual.\footnote{Id.} The court then goes on to seemingly break from that position in the very next paragraph of its opinion.\footnote{Id.}

\footnotesize{
\begin{flushleft}
\textit{Id.}\footnote{Id. at 514.} at 514.
\textit{Id.}\footnote{Id.}.
\textit{Id.} \footnote{People v. Prettyman, 926 P.2d. 1013, 1018 (Cal. 1996).} \\
\textit{Id.}\footnote{Id.}.
\textit{Id.}\footnote{Id.}.
\end{flushleft}}
that to prove the defendant is an accomplice the prosecution must show that the defendant 
acted with knowledge of the criminal purpose of the perpetrator and with an intent or 
purpose either of committing, or of encouraging or facilitating the commission of the 
offense.\textsuperscript{186} With these two very different expressions about the application of 
accomplice liability from California’s highest court, there remains a gaping loophole 
through which accomplice liability may be applied according to the objectives of 
prosecutors. It seems then, that a prosecutor may view accomplice liability law in 
California as more of a guideline than statutory law. A prosecutor in California is given 
great deal of leeway, of which she can seek convictions for individuals of principals 
regardless of their true role in the crime. It is clear that in California accomplice liability 
in is an area of criminal law that consists of islands of light in a sea of darkness.\textsuperscript{187} 
Florida largely follows this same metaphor.

\textbf{VI. Florida Accomplice Liability}

Consider Florida’s statutory provision governing accomplice liability.

\begin{quote}
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.\textsuperscript{188}
\end{quote}

While presence may not be a requirement to be convicted under Florida’s 
accomplice liability statute the Florida courts have been clear on a requirement that 
seems to run counter to the statute. It has been established in Florida that to become 
principally liable two elements must be present: (1) the defendant must intend that the 

\textsuperscript{186} Id.
\textsuperscript{187} Lawrence, \textit{supra} note 9, at 1525.
\textsuperscript{188} \textsc{Fla. Stat. Ann.} § 777.011 (West 2009).
crime be committed; and (2) the defendant must do some act to assist the other person in actually committing the crime.\(^{189}\) This rule of law places Florida in the “intermediate” category of accomplice liability.\(^{190}\) The “intermediate” category searches for the required mens rea of the defendant and it is encouraging to see that Florida has made an attempt to escape the “broad” category.\(^{191}\) However, it is apparent that arbitrary applications of this doctrine still remain present in Florida.

The legislature in Florida, like many other states, is clear that accomplices rendering any assistance may be punished as the principal.\(^{192}\) When analyzing accomplice liability within the scope of felony murder, it is clear that if the crime is committed by the principal, the accomplice is guilty of that crime, not of a separate and lesser offense of “aiding and abetting” even though these elements are required to qualify as an

\(^{189}\) Barron v. State, 990 So.2d 1098, 1110 (Fla. Dist. Ct. App. 2007) (Four men and a woman concocted a plan to rob an unsuspecting homeowner. The woman knocked on the door of Mr. Cody and indicated she was having car trouble. Soon thereafter, the men rushed the house. Mr. Cody’s son ran upstairs and grabbed a gun. He managed to shoot two of the men. He hit the defendant in the neck and the defendant stumbled back outside only to find that another battle had already transpired. The woman ordered one of the other men to shoot Mr. Cody because he had seen her face. He complied, paralyzing Mr. Cody. The defendant, who was upstairs at the time the events occurred that lead to Mr. Cody’s shooting was charged with attempted premeditated murder. The court held that because the attempted murder occurred while he was attempting to resist during the commission of the attempted robbery, that the shooting fell within the original criminal design and thus, the shooting did not constitute an independent criminal act. The court noted that the defendant was not some stranger unrelated to the common scheme or plan to rob him. This, the court stated, comports with the rules of accomplice liability).

\(^{190}\) Decker, supra note 58, at 237.

\(^{191}\) Id.

