

COMPLICITY AND STRICT LIABILITY: A LOGICAL INCONSISTENCY?

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“[T]o make a complete crime, cognizable by human laws, there must be both a will and an act . . . an unwarrantable act without a vicious will is no crime at all.”¹

The term “vicious will” illustrates the relationship between blameworthiness and punishment; the foundation of all criminal law, and the justification for the doctrine of complicity liability. The Colorado Supreme Court recently granted certiorari review of People v. Childress, a case in which the Court of Appeals held that one cannot be complicit in a strict liability crime. This holding is difficult to reconcile with Colorado’s application of the complicity doctrine to crimes of recklessness and negligence. The Childress case presents an issue of first impression and illustrates the logical inconsistencies in the current approach to complicity liability in Colorado. For these reasons, the case provides a good vehicle for the Colorado Supreme Court to clarify the law and resolve the potential for injustice inherent in the current approach. This Note focuses on the importance of reconciling the inconsistencies in the current approach and proposes a potential way in which this can be done.

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INTRODUCTION

The doctrine of complicity liability—also referred to as the law of aiding and abetting, accomplice liability, or accessorial liability—defines the circumstances in which one person becomes liable for the crimes of another.² The doctrine generally requires that the alleged complicitor act intentionally.³ Considerable confusion exists as to what exactly this “intent” element entails.⁴ Courts and commentators generally agree that complicity liability includes two “mens rea” elements: first, the alleged complicitor must *intentionally* aid the principal in the commission of the offense; second, the alleged complicitor must have the mens rea required for the underlying offense.⁵

Strict liability crimes impose liability without any

2. *People v. Childress*, No. 08CA2329, 2012 WL 2926636, at *2 (Colo. App. July 19, 2012) (“[C]omplicity is not a separate and distinct crime or offense, but rather is ‘a theory by which a defendant becomes accountable for a criminal offense committed by another.’” (quoting *Grissom v. People*, 115 P.3d 1280, 1283 (Colo. 2005))), *cert. granted*, No. 12SC820, 2013 WL 3168267 (Colo. June 24, 2013).

3. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 346 (1985).

4. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.7(e), at 579 (2d ed. 1986) (citing the “considerable variation in the language used by courts and legislatures” as reflecting the confusion).

5. See *id.* at 579–80; see also Kadish, *supra* note 3, at 349.

demonstrated culpability—and therefore without any mens rea requirement—with respect to one or more material elements of the offense.⁶ Because complicity liability generally requires that the alleged complicitor have the mens rea required for the underlying offense, it would seem that one cannot be complicit in a strict liability offense. However, imposing complicity liability in such situations may be appropriate in certain instances. The argument made in the sections that follow does not extensively explore whether complicity liability in cases of unintentional crimes is legally cognizable in its own right. Rather, the argument focuses mostly on the logical inconsistency in barring the application of complicity liability with respect to strict liability crimes while allowing its application in the context of negligent or reckless crimes.

Part I begins by analyzing the elements of a crime and how those elements affect liability for a particular crime. Part II looks at the justifications for imposing strict liability generally. Part III analyzes the complicity doctrine in the context of unintentional crimes, examining the approach Colorado courts have adopted as well as other jurisdictional approaches. Part IV takes a closer look at the “natural and probable consequences” doctrine, which allows complicity liability to reach situations in which the result of a principal’s conduct was a natural and probable consequence of his or her conduct irrespective of the criminal wrongdoing that the complicitor intended to facilitate. Part V explores potential problems with the various approaches and illustrates the logical inconsistency in barring the application of complicity liability with respect to strict liability crimes. Finally, Part VI provides a potential solution for courts addressing this issue in the future and recommends that the Colorado Supreme Court use the *Childress* case to clarify the law and extend complicity liability to strict liability crimes in situations in which the complicitor acts with a culpable mental state of at least criminal negligence.

I. CRIMINAL LIABILITY

It is helpful to understand at the outset the elements of a criminal offense generally, how those elements interact with

6. See WAYNE R. LAFAVE, SUBSANTITVE CRIMINAL LAW § 5.5 (2d ed. 2003).

the mens rea requirements for the offense, and the potential complications of that interaction. Although this Note focuses on the inconsistency in the approach Colorado courts have taken with respect to strict liability crimes, it is important to understand the difficulty of applying the complicity doctrine to *any* unintentional crime and the problems associated with such application.

A. Elements of a Crime

The American Law Institute's Model Penal Code (MPC)⁷ defines "element of an offense" to include: (1) conduct, (2) attendant circumstances, and (3) results.⁸ The MPC further defines a "material element" of an offense as "an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with . . . the harm or evil, incident to conduct, sought to be prevented by the law defining the offense."⁹ Thus, conduct is almost always a material element of the crime, while attendant circumstances and results can sometimes relate to jurisdiction or other matters immaterial to the "harm or evil" the law seeks to prevent. Of course, this does not mean that results or attendant circumstances can *never* be material elements of the crime. This Note focuses largely on situations in which the result of a particular crime *is* a material element of the offense and illustrates the difficulties this creates for the application of the complicity doctrine.

B. Mens Rea and Intent

It is generally understood that a crime consists of both a physical component and mental component; that is, both an act

7. It must be emphasized that the MPC is a *model* code, not a *uniform* code: "The principal contribution of the MPC is that it represents a systematic re-examination of the substantive criminal law. It identifies the major issues which should be confronted by the legislature in the recodification process and articulates and evaluates alternative methods of dealing with these issues." LAFAVE, *supra* note 6, § 1.1. No state follows the MPC *exactly*, but today, largely stimulated and influenced by the MPC, a total of thirty-eight states have adopted new substantive criminal law codes. *Id.* Accordingly, the MPC does provide a helpful guide in laying some ground rules, and many of its fundamental concepts are uniform throughout the states.

8. MODEL PENAL CODE § 1.13(9) (1962).

9. *Id.* § 1.13(10).

or omission (and sometimes also a prescribed result or attendant circumstance, or both) and a state of mind.¹⁰ The various elements of a crime are typically defined by a “culpable mental state” or *mens rea*. Colorado defines culpable mental state as “intentionally, or with intent, or knowingly, or willfully, or recklessly, or with criminal negligence.”¹¹ This definition is in accord with the MPC and most modern criminal codes.¹²

The traditional view is that a person *intends* a *result* in two circumstances: (1) when he consciously desires that result, whatever the likelihood of it happening; or (2) when he knows that the result is practically certain to follow from his actions.¹³ Thus, the traditional view of intent encompasses both “purpose” and “knowledge.” The modern approach, and the approach taken by the MPC, is to define separately the mental states of knowledge and intent (or purpose).¹⁴ The MPC provides that one acts *purposely* when “it is his conscious object . . . to cause such a result,”¹⁵ and one acts *knowingly* if “he is aware that it is practically certain that his conduct will cause such a result.”¹⁶

The MPC approach further expands the concept of intent by defining situations in which liability may rest on one acting recklessly or negligently as to a particular result, rather than purposely or knowingly. *Recklessness* in causing a result occurs when one “consciously disregards a substantial and unjustifiable risk that the material element [of the crime] . . . will result from his conduct.”¹⁷ Further, an individual acts with

10. LAFAVE, *supra* note 6, § 5.1.

11. COLO. REV. STAT. § 18-1-501(4) (2014).

12. See MODEL PENAL CODE § 2.02(3) (1962) (stating that the culpability element “is established if a person acts purposely, knowingly or recklessly with respect thereto”); see also LAFAVE, *supra* note 6, § 5.1(c) (stating that “[m]ost of the modern criminal codes expressly provide for these four basic types of culpability”).

13. See GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* §§ 16, 18 (2d ed. 1961); Walter W. Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 657–58 (1917); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 910–11 (1939).