\(^{192}\) See Id.
accomplice.\textsuperscript{193} In Florida, the felony murder rule and the law of principals combine to make a defendant liable for the acts of his co-defendants.\textsuperscript{194} Stated more generally, defendants are generally held responsible for the acts of their co-defendants.\textsuperscript{195} As perpetrators of an underlying felony, co-defendants are principals in any homicide committed to further or prosecute the initial common design.\textsuperscript{196} One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime.\textsuperscript{197}

When considering the sweeping nature of the preceding statute there is no doubt that by lending the car to an individual to further his acts of a robbery, a person has aided in a robbery. Now imagine that during the robbery the man that drove the car becomes involved in an argument and murders the inhabitants of the house. It is not plausible that the individual that lent the car would be accountable for murder. Attempting to attach the lending of the car to murder under both the felony murder rule and the accomplice liability doctrine would likely prove to be a hollow exercise.

An intoxicated 20-year-old named Ryan Holle lent his Chevrolet Metro to a friend enabling him to go rob a safe in the home of a marijuana dealer.\textsuperscript{198} That decision, prosecutors later said, was tantamount to murder.\textsuperscript{199} The man that attempted to rob the safe killed the 18-year-old daughter of the marijuana dealer during the commission of the offense.

\textsuperscript{193} Dressler, supra, note 86, at 433.
\textsuperscript{194} Bryant v. State, 412 So.2d 347, 350 (Fla. 1982).
\textsuperscript{195} Barron v. State, 990 So.2d 1098, 1104 (Fla. Dist. Ct. App. 2007).
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} http://www.nytimes.com/2007/12/04/us/04felony.html
\textsuperscript{199} Id.
Ryan Holle was a mile and a half away but was convicted of murder under Florida’s accomplice liability statute. David Rimmer, a prosecutor explained the theory to the jury in just twelve words: “No car, no crime. No car, no consequences. No car, no murder.” Now attempt to fit lending a car into the accomplice liability statute to secure a murder conviction. Certainly, most individuals would engage in an analysis wrought with greater complexities than that of the prosecutor’s. These twelve words, however, were all that was necessary to obtain Holle’s conviction because by lending the car and the application of the felony murder doctrine, murder was imputed to Holle.

Even though Holle was not at the scene of the crime during its commission, Florida courts have been clear that its statute on accomplice liability eliminates the distinctions between those who are actually or constructively present at the commission of the offense. Holle was not at the scene of the crime, nor did he engage in the planning of the crime, or otherwise lend any significant assistance in the furtherance of the robbery, yet under the statute a person is a principal in the first degree whether he actually commits the crime or merely aids, abets, or procures its commission. Possibly lending the vehicle was the procurement of the crime; however, it must be asked how far society

\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{State v. Reid, 886 So.2d 265, 266 (Fla. Dist. Ct. App. 2004) (The court stated that no distinction is to be made between those who are the brains of the crime and those who are the arms of the crime. Reid may have been the brain behind the crime; however, the jury convicted him of robbery with a firearm and attempted robbery with a firearm, yet specifically found that he did not carry a firearm during the robbery and attempted robbery. The appellate court said that this can only be explained as a successful strategy to label Reid as the principal who was not actually at the commission of the offense).}
\footnote{Hodge v. State, 970 So.2d 923, 927 (Fla. Dist. Ct. App. 2008).}
is willing to permit this line of causation to run.

It is clear that Florida engages in the same arbitrary utilizations of accomplice liability as Indiana and California. Further skewing its sense of justice, however, is Florida’s coupling of accomplice liability and felony-murder. In Florida, the felony-murder rule and the law of principals combine to make a felon liable for all of the acts of his co-felons. Additionally, whoever aids, hires, or otherwise procures a criminal offense to be committed is a principal and may be charged, convicted, and punished as such. These two statutes thus make a felon and his or her co-defendant equally responsible for a murder that occurs during their jointly-committed felony. Simply put, one’s presence during the commission of a felony resulting in murder will likely ascertain and, on appeal, sustain her conviction of murder as the state is armed with two doctrines that cast a far-reaching shadow over the criminal justice system.

VII. Illinois Accomplice Liability

Illinois provides a liberal or narrowly construed statute that seems to break from the sweeping language of the statutes listed above. Illinois’ statute on accomplice liability provides the following information:

§5-1...A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both.

§5-2...A person is legally accountable for the conduct of another when: (a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or (b) The statute defining the offense makes him so accountable; or (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such

206 Bryant v. State, 412 So.2d 347, 350 (Fla. 1982).
208 Id.
commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning of the commission of the offense. However, a person is not so accountable, unless the statute defining the offense provides otherwise, if: (1) He is a victim of the offense committed; or (2) The offense is so defined that his conduct was inevitably incident to its commission; or (3) Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following; 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.  