14. LAFAVE, *supra* note 6, § 5.2(b); see COLO. REV. STAT. §§ 18-1-501(5), (6) (illustrating this distinction by classifying crimes as either (1) “specific intent” crimes, requiring “purpose” as that term is used in the MPC approach, or (2) “general intent” crimes requiring “knowledge,” as that term is used in the MPC).

15. MODEL PENAL CODE § 2.02(2)(a)(i).

16. *Id.* § 2.02(2)(b)(ii).

17. *Id.* § 2.02(2)(c).

negligence as to a particular result when he “should be aware of a substantial and unjustifiable risk that the material element [of the crime] . . . will result from his conduct.”¹⁸ These same concepts are applied to conduct elements¹⁹ and attendant circumstances²⁰ as well, but this Note primarily focuses on the interrelationship between intent and results.

C. *Strict Liability*

Strict liability crimes have no mens rea requirement as to one or more material elements of the offense.²¹ “The concept of complicitor, or accomplice, liability took root in the common law, and the common law did not generally recognize strict liability crimes.”²² The MPC prohibits strict liability for any crime for which imprisonment, even for a day, is an available sentence.²³ Accordingly, the MPC holds that a person may not be guilty of a criminal offense unless he or she acted purposely, knowingly, recklessly, or negligently with respect to *each* material element of the offense.²⁴

In contrast to the MPC, the Colorado General Assembly, consistent with most jurisdictions,²⁵ allows for strict liability criminal offenses for which imprisonment is an available sentence:

18. *Id.* § 2.02(2)(d).

19. *Id.* §§ 2.02(2)(a)(i), (b)(i).

20. *Id.* §§ 2.02(2)(a)(ii), (b)(i).

21. Thus, a crime may be defined so as to require one type of culpable mental state as to one element and no fault at all as to another element, or a statute may impose strict liability as to all of the elements. LAFAVE, *supra* note 6, § 5.5, at 1; *see Staples v. United States*, 511 U.S. 600 (1994).

22. *People v. Childress*, No. 08CA2329, 2012 WL 2926636, at *2 (Colo. App. July 19, 2012) (citing *Morissette v. United States*, 342 U.S. 246, 251 (1952); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); and *People v. Rostad*, 669 P.2d 128 (Colo. 1983)), *cert. granted*, No. 12SC820, 2013 WL 3168267 (Colo. June 24, 2013)).

23. *See* MODEL PENAL CODE § 2.05 (explaining that culpability is not required only with regard to offenses which constitute violations). “Violations,” under the MPC, “are not crimes, may be punished only by a fine, forfeiture, or other civil penalty, and may not give rise to any disability or legal disadvantage based on conviction of a criminal offense.” LAFAVE, *supra* note 6, § 5.5(c); *see* MODEL PENAL CODE § 1.04(5).

24. *See* MODEL PENAL CODE § 2.02(1).

25. *See* LAFAVE, *supra* note 6, § 5.5 n.47 (“A few of the modern codes follow Model Penal Code § 2.05(1)(a) by providing that strict liability within the code is limited to certain minor offenses. An even smaller number provide, as in Model Penal Code § 2.05(2), that strict liability offenses outside the code must be treated as very minor offenses unless a mental state is actually proved.”).

The minimum requirement for *criminal* liability is the performance by a person of conduct which includes a voluntary act If that conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, the offense is one of ‘strict liability.’ If a culpable mental state on the part of the actor is required with respect to any material element of an offense, the offense is one of ‘mental culpability.’²⁶

Thus, in Colorado and other states that recognize strict liability crimes, such crimes do not require a culpable mental state as to one or more material elements of the crime.

II. ARGUMENTS FOR AND AGAINST STRICT LIABILITY

Many courts and commentators point to expediency and deterrence as the principle reasons for allowing strict liability crimes.²⁷ Often, strict liability crimes are created in order to help prosecutors deal with situations in which intention, knowledge, recklessness, or negligence is hard to prove, making convictions difficult to obtain unless the fault element is omitted.²⁸ A legislature may wish to impose strict liability if the conduct that the legislature seeks to prevent is sufficiently harmful and if prosecutions for that conduct are expected to be numerous.²⁹ Some commentators, arguing in support of the

26. COLO. REV. STAT. § 18-1-502 (2014) (emphasis added).

27. See LAFAVE, *supra* note 6, §5.5(c); see, e.g., *State v. Collova*, 255 N.W.2d 581, 585 (Wis. 1977) (“The usual rationale for strict liability statutes is that the public interest is so great as to warrant the imposition of an absolute standard of care the defendant can have no excuse for disobeying the law.”).

28. LAFAVE, *supra* note 6, § 5.5(c) (“[I]n some areas of conduct it is difficult to obtain convictions if the prosecution must prove fault, so enforcement requires strict liability.”); see, e.g., *Commonwealth v. Smith*, 44 N.E. 503, 504 (Mass. 1896) (“When, according to common experience, a certain fact generally is accompanied by knowledge of the further elements necessary to complete what it is the final object of the law to prevent . . . actual knowledge being a matter difficult to prove, the law may stop at the preliminary fact, and, in the pursuit of its policy, may make the preliminary fact enough to constitute a crime.”).

29. LAFAVE, *supra* note 6, § 5.5(c); see, e.g., *Staples v. United States*, 511 U.S. 600, 607 (1994) (noting that “public welfare offenses have been created by Congress” and that “[i]n such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation” (internal quotations and citations omitted)); see also *State v. Prince*, 189 P.2d 993 (N.M. 1948); *State v. Dobry*, 250 N.W. 702

imposition of strict liability to certain crimes, suggest that such an approach may be an effective deterrent because a person engaged in certain conduct would be more careful precisely because he knew that this kind of conduct was governed by a strict liability statute.³⁰ Therefore, according to some commentators, the presence of strict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kinds of conduct.³¹

Supporters of another view argue that strict liability offenses often do require fault, in a restrictive sense, in that they “can be interpreted as legislative judgments that persons who *intentionally* engage in certain activities and occupy some peculiar or distinctive position of control are to be held accountable for the occurrence of certain consequences.”³² Thus, these commentators argue that there is a restricted, albeit sub-surface, mens rea element present in these crimes, and therefore imposition of strict liability is justifiable.

The consensus argument opposing strict liability is that to punish conduct without considering the actor’s state of mind is both ineffective and unjust.³³ It is ineffective because conduct unaccompanied by an awareness of the elements making it criminal does not mark the actor as one who needs to be punished in order to deter him or others from behaving similarly in the future.³⁴ It is unjust because the actor is subject to criminal conviction without being morally blameworthy.³⁵ According to this view, the imposition of strict liability frustrates the justifications for criminal punishment, and consequently, criminal sanction is inappropriate in the absence of a mens rea requirement.³⁶

III. COMPLICITOR LIABILITY

Generally, one is liable as a complicitor for the crime of another, known as the principal, if one “(a) gave assistance or

(Iowa 1933); *Commonwealth v. Mixer*, 93 N.E. 249 (Mass. 1910).

30. Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 736 (1960).

31. *Id.* at 737.

32. *Id.* at 743 (emphasis added).

33. *See id.* at 734.

34. *See id.* at 734–36.

35. *Id.*

36. *Id.*

encouragement or failed to perform a legal duty to prevent [the crime] (b) with the intent thereby to promote or facilitate commission of the crime.”³⁷ A single act of assistance can be the basis for complicity liability with respect to more than one crime or more than one principal.³⁸ The “acts” that suffice for complicity liability may go beyond physical assistance in that they can include inducing the principal through threats or promises,³⁹ encouraging the principal with words or gestures,⁴⁰ or providing the principal with the plan for the crime.⁴¹ For complicity liability in any jurisdiction, the trier of fact must conclude that the defendant knew that his or her actions were facilitating the conduct of the principal.⁴² Inadvertent or unknowing encouragement or assistance does not subject a person to liability.⁴³ However, there is a split of authority as to whether some lesser mental state than intent will suffice, such as mere knowledge that one is aiding a crime or knowledge that one is aiding reckless or negligent conduct that may

37. LAFAVE, *supra* note 6, § 13.2.

38. *See, e.g.,* *Watts v. Bonneville*, 879 F.2d 685 (9th Cir. 1989) (involving the act of guarding the victim’s parents, which resulted in the defendant’s conviction as complicitor to rapes by each of his two associates).

39. *See, e.g.,* *State v. Scott*, 68 A. 258, 260 (Conn. 1907) (“Counseling or procuring the commission of the offense includes threats, promises, etc., which may have provoked the offense.”).

40. *See, e.g.,* *United States v. Whitney*, 229 F.3d 1296, 1303–04 (10th Cir. 2000) (using “racial epithets when referring to [the victims], and discuss[ing] cross burning as a symbol of hatred towards African-Americans on the afternoon prior to the crime” sufficient to establish aiding and abetting crime of “interfering with federal housing rights on the basis of race”); *McGhee v. Commonwealth*, 270 S.E.2d 729, 733 (Va. 1980) (finding that defendant who “repeatedly encouraged [the principal] to kill her husband” and “informed [the principal] where her husband could be found” prior to the murder, was accessory to murder of husband); *Alonzi v. People*, 597 P.2d 560, 563 (Colo. 1979) (finding a defendant who told undercover agent that he could obtain stolen cars and accepted payment after principal delivered stolen cars to agent guilty of “encourag[ing] the substantive offense of theft”).

41. *See, e.g.,* *State v. Haddad*, 456 A.2d 316, 324 (Conn. 1983) (involving a defendant who “instigated and devised the plan to break into . . . residence, for which he solicited the enlistment of [the principal]” and “managed and implemented” the break-in guilty as accomplice in first-degree burglary); *Commonwealth v. Richards*, 293 N.E.2d 854, 860 (Mass. 1973) (involving a defendant who “gave the others a scheme for the robbery in which they were to lend one another support in stealing the money and getting away” and “furnished deadly weapons” guilty of aiding and abetting, *inter alia*, armed robbery).

42. LAFAVE, *supra* note 6, § 13.2(c).

43. *See* *Hicks v. United States*, 150 U.S. 442, 449 (1893); *State v. Grebe*, 461 S.W.2d 265, 268 (Mo. 1970).

produce a criminal result.⁴⁴

As discussed in the Introduction, there is considerable confusion as to what a complicitor's mental state must be in order to hold him accountable for a crime committed by another.⁴⁵ This confusion may be attributable to uncertainty as to whether criminal law should be concerned with the complicitor's mental state relating to his own acts of aiding and abetting, to his awareness of the principal's mental state, to the fault requirements for the offense involved, or some combination of the above.⁴⁶ Some courts base liability on the complicitor's knowledge or reason to know of the principal's mental state,⁴⁷ others base liability on the complicitor sharing the criminal intent of the principal,⁴⁸ and still others speak of the complicitor's intent to aid or encourage the specific crime committed.⁴⁹ While there is considerable diversity in the case law on the subject of whether accomplice liability may rest upon knowing aid to reckless or negligent conduct, it seems clear that one does not obtain liability without fault in this area.⁵⁰ Some argue that a complicitor may be liable on a no-fault basis if the crime committed by the principal is one of strict liability, but this argument was recently rejected by the Colorado Court of Appeals.⁵¹ This argument is now before the Colorado Supreme Court and deserves a second look. The

44. LAFAVE, *supra* note 6, § 13.2.

45. LAFAVE & SCOTT, *supra* note 4, at 579.

46. LAFAVE, *supra* note 6, § 13.2(b).

47. *See, e.g.*, *Mowery v. State*, 105 S.W.2d 239, 240 (Tex. Crim. App. 1937) (holding that accused who did not know that principal had obtained stick that caused the fatal blow or that the principal intended to strike deceased is not complicit in homicide).

48. *See, e.g.*, *United States v. Hewitt*, 663 F.2d 1381, 1385 (11th Cir. 1981) (acknowledging evidence showing that defendant "shared the criminal intent of the principal" in using an explosive to commit a federal felony "because it was [defendant] who originally counseled [principal] to destroy the Village Grocery and fraudulently obtain insurance proceeds"); *State v. Kendrick*, 177 S.E.2d 345, 347 (N.C. Ct. App. 1970) (finding prejudicial error where "the instructions given to the jury failed to require a finding by the jury that the aider or abettor shared in the felonious intent of the perpetrator").

49. *See, e.g.*, *State v. Harrison*, 425 A.2d 111, 115 (Conn. 1979) ("The accessory, like the principal actor, must have the intent to commit the specific crime charged, in this case, attempted robbery."); *State v. Grebe*, 461 S.W.2d 265, 268 (Mo. 1970) (finding prejudicial error in jury instruction that "did not require the jury to find that appellant intentionally aided and abetted [the principal] in the commission of the act of stabbing [the victim]").

50. LAFAVE, *supra* note 6, § 13.2(b).

51. *See People v. Childress*, No. 08CA2329, 2012 WL 2926636 (Colo. App. July 19, 2012), *cert. granted*, No. 12SC820, 2013 WL 3168267 (Colo. June 24, 2013).

discussion below looks at the approach Colorado courts have taken with respect to no-fault complicity liability, illustrating some of the problems with the courts' current approach, and offering a potential solution to those problems.

A. *The Colorado Approach*

“Complicity is not a separate and distinct crime or offense in Colorado. Rather, it is a theory by which a defendant becomes accountable for a criminal offense committed by another.”⁵² In Colorado, “[a] person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.”⁵³ Colorado courts have held that complicity liability thus requires a “dual mental state” in which (1) the complicitor has the culpable mental state required for each element of the underlying crime committed by the principal, and (2) the complicitor assists or encourages the commission of the crime with the intent to promote or facilitate such crime.⁵⁴ This suggests that complicity liability in Colorado is a “specific intent”⁵⁵ crime in which one must actually *intend* the result. However, as demonstrated by the three Colorado cases examined below, this is not always the case.

1. *People v. Wheeler*

In *People v. Wheeler*, the Colorado Supreme Court was faced with the difficulty of reconciling the requirement that a complicitor *intend* to promote or facilitate the commission of the offense with the definition of criminally negligent homicide, a crime in which the result element, death, is fulfilled when a person *unintentionally* causes the death of another.⁵⁶ In

52. *Grissom v. People*, 115 P.3d 1280, 1283 (Colo. 2005) (internal quotation marks and citation omitted).

53. COLO. REV. STAT. § 18-1-603 (2014).

54. *Bogdanov v. People*, 941 P.2d 247, 251–52 (Colo. 1997).

55. As discussed *supra* note 14, some states, including Colorado, classify crimes as either (1) “specific intent” crimes, requiring “purpose” or “intent” with respect to a result element, or (2) “general intent” crimes, requiring only “knowledge” or “willfulness.” See COLO. REV. STAT. §§ 18-1-501(5), (6).

56. 772 P.2d 101, 103 (Colo. 1989).