The narrow application of accomplice liability works to defeat arbitrary applications. Illinois’ statute concerning accomplice liability catches three types of acts but allows another three to escape. Section 5-2 defines accomplices by utilizing a person’s mental state, other criminal statutes, and the physical actions of the accomplice. This section, however, goes on to provide limiting components. These limitations manifest themselves by highlighting whether the accomplice is a victim of the offense; whether his conduct was inevitably incident to the crime’s commission; and whether he terminates his efforts.

Illinois’ statute, relative to Indiana, California, and Florida’s statutes concerning accomplice liability is plainly constructed with a striking degree of specificity. The

\[210\] 720 ILL. COMP. STAT. 5/5-2 (2009).
\[211\] Id. (Part “b” of the statute allows the legislature to create a catchall by drafting other criminal statutes that permit for the conviction of an accomplice notwithstanding the definition of the actual accomplice liability statute. While the legislature has provided for limitations on the accomplice liability statute, it made sure to leave a window open that will allow for convictions to pass if the state so chooses).
\[212\] Id.
\[213\] Id. (These limitations are encouraging when compared to the other state’s statutes on accomplice liability. It is without question that the states previously discussed do takes these considerations under advisement; however, courts might often be left to precedent that can easily be manipulated allowing for a broad interpretation).
‘natural and probable consequences’ doctrine is at odds with the language, “incident to the crime’s commission” in the Illinois accomplice liability statute. The ‘natural and probable consequences’ doctrine, as discussed above, permits a person who encourages or facilitates the commission of a crime to be criminally liable not only for that crime, but also for any other crime that is a natural and probable consequence of the target crime. Illinois appears to break away from the ‘natural and probable consequences’ doctrine by not holding an accomplice accountable for crimes so defined that her acts are incident to the commission of the crime. Under the ‘natural and probable consequences’ doctrine, however, it makes no difference that the accomplice’s acts are merely incident to the principal’s crime. Rather, these incident acts secure the accomplice’s conviction. Precedent within Illinois, however, dilutes the statutory language and places it at odds with accomplice liability.

Regardless of the language in the Illinois statute concerning accomplice liability, Illinois courts look at the circumstances surrounding the perpetration of the crime, such as the defendant’s presence at the scene of the crime, the maintenance of a close affiliation with the perpetrator after the commission of the crime and the failure to report the crime. In People v. Cassell, C.G. testified that she was in her neighbor’s apartment when her ex-boyfriend, Simmons, entered and pulled C.G. outside and told her to get into a car. Vernetta Cassel was the driver. Simmons and Cassel hit C.G. and Simmons

214 People v. Hoang, 51 Cal. Rptr. 3d 509, 513 (2006).
217 Id. at 658.
218 Id.
eventually had intercourse with C.G. against C.G.’s will.\textsuperscript{219} This occurred while Cassel drove the car.\textsuperscript{220} Cassell eventually stopped and C.G. exited the car and knocked on the door of the first house she encountered for help.\textsuperscript{221}

Cassell testified that she did in fact drive the vehicle but decided to stop, get out, and make a phone call.\textsuperscript{222} Upon her return she witnessed C.G. being sexually assaulted.\textsuperscript{223} In either recollection of the events that occurred, Cassell was present at the scene of the crime, had a close affiliation with the perpetrator after the commission of the crime, and failed to report the crime. The trial court found Cassell guilty of aggravated criminal sexual assault and aggravated kidnapping and sentenced her to three consecutive six-year terms of imprisonment.\textsuperscript{224}

Sexual assault is a deplorable act and often there are accomplices involved in ensuring that one or multiple people may conduct sexual assault upon a victim. While the accomplice liability doctrine likely served its purpose in the \textit{Cassell} case, the appellate court’s analysis seems to broaden the application of the accomplice liability statute. The court stated that Cassell drove Simmon’s to C.G.’s building and watched as Simmons dragged C.G. out of the building by her collar and began beating her.\textsuperscript{225} Cassell also hit and beat C.G. Cassell then drove Simmons and C.G. to a remote location where Simmons threatened to kill C.G. and then sexually assaulted her.\textsuperscript{226}