Colorado, “[a]ny person who causes the death of another person by conduct amounting to criminal negligence commits criminally negligent homicide.”⁵⁷ While “criminal negligence” is considered to be a culpable mental state in Colorado,⁵⁸ it does not require that the actor necessarily *intend* the result that follows from his or her conduct: “A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur.”⁵⁹

In *Wheeler*, relying on Colorado’s complicity liability statute,⁶⁰ the alleged complicitor argued that the “intent to promote the offense” requirement precluded a finding of complicity liability for criminally negligent death.⁶¹ He argued that the mens rea for complicity is the “intent to promote or facilitate the commission of the offense, which requires knowledge by the complicitor that the principal intended to commit the crime.”⁶² Because criminally negligent homicide is an unintentional crime, he argued that a complicitor cannot logically intend to promote or facilitate the commission of that particular offense or know that the principal intended to commit the offense because the principal himself never intended to commit the crime in the first place.⁶³

According to the *Wheeler* court, because complicity is not a substantive offense, the intent requirement referred to in the Colorado complicity statute retains its common meaning.⁶⁴ This common meaning, the court reasoned, indicates that “intent to promote or facilitate the commission of the offense” means “intent to promote or facilitate the *act or conduct* of the principal,” and therefore, this language does not require that the alleged complicitor intend for the principal to cause the result element, in this case, death.⁶⁵ The court further reasoned that “[t]he complicitor also need not intend for the

57. COLO. REV. STAT. § 18-3-105.

58. *See id.* § 18-1-501(4).

59. *Id.* § 18-1-501(3).

60. *Id.* § 18-1-603.

61. 772 P.2d at 103.

62. *Id.* (internal quotation marks and citations omitted).

63. *Id.* at 102.

64. *Id.* at 103.

65. *Id.* (emphasis added).

principal to act in a criminally negligent manner.”⁶⁶ Rather, the intent language requires only *knowledge* on the part of the complicitor that “the principal is engaging in, or is about to engage in, criminal conduct.”⁶⁷ Therefore, the court concluded, for a person to be guilty of criminally negligent homicide through a theory of complicity, he does not need to know that death will result from the principal’s conduct because the principal need not know that to be guilty of the crime.⁶⁸ The complicitor need only “be aware that the principal is engaging in conduct that grossly deviates from the standard of reasonable care and poses a substantial and unjustifiable risk of death to another. In addition, he must aid or abet the principal in that conduct and, finally, death must result from that conduct.”⁶⁹

Although criminally negligent homicide is not a strict liability crime by definition, it is analogous in the sense that one who engages in conduct that grossly deviates from the standard of care and poses a substantial and unjustifiable risk of death to another is liable for the resulting death whether or not he actually intended the death to occur. Thus, the complicitor is likewise held liable for the death regardless of whether he *intended* the result.

2. *Bogdanov v. People*

In *Bogdanov v. People*, the Colorado Supreme Court again reviewed the state of mind required for complicity liability.⁷⁰ The court agreed with the *Wheeler* decision that, while the term intent is used in the statute, complicity itself does not thereby become a specific intent crime.⁷¹ Instead, the statutory

66. *Id.* at 103–04.

67. *Id.* at 104.

68. *Id.* at 105.

69. *Id.*

70. 941 P.2d 247, 250 (Colo. 1997).

71. *Id.* This is a critical distinction. It opens the door for complicity liability with regard to unintentional crimes. Many courts that treat complicity liability as a specific intent crime hold that the complicitor must specifically intend the result and therefore cannot be complicit in a crime for which the only mens rea requirement of the underlying crime is recklessness or criminal negligence. *See* *Everett v. Beard*, 290 F.3d 500, 513 (3d Cir. 2002) (“Pennsylvania law has clearly required that for an accomplice to be found guilty of first-degree murder, s/he must have intended that the victim be killed.”); *see also* *Smith v. Horn*, 120 F.3d 400, 411 (3d Cir. 1997) (“[S]pecific intent to commit a killing, not simply intent to

definitions of mens rea do not apply and the term retains its common meaning.⁷² The *Bogdanov* court concluded that, although the statutory definition of intent does not apply, “there is nevertheless a dual mental state requirement of the complicitor that must be proven before he or she can be legally accountable for the offense of another.”⁷³ This “dual mental state,” the court explained, exists where “(1) the complicitor has the culpable mental state required for the underlying crime committed by the principal; and (2) the complicitor assists or encourages the commission of the crime committed by the principal with the intent to promote or facilitate such commission.”⁷⁴

In introducing this dual mental-state test, the *Bogdanov* court attempted to limit the doctrine of complicity by first declaring that the complicitor must intend that his conduct have the effect of assisting the principal in committing the crime and second, by limiting the *Wheeler* rule to crimes of recklessness and negligence.⁷⁵ These are important limitations because they are relied upon by the court of appeals in *Childress*.

3. *People v. Childress*

Most recently, the Colorado Court of Appeals faced the issue of whether one can be complicit in a strict liability crime.

commit some other crime from which a killing results, is a prerequisite to a conviction for first-degree murder.”).

72. *Bogdanov*, 941 P.2d at 250.

73. *Id.*

74. *Id.* at 250–51 (internal quotations omitted).

75. The court first stated: “It is not sufficient that the defendant intentionally engaged in acts which ultimately assisted or encouraged the principal. Rather, the complicitor must intend that his conduct have the effect of assisting or encouraging the principal in committing or planning the crime committed by the principal.” *Id.* at 251. In limiting the *Wheeler* decision, the court declared that “[t]he rule of *Wheeler* should only be applied to crimes defined in terms of recklessness or negligence, and should not be applied to dispense with the requirement that the complicitor have the requisite culpable mental state of the underlying crime with which he is charged.” *Id.* In *People v. Grissom*, the most recent Colorado case before *Childress* to address the issue of complicity liability with relation to unintentional crimes, the court was faced with the issue of whether one can be complicit in a crime requiring only recklessness as to the result. 115 P.3d 1280 (Colo. 2005). The Colorado Supreme Court again reaffirmed *Wheeler* and relied on the *Bogdanov* test to hold that a defendant can be held liable for reckless manslaughter as a complicitor on the same grounds. *Id.* at 1288.

The crime at issue was “vehicular assault (DUI).”⁷⁶ To be guilty of this crime, an individual “(1) must operate or drive a motor vehicle (2) while under the influence of alcohol or drugs, and (3) this conduct must be the proximate cause of serious bodily injury.”⁷⁷ The statute does not require any type of culpable mental state and clearly specifies that “[t]his is a strict liability crime.”⁷⁸ The defendant in *Childress*, while riding in the backseat of a car that his son was driving, urged his son to speed and disregard traffic signals.⁷⁹ His son, who was intoxicated at the time, drove well over the speed limit and ran several red lights, eventually crashing into a building and causing serious injury to the defendant’s three-year-old child who was in the backseat with the defendant.⁸⁰

The *Childress* court rejected the People’s argument that, because no culpable mental state is required for the principal to violate the vehicular assault (DUI) statute, none is required for the complicitor.⁸¹ The court reasoned that adopting such an argument would “transform the complicity statute into a means of imposing strict liability on an alleged complicitor when the principal acts without a culpable mental state.”⁸² The court looked to the statutory definition of culpable mental state, which is defined as “intentionally, or with intent, or knowingly, or willfully, or recklessly, or with criminal negligence,”⁸³ and determined that a culpable mental state can be unintentional only to the extent that one acts recklessly or with criminal negligence.⁸⁴ Accordingly, the court reasoned that to adopt the People’s argument and apply complicity liability to a strict liability crime would be to omit the term “culpable” from the dual mental-state requirement in *Bogdanov*.⁸⁵ Noting that the Colorado Supreme Court has extended complicity liability to some crimes for which the culpable mental state is not intentional (*Wheeler, Bogdanov*,

76. *People v. Childress*, No. 08CA2329, 2012 WL 2926636, at *3 (Colo. App. July 19, 2012), *cert. granted*, No. 12SC820, 2013 WL 3168267 (Colo. June 24, 2013).

77. *Id.*; COLO. REV. STAT. § 18-3-205(1)(b)(I) (2014).