Later, Cassell drove away from Simmons and C.G. as Simmons dragged C.G. into

\begin{itemize}
\item \textsuperscript{219} See \textit{Id}.
\item \textsuperscript{220} \textit{Id}.
\item \textsuperscript{221} \textit{Id}.
\item \textsuperscript{222} \textit{Id.} at 660.
\item \textsuperscript{223} \textit{Id}.
\item \textsuperscript{224} \textit{Id}.
\item \textsuperscript{225} \textit{Id.} at 664.
\item \textsuperscript{226} \textit{Id}.
\end{itemize}
an alley and Cassell failed to report the crime.\textsuperscript{227} Cassell also hit C.G. and threatened to kill her if she told anyone what happened.\textsuperscript{228} These actions undoubtedly council for the utilization of the accomplice liability doctrine. The court, however, could have relied solely on the statute to affirm the conviction so as to limit the accomplice liability doctrine within the bounds set forth by the legislature. Instead, the court relied on other precedent, thus expanding accomplice liability.\textsuperscript{229}

Illinois’ accomplice liability statute makes no mention of the defendant’s presence at the scene of the crime, the maintenance of a close affiliation with the perpetrator after the commission of the crime or the failure to report the crime; however, this is the precedent that the court on which the court relied. The accomplice liability statute would have served its purpose well in the \textit{Cassell} case, yet the court searched for the outer boundaries of the doctrine, relying on case precedent that differs from the statute to affirm Cassell’s conviction.

Illinois Senate’s introduction of Bill 1300 may show that the state is attempting to embrace common law accomplice liability precedent in Illinois. This can only be to extend the reach of accomplice liability. Section 5/5-2 of the Illinois Code would include the new following language:

\begin{quote}
...When two or more persons engage in common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts. Mere presence at the scene of a crime does not render a person accountable for an offense; a person’s presence at the scene of the crime, however, may be considered with other circumstances by the trier of fact
\end{quote}

\textsuperscript{227} \textit{Id.}.
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.} at 663.
when determining accountability...

The passage of this bill will cast a much larger net, convicting more individuals and further arming prosecutors. The Bill includes language that references presence at the scene of the crime. While presence will not be considered to be dispositive, it may be considered along with other circumstances by the trier of fact. This language will align precedent and the statutory provision governing accomplice liability by granting the trier of fact in Illinois with the power to consider “other circumstances” when determining accountability. This will place Illinois closer to the previously discussed States in their application of the accomplice liability doctrine.

As previously mentioned, an accessory before the fact is one who orders, counsels, encourages, or otherwise aids and abets another to commit a felony and who is not present at the commission of the offense. However, the distinction between an accessory before the fact and a accessory after the fact has been abrogated. 

People v. Ross illuminates the fact that Illinois no longer follows this distinction. Ross reaffirms, six years later, that Illinois still relies on outside factors utilized in People v. Cassell. In People v. Ross, Hannah was a “coordinator” in the Gangster Disciples street gang. Hannah was in charge of all the juvenile members of the gang. In an attempt to

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231 Id.
232 Id.
233 Id.
234 LaFave, supra note 6, at 790.
236 Cassell, 669 N.E.2d at 663.
237 Ross, 769 N.E.2d at 958 (Hannah is a male and was a juvenile during his trial and his first name is not provided within the opinion).
238 Id.
accumulate money for guns for an impending war with a rival gang, Hannah held a meeting to verbalize his plan to rob a convenience store.\textsuperscript{239}

Hannah planned to be involved in the robbery; however, was not able to because his mother made him attend school on the day of the robbery.\textsuperscript{240} Later that day Hannah spoke to Ross, one of the juveniles involved in the robbery, who indicated that it did not go as planned.\textsuperscript{241} Jamel, another juvenile, admitted to Hannah that he shot the victim in the store because the victim swung a stick at him; however, he never intended to shoot the victim.\textsuperscript{242} Hannah was charged and found guilty of first degree murder and armed robbery on a theory of accomplice liability.\textsuperscript{243}

On appeal, the court stated that while Hannah was not present at the scene of the crime, it is the communication of intent, not the naked act of withdrawal, that determines whether a defendant is released from accountability.\textsuperscript{244} Hannah’s absence did not wholly deprive the other defendants from committing the crime as the record strongly suggests.\textsuperscript{245} Also, Hannah’s post crime behavior in inquiring about whether any money was ascertained from the robbery tends to show participation in the crime and with all of

\textsuperscript{239} \textit{Id.}
\textsuperscript{240} \textit{Id.} at 959.
\textsuperscript{241} \textit{Id.}
\textsuperscript{242} \textit{Id.}
\textsuperscript{243} \textit{Id.} at 960.
\textsuperscript{244} \textit{Id.} at 966. It is unclear why this distinction is drawn in such a clear-cut fashion. It seems that one may formulate intent to be a part of a crime and then verbally withdraw yet remain on the hook. By what device must courts use to determine the accomplice’s intent to withdraw even after he expressly verbalizes this intent and is not present at the scene of the crime?\textsuperscript{245} \textit{Id.} at 967. Case precedent in Illinois suggests that one must “wholly deprive” others from completing a crime in order to complete a successful withdraw from being an accomplice to the crime. This is a rigorous standard that many individuals will find trouble completing.
these facts taken together, even absent Hannah’s presence, the trial court did not err in refusing to give a withdrawal instruction.246

Again, the court seemed to stretch accomplice liability, if only slightly, to ensure conviction. The Illinois statute governing accomplice liability above reads in part, “A person is not accountable...if before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following; wholly deprive his efforts of effectiveness in such commission...”247 The court in Ross, however, relied on language from case precedent that states that, “Legal accountability ends when a defendant detaches himself form the criminal enterprise by whole depriving the enterprise of the effectiveness of his efforts...”248 The obvious differences between Illinois’ accomplice liability statute and case precedent is that the statute permits withdrawal if the accomplice terminates his efforts to promote the crime, while the case precedent states that the accomplice must deprive the criminal enterprise of the effectiveness of his efforts.

The distinctions may leave some dubious in their acceptance of the very real implications that slight language changes may play in the accomplice liability doctrine. However, it is clear that if the statute was utilized without accompanying precedent that Hannah’s case would have been much more optimistic. This is not to suggest that Hannah would, or should have been released from charges; however, by permitting the judicial system to bolster Illinois’ accomplice liability statute with helpful language, accomplice liability remains, to some extent, out of the hands of the legislature.

246 Id.
During an age when political crimes are serving as particularly divisive among residents of Illinois it would seem that accomplice liability would be being utilized frequently.\textsuperscript{249} Often the degree of complexity that surrounds such crimes mandates involvement from an array of sources. However, as other state’s judicial systems have shown, the doctrine often lies dormant in cases where its use is expected and is applied in cases where its use challenges societies’ understanding of criminal law.\textsuperscript{250}

It is evident that Illinois, like the States discussed above, has its problems with accomplice liability law. Current accomplice liability law in Illinois, like many States, is unjust in various regards, not the least of which is the fact that perpetrators, substantial participants, and tangential accomplices are often treated alike in the guilt phase of a criminal trial.\textsuperscript{251} While Illinois’ statute does provide a fairer framework by which accomplices will be tried, there is much work to be done to ensure that Illinois does not fall into the illogical category of states by permitting the ‘natural and probable consequences’ doctrine to prevail regardless of the governing statutory provision.

\textbf{VIII. Reformation and Conclusion}

It has been argued that the reasons for imposing culpability upon a secondary actor stem from an innate sense of justice: one who willingly participates or aids in the

\begin{footnotes}
\textsuperscript{249} \url{http://www.chicagotribune.com/news/local/chi-ready-for-reform-15-feb15,0,6270951.story}
\textsuperscript{250} The doctrine may find more stable ground in crimes that do require a physical act because this does not present such an utter challenge to our innate understanding of the elements required to commit a crime. In order to commit crimes that do not require physical acts, many individuals may be involved and their words can serve as a catalyst for the crime. To commit robbery, for example, if one person sits out the physical portion of the crime then it seems to defeat the very principle that allows conviction.
\textsuperscript{251} Dressler, \textit{Supra}, note 85, at 488.
\end{footnotes}
commission of a crime deserves punishment.\textsuperscript{252} The interrelationship between blame and punishment is the foundation of all criminal law and is said to justify the doctrine of accomplice liability.\textsuperscript{253} Some measuring device, however, is necessary to assess blame and a corresponding level of punishment. That device is found in the intent and act requirements that are components of accomplice liability.\textsuperscript{254}