78. *See* COLO. REV. STAT. § 18-3-205(1)(b)(I).

79. *Childress*, 2012 WL 2926636, at *1.

80. *Id.*

81. *Id.*

82. *Id.*

83. COLO. REV. STAT. § 18-1-501(4).

84. *Childress*, 2012 WL 2926636, at *3.

85. *Id.*

and *Grisson*), the court declined to extend complicity liability to the crime of vehicular assault (DUI) because it involves no mental state at all, rather than an unintentional one.⁸⁶

B. Other Jurisdictions

Three jurisdictional approaches exist regarding the mental state requirement for result elements in complicity liability. The first approach holds that a person should not be criminally liable as an accomplice unless that person specifically intended to promote or facilitate the commission of the offense.⁸⁷ Jurisdictions that have adopted this approach treat complicity liability as a specific intent crime in which the alleged complicitor must specifically intend the result in order to be held liable.⁸⁸

The second approach is that of the MPC, which defines a complicitor as one who either (1) acts with the purpose of promoting or facilitating the commission of the particular underlying offense, or (2) acts with the mental culpability required for conviction as to each element—including result elements—of the underlying offense.⁸⁹

Finally, the third approach, which applies the broadest view of culpable mental state as it relates to result elements, does not require the accomplice to have intended the criminal result nor to have shared with the principal the mental state required for commission of the substantive crime charged.⁹⁰

86. *Id.* at *4–5.

87. John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 380 (2008).

88. *See, e.g., State v. Carrasco*, 946 P.2d 1075, 1079–80 (N.M. 1997) (“In New Mexico, a jury must find a community of purpose for *each* crime of the principal. This principle means that a jury must find that a defendant *intended* that the acts necessary for *each* crime be committed; a jury cannot convict a defendant on accessory liability for a crime unless the defendant intended the principal’s acts.”).

89. Decker, *supra* note 87, at 380–81; *see* MODEL PENAL CODE § 2.06 (1962). For example, the Connecticut Supreme Court stated that “[the complicitor liability statute] is not limited to cases where the substantive crime requires the specific intent to bring about a result. [It] merely requires that a defendant have *the mental state required for the commission of a crime* while intentionally aiding another. . . . Accordingly, an accessory may be liable in aiding another if he acts intentionally, knowingly, recklessly, or with criminal negligence toward the result, depending on the mental state required by the substantive crime.” *State v. Foster*, 522 A.2d 277, 283 (Conn. 1987) (affirming defendant’s conviction for criminally negligent homicide based upon this approach).

90. Decker, *supra* note 87, at 381. In California, for example, in determining whether a defendant’s act of driving a getaway car following a robbery was

Instead, jurisdictions employing this approach apply the natural and probable consequences doctrine, allowing complicity liability to reach situations in which the result of the principal's conduct was a natural and probable consequence of his or her conduct regardless of the lesser criminal wrongdoing that the alleged complicitor had in mind.⁹¹

Little more than a handful of states follow the first view.⁹² A significant minority of states follow some variation of the second view, but on the whole do not limit the second approach to result-based crimes as does the MPC.⁹³ The largest number of jurisdictions follow the third view.⁹⁴

1. Practical Application of the Three Approaches

The first approach treats complicity liability as a “specific intent” crime for which one cannot be held complicit in a crime unless he actually intended the result that constituted the offense. This approach bars application of the complicity doctrine with respect to any unintentional crime (including crimes of recklessness and negligence) and is clearly inconsistent with Colorado’s approach to complicity liability.

As to the second approach, the MPC states: “When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, *if any*, with respect to that result that is sufficient for the commission of the offense.”⁹⁵ This language appears to

sufficient to hold the defendant liable for a murder committed by the principal during the robbery, the court of appeals stated that “[a]s an aider and abettor, defendant was liable not only for the robbery which he intended to assist but also for any natural and probable consequences thereof.” *People v. Hammond*, 226 Cal. Rptr. 475, 478–79 (Ct. App. 1986).

91. *Decker*, *supra* note 87, at 380–81.

92. *Id.* at 380. The states that follow this approach are Florida, Mississippi, New Mexico, Oregon, Pennsylvania, and Texas. *Id.* at 262.

93. *Id.* at 380–81. According to *Decker*, fourteen states follow this approach. *Id.* at 275. These states are Connecticut, Georgia, Hawaii, Idaho, Kentucky, Massachusetts, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, Utah, Vermont, and Wyoming. *Id.*

94. *Id.* at 380. According to *Decker*, twenty states follow this approach. *Id.* at 311. These states are Alabama, Arizona, Arkansas, California, Delaware, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee, Virginia, and Wisconsin. *Id.* at 311–25.

95. MODEL PENAL CODE § 2.06(4) (1962) (emphasis added).

allow complicity liability not only for reckless and negligent crimes, but also for those crimes in which the principal is held strictly liable for the result. However, as discussed above, the MPC does not recognize strict liability crimes, so this likely would not be an issue in a state that followed both the MPC's approach to complicity liability and its approach to strict liability. If, however, a state follows the MPC approach to complicity liability but allows for strict liability crimes, the complicity doctrine would logically extend to strict liability crimes.

Colorado appears to follow some hybrid of the first and second approaches with regard to unintentional crimes. Colorado courts appear to follow a narrow approach similar to the first category when the principal offense explicitly requires either intent or knowledge.⁹⁶ However, *Wheeler, Bogdanov*, and *Grissom* appear to allow for a wide range of liability with regard to unintentional crimes of recklessness and negligence. Further, the requirement that a complicitor have the mental state of the underlying crime with which he is charged suggests an approach similar to the MPC in which one must act, with regard to result elements, with the kind of culpability that is sufficient for the commission of the offense. However, unlike the MPC, Colorado recognizes strict liability crimes. The "if any" language in the MPC suggests that one could be complicit in a crime for which no culpable mental state is required as to a result element and thus could be complicit in a strict liability offense. After *Childress*, this is not the case in Colorado. Accordingly, Colorado appears to follow the fundamental approach of the MPC with regard to result elements but limits that approach to crimes of recklessness and negligence.

The third approach is particularly far-reaching and the source of much criticism. While the first two approaches are relatively straightforward in their application, the third approach can be ambiguous or at least subjective as to what exactly constitutes a natural and probable consequence of a particular crime. Because this third approach appears to be the majority approach and because there are numerous concerns regarding its application, it deserves a closer look.

96. Decker, *supra* note 87, at 370; see *People v. Bass*, 155 P.3d 547, 551 (Colo. App. 2006) (holding that specific intent is required for complicitor liability with regard to attempted robbery).

IV. NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

The majority rule is that complicity liability extends to the results that were a natural and probable consequence of the criminal activity that the complicitor aided or abetted.⁹⁷ This doctrine pushes the outer limits of the mental-state requirement by providing that intent with respect to one offense can result in criminal liability for another offense that was the natural and probable consequence of the one intended.⁹⁸

The natural and probable consequence rule, if viewed broadly, is inconsistent with the more fundamental principles of our system of criminal law because “it would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind.”⁹⁹ Some courts have recognized this problem and have refused to apply the doctrine broadly.¹⁰⁰ Many of these courts instead hold that the rule should be applied only to unique situations in which unusual principles of liability obtain.¹⁰¹

Two examples of unusual principles of liability are felony murder and misdemeanor manslaughter. Both crimes allow for a homicide conviction without any showing that the defendant intentionally, knowingly, recklessly, or even negligently caused the death.¹⁰² Accordingly, if one was complicit to the underlying felony or dangerous misdemeanor, he or she is equally guilty with the principal for the resulting death.¹⁰³ These two crimes essentially (although not explicitly) hold the

97. LAFAVE, *supra* note 6, § 13.3(b); *see, e.g.*, *People v. Prettyman*, 926 P.2d 1013, 1019 (Cal. 1996) (noting that the natural and probable consequences rule is the well-established rule); *see also* W. CLARK & W. MARSHALL, *LAW OF CRIMES* 528–529 (7th ed. 1967); 1 WHARTON, *CRIMINAL LAW* 181 (Charles E. Torcia, 14th ed. 1978).