It was stated above that a shift in accomplice law began when it became clear that it was difficult to explain the rules for distinguishing some accomplices from others as this was as difficult to uncover as the theoretical explanation for why we punish accomplices at all.\textsuperscript{255} While this may be true, it does not permit the judicial system to sidestep correct and fair outcomes. The judicial system eradicated the distinctions of accomplice liability for the sake of organization in an effort to eliminate the various, sometimes confusing, distinctions. One must ask, however, is eliminating confusion really worth unjustly punishing someone that does not hold the required mental state and intent to be punished as a principal? Considering this, a return to the common law distinctions between different types of accomplices is necessary. The remainder of this article will advocate for the resurrection of the common law distinctions between accomplices and show that it can be done in an efficient and clear manner.

Our Supreme Court has stated that at common law, the subject of principals and accessories was riddled with intricate distinctions.\textsuperscript{256} Those “intricate” distinctions are as

\textsuperscript{252} Rogers, \textit{supra} note 1, at 1355.
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} \textit{Id.} at 1356.
\textsuperscript{255} Dressler, \textit{supra}, note 22, at 91
follows: (1) principal in the first degree; (2) principal in the second degree; (3) accessory before the fact; and (4) accessory after the fact.\textsuperscript{257} A simple explanation of the preceding distinctions shows that they are not too confusing to be applied to our current judicial framework and the return of these distinctions will properly balance judicial efficiency and fundamental fairness.

A principle in the first degree may simply be defined as the criminal actor.\textsuperscript{258} He is the one who, with the requisite mental state, engages in the act or omission which causes the criminal result.\textsuperscript{259} Principals in the second degree were required to be present at the scene of the crime and aid, counsel, command, or encourage the principal in the first degree in the commission of the offense.\textsuperscript{260} Common law allowed for the principal in the second degree to be constructively present, which allowed the secondary actor to be physically absent from the scene of the crime but aid and abet the primary actor from a distance.\textsuperscript{261} An accessory before the fact is one who orders, counsels, encourages, or otherwise aids and abets another to commit a felony and who is not present at the commission of the offense.\textsuperscript{262} Accessories after the fact are those that rendered assistance after the crime was complete.\textsuperscript{263}

The principal in the first degree actually commits the crime while the principal in the second degree aids in the commission of the crime, while an accessory before the fact

\textsuperscript{257} LaFave, \textit{supra} note 8, at 789; Dressler \textit{supra} note 8, at 94-95.
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} \textit{Id.}
\textsuperscript{260} \textit{See} Standefer, 477 U.S. at 15.
\textsuperscript{261} Dressler \textit{supra} note 8, at 94-95.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} Standefer, 477 U.S. at 15.
aids in the commission of the crime but is not present and the accessory after the fact renders assistance after the crime is complete.\textsuperscript{264} If the judicial system is to give any merit to mens rea, actus reus, and causation, these distinctions must stand and their degree of punishment should be proportionate to the level of involvement of the accomplice for purposes of fairness and uniformity.

The benefits of the return of the common law distinctions are apparent through an example provided by Dressler. If \( A \) fires a gun at \( B \) with the intention of killing \( B \), but \( B \) is already dead from an unrelated source, \( A \) is not legally responsible for \( B \)'s death.\textsuperscript{265} \( A \) may be morally as evil as if he had caused the death.\textsuperscript{266} Nonetheless, despite \( A \)'s actions and mens rea, he is not a murderer because, quite simply, he did not cause the death.\textsuperscript{267} He may be punished, however, for any harm he did cause.\textsuperscript{268} Similarly, if \( B \) were alive at the time of the shooting, but \( A \)'s endeavors to kill misfire, we punish \( A \) for the harm he caused and not for the harm he tried to cause.\textsuperscript{269} We prosecute \( A \) for assault or attempted murder, but not for murder.\textsuperscript{270}