98. LAFAVE, *supra* note 6, § 13.3(b).

99. *Id.*

100. *Id.*; *see, e.g.*, *United States v. Greer*, 467 F.2d 1064, 1069 (7th Cir. 1972) (“[A] defendant can be held responsible as an aider and abettor of a crime even where there is no direct proof that he intended to aid the crime But where the relationship between the defendant’s acts and the ultimate crime for which he is charged is as attenuated as it is in the instant case, we would require some showing of specific intent to aid in, or specific knowledge of, the crime charged.”).

101. *See, e.g.*, *People v. Cooper*, 743 N.E.2d 32, 38 (Ill. 2000) (“[T]he concept of reasonable foreseeability . . . while essential to a felony murder inquiry, has no place in accountability analysis.”).

102. LAFAVE, *supra* note 6, § 13.3(b).

103. *Id.*

principal (and thereby the complicitor) strictly liable for the resulting death. If the natural and probable consequences rule is limited to such cases, it is not objectionable because these offenses require no mental state as to the result element, whereas the natural and probable consequences doctrine imposes what appears to be a negligence standard as to the result because the result must be reasonably foreseeable.¹⁰⁴ Therefore, the rule would require a *more* culpable mental state than the underlying offense requires. For this reason, the rule is also unobjectionable when applied to an attendant circumstance, such as a jurisdictional element, that requires no awareness and is otherwise of the strict liability variety.¹⁰⁵

The criticisms of the natural and probable consequences doctrine are certainly sound in many cases and should not be overlooked or ignored. One of the principle elements of complicity liability in many jurisdictions, including Colorado, is that the complicitor must have the culpable mental state of the underlying crime.¹⁰⁶ The natural and probable consequences doctrine, in effect, ignores the culpable mental state required in the underlying crime as to the result element and instead applies what is essentially a negligence standard. If the purpose of complicity liability is to hold the alleged complicitor equally liable for the offense of the principal, this purpose is frustrated by allowing for liability based on a negligence standard where the underlying crime requires recklessness, knowledge, intent, or some other *more* culpable mental state. Accordingly, as discussed further below, the natural and probable consequence doctrine should be applied narrowly in cases where the underlying offense is one of strict liability.

V. PROBLEMS WITH THE COLORADO APPROACH

Complicity liability under Colorado law requires a technical analysis in which the alleged complicitor must (1)

104. *Id.* This implicit negligence standard was articulated in *Wilson-Bey v. United States*: “To say that the accomplice is liable if the offense . . . is ‘reasonably foreseeable’ or the ‘probable consequence’ of another crime is to make him liable for negligence, even though more is [or may be] required in order to convict the principal actor. This is both incongruous and unjust.” 903 A.2d 818, 837 (D.C. 2006) (quoting MODEL PENAL CODE & COMMENTARIES § 2.06 at 312 n. 42 (1982)).

105. LAFAVE, *supra* note 6, § 13.3(b); see *Perry v. United States*, 36 A.3d 799, 808–11 (D.C. 2011).

106. See, e.g., *Bogdanov v. People*, 941 P.2d 247, 250 (Colo. 1996).

have the culpable mental state of the underlying crime and (2) must facilitate the commission of that crime with the intent that his or her actions facilitate the conduct of the principal.¹⁰⁷ There are some obvious problems with a technical, blanket rule barring application of complicity liability with respect to strict liability crimes in that it allows for situations in which culpable actors face no liability based on a technicality. The discussion that follows explores some of these situations and provides a potential solution to these problems.

A. Childress *Example*

Take the *Childress* case as an initial example. Childress was accused of being complicit in the crime of Vehicular Assault (DUI). This crime requires only that the principal drive intoxicated and that this conduct cause injury. The fact that Childress was encouraging his son to drive recklessly must be put aside under the technical analysis introduced in *Bogdanov* because *reckless* driving is not an element of the underlying crime—only *intoxicated* driving is.¹⁰⁸ It is instructive to consider the facts in *Childress* as the same as a situation in which Childress simply gave his son the keys, encouraged him to drive intoxicated, and sat quietly in the seat next to him. If Childress were held to be complicit in the particular offense of Vehicular Assault (DUI) on the facts of the case, it would logically follow that he would be complicit in this second hypothetical scenario on the same grounds.

Childress had a culpable mental state of some sort. He had *knowledge* that his son was intoxicated because he bought alcohol for the party and drank with his son. He *intended* for his son to drive with the knowledge that he was intoxicated. Further, he *intended* that his words *encourage* his son to drive intoxicated (again, forget about the words encouraging him to

107. *Id.* at 250–51.

108. See COLO. REV. STAT. § 18-3-205(1)(b)(I) (2014). The analysis would be different if we were asking if Childress could be complicit in the crime of Vehicular Assault (Recklessness), for which he was initially charged, but ultimately acquitted. The record is unclear as to why he was acquitted of this crime but convicted of Vehicular Assault (DUI) at the trial court. Vehicular Assault (DUI) was the only charge at issue at the court of appeals. This would be a relatively easy analysis if the crime at issue was Vehicular Assault (Recklessness) as the Colorado Supreme Court clearly held in *Grissom* that one can be complicit in unintentional crimes involving recklessness. See *Grissom v. People*, 115 P.3d 1280, 1288 (Colo. 2005).

drive recklessly). The only element of the crime for which he had no culpable mental state was the resulting injury. However, as the law currently stands in Colorado, the fact that Vehicular Assault (DUI) has a strict liability element bars application of the complicity doctrine, as a technical matter, from the start.

Consistent with some commentators' views of strict liability crimes generally, it is possible that the legislature considered driving while intoxicated to be so offensive and fraught with danger that it chose to impose strict liability to ensure that such egregious behavior does not go unpunished when injury results.¹⁰⁹ While it can be argued, and probably correctly, that neither Childress nor his son intended the resulting injury, the alleged complicitor (Childress) and the principal (his son) have virtually identical mens rea in this situation. Is it logical or just to hold one responsible for the resulting injury but not the other?

B. Statutory Rape Hypothetical

Consider another example of two extremes and the problems they illustrate: an alleged complicitor tries to help his friend "get lucky." Both individuals go out to a bar, with the alleged complicitor playing "wing man," that is, trying to help his friend meet someone. At some point during the night, the alleged complicitor introduces his friend to a young woman and, at the end of the night, all three return to the alleged complicitor's house. Upon returning home, the alleged complicitor gives his friend a condom and pushes the couple into a bedroom. The intercourse that follows is consensual.¹¹⁰

There can be no doubt from this hypothetical fact pattern that the complicitor *intended* for his friend (the principal) to have intercourse with the young woman. Engaging in consensual sexual intercourse is generally not a crime, so at this point, we have no reason to believe that our alleged

109. For further discussion of the reasons and justifications for imposing strict liability, see *supra* Part II.

110. The imposition of strict liability in the context of statutory rape is based largely on the notion that a minor does not have the mental capacity to truly "consent." See, e.g., KY. REV. STAT. ANN. § 510.030 (2012) ("[T]he victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old . . ."). For purposes of this hypothetical, it is assumed that this individual was able to, and did in fact, consent.

complicitor has violated the law. But suppose that the young woman is under the legal age provided by statute.¹¹¹ In most states, statutory rape is a strict liability crime in which the defendant is held liable regardless of whether he was aware of the age (attendant circumstance) of the victim.¹¹² Under *Childress*, and a technical application of the Colorado complicity law, the alleged complicitor faces no liability. There can be no complicity liability in this situation because statutory rape is a strict liability crime and the Colorado courts have expressly refused to extend application of the complicity doctrine to such crimes. If the alleged complicitor had no idea that the victim was underage, it appears that justice (at least arguably)¹¹³ is served.