Significantly, the common law, which at first did not punish attempt at all, subsequently punished it at a lesser level than the completed offense.\textsuperscript{271} Even today, punishment for attempt ordinarily is mitigated.\textsuperscript{272} In every case, the law demands some

\textsuperscript{264} See generally Standefer, 477 U.S. at 15; LaFave, supra note 8, at 789; Dressler supra note 8, at 94-95.
\textsuperscript{265} Dressler supra note 8, at 99.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id. at 100.
\textsuperscript{271} Id.
\textsuperscript{272} Id.
form of causation.\textsuperscript{273} Accomplice liability, however, is complete without such a causal link.\textsuperscript{274} It is not that some cases are exceptions to the requirement of causation.\textsuperscript{275} Simply, there is no such requirement.\textsuperscript{276} Although some assistance apparently is required, an accomplice is accountable for the actions of the perpetrator even if the desired consequences would have occurred precisely when they did without her conduct.\textsuperscript{277} The most trivial assistance is sufficient basis to render the secondary actor accountable for the actions of the primary actor.\textsuperscript{278} The common law distinctions of accomplice liability combat this problem.

The Model Penal Code and the majority of states no longer maintain the common law distinctions of accessories and principals in their statutory language; however, six states continue to use these common law terms in their legislation.\textsuperscript{279} 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.”\textsuperscript{280} Vermont utilizes common law language as well. Using the same common law terminology, it states that “[a] person who is accessory before the fact” is equally as

\textsuperscript{273} \textit{Id.} at 101. (If the law demands some form of causation to hold an individual liable for a crime there is no reason that accomplice liability should be carved out as an exception. To eliminate confusion is not a substantial enough reason to justify unfair punishment).

\textsuperscript{274} \textit{Id.} at 102.

\textsuperscript{275} \textit{Id.}

\textsuperscript{276} \textit{Id.}

\textsuperscript{277} \textit{Id.}

\textsuperscript{278} \textit{Id.}


liable as the “principal offender.” Virginia's statute refers to both the “principal in the second degree” and the “accessory before the fact.”

Merely incorporating common law language, however, does not defeat the injustice that current accomplice law has created. States must utilize this language in order to set forth the differences in the varying levels of contribution of each accomplice and provide for their punishments accordingly. Due to the fact that no United States jurisdiction provides for the differences in intent and contributions for accomplice law, it is necessary to look at other countries. Sweden, while not putting common law distinctions to work, does permit its judicial system to distinguish between intent and varying levels of contribution in its penal code.

Sweden’s penal code provides:

Punishment as provided for an act in this Code shall be imposed not only on the person who committed the act but also on anyone who furthered it by advice or deed. The same shall also apply to any other act punishable with imprisonment under another Law or statutory instrument. A person who is not regarded as the perpetrator shall, if he induced another to commit the act, be sentenced for instigation of the crime and otherwise for aiding the crime. Each accomplice shall be judged according to the intent or the negligence attributable to him.

Sweden’s penal code shows that accomplice liability is recognized; however, every accomplice is to be judged according to her intent. This permits a lesser sentence for the accomplice that does not hold the required mens rea for the outcome of the crime. The common law distinctions will accomplish this same result, while at the same time take away broad discretion from the courts. To be sure, the common law distinctions can be

283 See generally Codigo Penal Part 1, Ch. 23, § 4 (1996).
hypothetically applied to published case opinions and other various examples.

Defendant drove his two co-defendants to a parking lot where the two co-defendants jumped out of the car and robbed an elderly gentleman. They returned to the car and the defendant drove away. The defendant was charged as a principal to the crime because he aided and abetted by driving the getaway car. The defendant claimed that he was no more than an accessory after the fact. On appeal, the California Supreme Court held that a getaway driver who has no prior knowledge of a robbery, but who forms an intent to aid in carrying away the loot during such asportation may be properly found liable as an aider and abettor of the robbery.

Such a sweeping rule of law turns a blind eye to the actor’s mens rea and the doctrine of causation. Cooper is a prime example where distinguishing the criminal actor as an accessory after the fact would be proper. The defendant did not physically knock down the victim and forcefully obtain his money. Rather, the defendant drove away from the scene of the crime. California’s view of accomplice law would hold the victim liable even if he had no knowledge that the crime was about to occur, did not wish for the crime to occur, or even if he was appalled at the behavior of the principals. The fact that the defendant was an accessory after the fact cannot be disputed; however, he is nothing more.

The distinction of an accessory before the fact is sufficiently comprehensible to be put into application as is the distinction of an accessory after the fact. Suppose A is


\[286\] Id.

\[287\] Id.
unwaverings in his attempt to rob a liquor store and approaches B for help. B instructs A where the least crowded liquor stores are located in the city to lessen the amount of eye witnesses. Under the current accomplice liability framework, B is equally liable as a principle. What if B refused to provide any information? This would have merely changed the location in which A committed the robbery. Now suppose that A had decided that he was going to rob a liquor store on Monroe Street and that A approached B telling him of his plan and that B said that was a good idea because it is always the least crowded, providing a form of comfort to A because now A knows there will be a low number of eye witnesses. B has done nothing to aid or abet the crime; however, it is no stretch to state that he very well may be held liable as a principle under the current scheme of accomplice liability.

In the preceding examples, justice would be better served if B were considered an accessory before the fact, thus deserving of lesser punishment. In a more pragmatic sense, B, in the example where A had already made up his mind to rob the liquor store on Monroe Street, should not be held liable to any degree if causation is paid any respect.

Stated above, principals in the second degree were required to be present at the scene of the crime and aid, counsel, command, or encourage the principal in the first degree in the commission of the offense. If any one of the four common law distinctions may be merged into equal liability with the principal, this is the category. It is clear that principals in the second degree are just that, principals. However, principals

\[288\] See Mueller, supra note 152, at 2171.
\[289\] Id.
\[290\] Id.
\[291\] Id.
\[292\] See Standefer, 477 U.S. at 15.
in the second degree do not actually commit the crime; but rather, lend assistance to further its commission while being physically present. For a State, such as Indiana or California, to hold the principal in the second degree equally liable as these States do for accomplices generally would not rectify the problem of intent entirely but would surely be a better system than these States currently have.\textsuperscript{293} A system that truly incorporates mens rea and causation, however, would recognize that there are many instances in which a principal in the second degree is not equally liable with the principal in the first degree.

For example, $A$ and $B$ decide to break into $C$’s home during the hours that $C$ normally works. $A$ and $B$ only discuss bringing a crow bar so as to ascertain entrance into $C$’s home. $A$ and $B$ break into $C$’s home and began stuffing $C$’s valuables into sacks. $A$ decides to go upstairs to look through $C$’s bedroom while $B$ goes to the basement to look for other goods. $A$ discovers $C$ lying in his bed because $C$ was sick and stayed home from work that day. $A$ pulls a gun from his waistband and shoots $C$, killing him instantly. $B$, startled by the gunshot, sprints upstairs to find $C$ lifeless with a bullet wound in his chest. $B$ is distraught as his intentions were only to rob $C$, not to murder him. $B$ is now liable as the principal because $A$’s actions were the natural and probable consequences of the robbery.\textsuperscript{294} With this in mind, this intent and causation defeating doctrine should not be applied to accomplices. $B$ may be a principal in the second degree; however, he should not be held equally liable with $A$ because his mens rea will not allow it.

The doctrine of accomplice liability seeks to hold everyone who assists in a crime responsible for the entire crime, even if their actions do not directly aid in the

\textsuperscript{293} See generally \textsc{Ind. Code Ann.} § 35-41-2-4 (West 2009); \textsc{Cal Penal Code} § 31 (West 2009).

\textsuperscript{294} See \textit{People v. McCoy}, 24 P.3d 1210, 1213 (Cal. 2001).
commission of the crime.\textsuperscript{295} The hope is that by allowing liability even when the actions taken do not directly assist the crime, the State is deterring people from assisting in the commission of a crime.\textsuperscript{296} This form of derivative liability has become deeply rooted in most of the United States.\textsuperscript{297} If the broad and sweeping nature of accomplice liability is permitted to continue in the United States then when watching an accomplice that rendered minor aid stand trial, there will remain hundred of thousands of individuals that must accept the truth that there but for the grace of God go they.

\textsuperscript{295} Lawrence, supra, note 9 at 1540.
\textsuperscript{296} Id.
\textsuperscript{297} Id.