111. In Colorado, for example, an actor commits sexual assault when “the victim is less than fifteen years of age and the actor is at least four years older than the victim” or when “the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim.” COLO. REV. STAT. § 18-3-402(1)(d), (e).

112. See *United States v. Ransom*, 942 F.2d 775, 777 (10th Cir. 1991) (“The weight of authority in this country indicates that statutory rape has traditionally been viewed as a strict liability offense.”); see also 1 WHARTON’S CRIM. LAW & PROC. § 321 (1957) (“It is immaterial that the defendant in good faith believed that the female was above the prohibited age . . .”). Other states hold that negligence or recklessness as to the age of the victim is required. See, e.g., KY. REV. STAT. ANN. § 510.030 (“[T]he defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent.”); *People v. Hernandez*, 393 P.2d 673, 676–77 (Cal. 1964) (absent a legislative directive to the contrary, a charge of statutory rape was defensible where a criminal intent was lacking). In Colorado, “an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older” is only available to the defendant “[i]f the criminality of conduct depends on a child being younger than eighteen years of age and the child was in fact at least fifteen years of age.” COLO. REV. STAT. § 18-1-503.5(1). By contrast, “[i]f the criminality of conduct depends on a child’s being younger than eighteen years of age and the child was in fact younger than fifteen years of age, there shall be no defense that the defendant reasonably believed the child was eighteen years of age or older.” *Id.* § 18-1-503.5(2). Further, “[i]f the criminality of conduct depends on a child being younger than fifteen years of age, it shall be no defense that the defendant did not know the child’s age or that the defendant reasonably believed the child to be fifteen years of age or older.” *Id.* § 18-1-503.5(3). Thus, in Colorado, statutory rape is often treated as a strict liability crime. See *People v. Salazar*, 920 P.2d 893, 895 (Colo. 1996) (“[T]he legislative history relating to the adoption of [Colorado’s statutory rape laws] demonstrates that the General Assembly intended this offense to be a strict liability offense.”). For the purposes of this illustration, this Note treats statutory rape as a strict liability crime.

113. In this situation, as in the *Childress* example, the alleged complicitor has the exact same culpable mental state as the principal. It could be argued that if the legislature considered the crime of statutory rape so heinous or considered the defendant’s mens rea as to the victim’s age too difficult to prove in a situation that

To further illustrate the problems associated with a technical, blanket rule like the one currently in place in Colorado, consider a variation of the previous hypothetical: suppose the same facts as above except that the alleged complicitor actually *knew* the age of the young woman before any of the events occurred and that his friend (the principal) had no idea the woman was underage. *Childress* would still bar application of complicity liability, and the complicitor would be free to go. Justice is not served in this example. The alleged complicitor in this revised hypothetical has an even more culpable mental state than the principal. However, as the law currently stands in Colorado, the fact that the complicitor actually knew the age of the victim would have no bearing on liability. The fact that the crime involves a material, strict liability element would bar application of the complicity doctrine; the principal would be guilty of statutory rape and the complicitor could not be held criminally liable.

Of course, simply extending complicity liability to all strict liability crimes presents its own set of problems. One can imagine some situations in which a rigid application of complicity liability to a strict liability crime would produce perverse results. In the *Childress* example, is it just to hold somebody liable for a resulting injury if he gave his car keys to somebody he knew to be intoxicated and who eventually caused an injury? Is it just to hold the “wing man” liable in the statutory rape hypothetical when he does not know the age of the victim and genuinely intends for his friend to have legal intercourse? If the bar on complicity liability with respect to strict liability crimes is completely thrown out the window and the technical dual mental state test is used, liability would stretch to these alleged complicitors as well. There must be some limiting factor. The rule proposed below, combined with a restricted application of the natural and probable consequences doctrine, provides such a limitation.

was likely to come up often and therefore determined that imposition of strict liability was appropriate, the same justifications for the imposition of strict liability upon the principal should be extended to a complicitor who aided such a crime. However, these arguments speak to whether complicity liability, or even strict liability, is a justifiable doctrine at all. These issues are beyond the scope of this Note.

VI. POTENTIAL SOLUTION

This Note asserts that, if a jurisdiction allows for the application of complicity liability with respect to unintentional crimes of recklessness and negligence, it is illogical to refuse to extend the doctrine to strict liability crimes. Accordingly, this discussion adopts the underlying theory that complicity liability *does* extend to unintentional crimes without questioning whether such application is cognizable at all.

A. Interpretation of the Bogdanov Test

The *Childress* court appears to have based its holding that complicity liability cannot apply to a strict liability crime on a technical reading of the dual mental state test announced in *Bogdanov*. As discussed previously, the *Childress* court reasoned that, because the test requires that the complicitor have the *culpable* mental state of the underlying crime, complicity liability cannot extend to underlying crimes that require no culpable mental state as to one or more material element. This technical reading of the *Bogdanov* test might have overlooked the intent of the *Bogdanov* court and the intent of the legislature in imposing strict liability in certain situations.

The *Bogdanov* court stated that:

Complicity is not a theory of strict liability. It is not sufficient that the defendant intentionally engaged in acts which ultimately assisted or encouraged the principal. Rather, the complicitor must intend that his conduct have the effect of assisting or encouraging the principal in committing or planning the crime committed by the principal.¹¹⁴

The *Bogdanov* court did not say that complicity liability cannot apply to crimes of strict liability. Rather, it indicated that the doctrine itself is not a form of strict liability. The court is concerned with the *complicitor's* culpable mental state rather than the culpable mental state, or lack thereof, of the underlying crime. If the court intended to bar the application of

114. *Bogdanov v. People*, 941 P.2d 247, 251 (Colo. 1996).

complicity liability with respect to strict liability crimes, this would have been a good opportunity to do so.

Consistent with the holding in *Bogdanov*, one could argue that the term culpable mental state includes unintentional behavior. Under that reading, the dual mental state test would more closely reflect the MPC approach and could be stated as: the complicitor must (1) have the culpable mental state, *if any*, required for the underlying crime; and (2) the complicitor must intend that his own conduct promote or facilitate the commission of the crime committed by the principal.

These are technical arguments, and it is not the purpose of this Note to argue that the current approach to complicity liability in Colorado is inconsistent based on a technical reading of precedent. Instead, these arguments are presented to illustrate the flaws in the *Childress* court's analysis and to point out that the "dual mental state" test in *Bogdanov* does not, as a technical matter, bar the application of complicity liability to strict liability crimes.

B. A Logical Approach

Irrespective of the technical arguments for one interpretation of the test or another, it is logically inconsistent to allow for complicity liability in the case of recklessness and negligence and not allow for its application in the context of strict liability crimes. The crime of negligent manslaughter, addressed in *Wheeler*, illustrates this inconsistency.¹¹⁵ One is liable for criminally negligent manslaughter if he acts in gross deviation from the standard of care that a reasonable person would exercise and thereby fails to perceive a substantial and unjustifiable risk that an adverse result will occur.¹¹⁶ Whatever the culprit's *intent*, he is liable for the result if he engages in this sort of conduct. This is closely analogous to the strict liability crime of Vehicular Assault (DUI) addressed by the *Childress* court in that whatever the culprit's *intent*, he is liable for the result if he drives intoxicated.¹¹⁷ The difference is that to be held liable for criminally negligent homicide, one must fail to perceive a substantial and unjustifiable risk that the result will occur, while strict liability crimes like Vehicular

115. See *supra* Part III.A.1.

116. See COLO. REV. STAT. §§ 18-3-105, 18-1-501(3) (2014).

117. See *supra* Part III.A.3.

Assault (DUI) require no awareness (or lack of awareness) as to the result. This difference is tenuous but important to note.

Contrary to the suggestion of the *Childress* court, the *Bogdanov* opinion does not close the door on the application of complicity liability to crimes of strict liability.¹¹⁸ Rather, the opinion emphasizes and focuses on the importance of a culpable mental state with regard to the complicitor. An absolute bar on the application of the complicity doctrine with respect to strict liability crimes should be abandoned because it creates a logical inconsistency, can lead to perverse results, and rests on a technical reading of precedent that may not have been intended. Complicity liability should be extended to strict liability crimes, but this application must be limited to reconcile the doctrine's application to other unintentional crimes and to avoid the parade of horrors that will follow from unrestrained application of the doctrine.

The spirit of the *Bogdanov* opinion should be followed. Accordingly, application of the complicity doctrine should be allowed where: (1) the complicitor has a culpable mental state as defined in section 18-1-501(4) of the Colorado Revised Statutes with respect to each material element of the underlying crime committed by the principal; (2) the complicitor's mental state is no less culpable than the mental state, if any, required for each material element of the underlying crime committed by the principal; and (3) the complicitor intends that his own conduct promote or facilitate the conduct of the principal.

C. Application of the Proposed Rule

It is important to flesh out the rule proposed above in order to fully understand how it is to be applied. The *Childress* case provides an adequate platform to illustrate this application.

First, under the proposed rule, as a threshold requirement for the application of the complicity doctrine to any crime, the alleged complicitor must have a culpable mental state as defined in Colorado as "intentionally, or with intent, or knowingly, or willfully, or recklessly, or with criminal negligence"¹¹⁹ with respect to all material elements of the

118. See *supra* Part III.A.2.

119. COLO. REV. STAT. § 18-1-501(4).

crime. Vehicular Assault (DUI) consists of three material elements: (1) operating or driving a motor vehicle (2) while under the influence of alcohol or drugs, and (3) this conduct must be the proximate cause of serious bodily injury.¹²⁰ Thus, at a minimum, Childress must have acted with a gross deviation from the standard of care that a reasonable person would exercise by encouraging his son to (1) drive a motor vehicle (2) while intoxicated and (3) in doing so, he must have failed to perceive a substantial and unjustifiable risk that encouraging his son to do so will result in injury.

Second, the alleged complicitor's mental state must be no less culpable than the mental state, if any, required for each material element of the underlying crime committed by the principal. The "if any" language in this part of the proposed rule allows for complicity liability with respect to strict liability crimes but, pursuant to the threshold requirement for the application of the doctrine to any crime, the alleged complicitor must still act with *some* culpable mental state even if no culpable mental state is required of the principal. Further, the "no less culpable" language ensures that the alleged complicitor will not be held liable, for example, if he or she is found to have acted with only negligence but the underlying crime requires recklessness.¹²¹ In the *Childress* example, the crime of Vehicular Assault (DUI) does not require a culpable mental state with respect to any material elements of the crime.¹²² Under the proposed rule, Childress may still be held liable. However, it is important to remember that Childress must still have acted with at least criminal negligence as to each of these three elements under the threshold requirement of the proposed rule.

120. COLO. REV. STAT. § 18-3-205(1)(b)(I).

121. This language also avoids another potential injustice that strict application of the dual mental state test could create: if the alleged complicitor must have the culpable mental state of the underlying crime, strictly construed, a complicitor acting with *intent* as to an underlying offense that requires only *recklessness* does not act with the same mental state required for the underlying crime and thus could not be held liable under a strict reading of the dual mental state test even though he acted with a *more* culpable mental state than the underlying crime requires. Perhaps courts would find that the more culpable mental state encompasses the lesser but that is uncertain and would go against the technical reading and application of the test that Colorado courts have adopted. Exploration of this potential problem is beyond the scope of this Note, but the language in the proposed rule ensures that this pitfall will be avoided.

122. COLO. REV. STAT. § 18-3-205(1)(b)(I).

Finally, under the proposed rule, the alleged complicitor must intend that his or her conduct promote or facilitate the conduct of the principal. This element of the rule imposes an additional mental state requirement in that it requires actual intent with regard to the influence the complicitor's actions have on the principal. This element does not require that the complicitor specifically intend the *result*. Rather, the complicitor must intend only that his or her actions promote or facilitate the *conduct* that the principal engages in. Accordingly, Childress must intend that his conduct—encouraging his son to drive while intoxicated—actually promote or facilitate his son driving while intoxicated. As an extreme example: if Childress encouraged his son to drive while intoxicated and his son instead decided to rob somebody, Childress would not be liable as a complicitor in the robbery.

This proposed rule allows for complicity liability with regard to crimes of strict liability but imposes an important limitation to the doctrine by limiting liability to situations in which the complicitor acted with at least criminal negligence as to all material elements of the underlying offense. The most obvious weakness of this limitation—and thereby, of the proposed rule itself—is that its application could be largely discretionary and therefore could be used to impose liability beyond the demands of justice. One acts with criminal negligence as to a particular result when he or she fails to perceive a substantial and unjustifiable risk that the result will occur.¹²³ Whether one can be held complicit under the proposed rule for crimes that result from handing an intoxicated friend keys to a car or playing “wing man” for a friend may depend on how broadly “substantial” and “unjustifiable” are interpreted. This is a unique situation of liability in which a restricted view of the natural and probable consequences doctrine may be necessary and should be seriously considered. However, that discussion speaks largely to negligence standards and is outside the scope of this Note. Nevertheless, the proposed rule by itself presents no new form of liability because it allows for complicity liability only where the alleged complicitor acts with at least criminal negligence. Therefore, it is consistent with the *Wheeler* decision, and the scope of liability allowed by that decision will likely govern the application of this rule as well.

123. COLO. REV. STAT. § 18-1-501(3).

The proposed rule clarifies the application of the complicity doctrine in Colorado and changes the current approach only in that it allows for the application of the doctrine with respect to crimes of strict liability. However, the proposed rule does not necessitate its application in all cases of strict liability. The result, for which an alleged complicitor may be held liable under the proposed rule, should remain within the scope of the *Wheeler* decision restrained by a narrow application of the natural and probable consequences doctrine.

CONCLUSION

The Colorado Supreme Court should use the opportunity presented by the *Childress* case to clarify the doctrine of complicity liability and hold that the doctrine applies to situations in which (1) the complicitor has a culpable mental state as defined in section 18-1-501(4) of the Colorado Revised Statutes with respect to each material element of the underlying crime committed by the principal; (2) the complicitor's mental state is no less culpable than the mental state, if any, required for each material element of the underlying crime committed by the principal; and (3) the complicitor intends that his own conduct promote or facilitate the conduct of the principal.

This rule allows for complicity liability with regard to strict liability crimes in order to avoid the perverse results discussed above. Importantly, it also ensures that any complicitor will have a culpable mental state of at least criminal negligence. In doing so, this rule adequately safeguards against the *Childress* court's fear of "imposing strict liability on an alleged complicitor when the principal acts without a culpable mental state."¹²⁴ At the same time, the rule stays true to the spirit of the *Bogdanov* decision and ensures that the alleged complicitor acts with a culpable mental state in order for liability to attach. The *Bogdanov* court made it clear that complicity liability is not itself a crime of strict liability and the rule proposed by this Note ensures that it will not become one.

124. *People v. Childress*, No. 08CA2329, 2012 WL 2926636, at *1 (Colo. App. Jul. 19, 2012), *cert. granted*, No. 12SC820, 2013 WL 3168267 (Colo. June 24, 2013).