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COMMENTS

ACCOMPLICE LIABILITY UNDER THE 1979 MISSOURI CRIMINAL CODE

I. INTRODUCTION

Accomplice liability is perhaps the most difficult theory to understand in criminal law. The person being tried for the crime did not physically perform the acts which constitute the crime, but only aided or abetted the principal actor of the offense. It has therefore been necessary to prove not only the acts and state of mind of the accomplice, but also the acts and state of mind of the principal. The complexities that arise from trying to juggle these four variables into a conviction or an acquittal are seemingly endless. Most existing accomplice liability statutes provide few guidelines, and the judiciary is not always consistent in its terminology. In response to dissatisfaction with traditional accomplice liability statutes, several state legislatures have enacted remedial legislation to provide for more uniform application and analysis.¹

The 1979 Missouri Criminal Code has made several major changes in the area of accomplice liability.² Although Missouri's provisions are

1. See ILL. REV. STAT. ch. 38, § 5-1, 5-2, 5-3 1973; OR. REV. STAT. §§ 161.150-.165; TEX. PENAL CODE ANN. tit. 2, §§ 7.01-.03 (Vernon 1974).

2. MO. CRIM. CODE §§ 562.036-.051 (eff. Jan. 1, 1979) (repealing RSMO §§ 556.170-.190 (1969)).

RSMO § 562.036, Accountability for conduct, provides:

A person with the required culpable mental state is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible, or both.

RSMO § 562.041, Responsibility for the conduct of another, provides:

1. A person is criminally responsible for the conduct of another when

(1) The statute defining the offense makes him so responsible; or

(2) Either before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense.

2. However, a person is not so responsible if:

(1) He is the victim of the offense committed or attempted;

(2) The offense is so defined that his conduct was necessarily incidental to the commission or attempt to commit the offense. If his conduct constitutes a related but separate offense, he is criminally responsible for that offense but not for the conduct or offense committed or attempted by the other person;

(3) Before the commission of the offense he abandons his purpose and gives timely warning to law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

similar to newly adopted provisions of other states, the Missouri provisions are unique in their wording and application. In some ways the 1979 Criminal Code has expanded the scope of accomplice liability, and in other ways it has narrowed the scope. It is now clear that persons who unsuccessfully attempt to aid the commission of a crime are subject to liability.³ The state of mind requirement for the accomplice has been modified which may affect the application of the felony murder rule and the natural and probable consequence rule.⁴ An affirmative defense of withdrawal is now available to a defendant who makes an effort to absolve himself from liability by trying to prevent the crime.⁵ Many common law defenses have been statutorily precluded, and certain persons are excepted from liability.⁶ The purpose of this comment is to discuss these and other changes made by the 1979 Missouri Criminal Code in Missouri's law of accomplice liability.

II. PARTIES TO THE OFFENSE

Parties to felonies at common law were classified as principal in the first degree, principal in the second degree, accessory before the fact, and accessory after the fact.⁷ The principal in the first degree is the criminal actor, or the party who does the act or omission with the requisite state of mind for the commission of the offense. The principal in the second degree is present at the scene of the crime and in some manner aids, assists, or encourages the perpetrator.⁸ An accessory before the fact is not present at the

3. The defense provided by subdivision (3) of subsection 2 is an affirmative defense.

RSMO § 562.046, Defenses precluded, provides:

It is no defense to any prosecution for an offense in which the criminal responsibility of the defendant is based upon the conduct of another that

(1) Such other person has been acquitted or has not been convicted or has been convicted of some other offense or degree of offense or lacked criminal capacity or was unaware of the defendant's criminal purpose or is immune from prosecution or is not amendable to justice; or

(2) The defendant does not belong to that class of persons who was legally capable of committing the offense in an individual capacity.

RSMO § 562.051, Conviction of different degrees of offenses, provides:

Except as otherwise provided, when two or more persons are criminally responsible for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating or mitigating fact or circumstance.

3. MO. CRIM. CODE § 562.041.1(2) (eff. Jan. 1, 1979). See text accompanying notes 48-52 *infra*.

4. *Id.* §§ 562.036, 562.041.1(2). See text accompanying notes 113-61 *infra*.

5. *Id.* § 562.041.2(3). See text accompanying notes 206-29 *infra*.

6. *Id.* § 562.046. See text accompanying notes 162-205 *infra*.

7. See generally 22 C.J.S. Criminal Law §§ 79-86 (1961).

8. *Id.*

scene of the crime, but orders, procures, assists, incites, encourages, or in some way aids the principal in the first degree before the commission of the offense.⁹ An accessory after the fact is one who gives aid to a felon after the commission of the crime has been completed.¹⁰

At common law there were several technical procedural problems which shielded accessories from liability in spite of evidence of their criminal assistance.¹¹ The former Missouri statute on accomplice liability abrogated the procedural differences and the distinctions between principal in the first degree, principal in the second degree, and accessory before the fact by providing that a principal in the second degree and an accessory before the fact could be charged, tried, and convicted in the same manner as the principal in the first degree.¹² In other words, the information or indictment did not need to allege facts of aiding and abetting, but could have charged the aider and abettor with the commission of the crime of the principal.¹³

The 1979 Criminal Code does not refer to principals or accessories.¹⁴ Instead it describes the conditions under which a person is criminally responsible for the conduct of another. The scope of section 562.041, which deals with responsibility for the conduct of another, encompasses both a principal in the second degree and an accessory before the fact.

III. CONDUCT NECESSARY FOR ACCOMPLICE LIABILITY

A. *Conduct of the Principal*

Aiding and abetting has been a standard legislatures and courts have used to deem one person guilty of a crime that was committed by someone else.¹⁵ At least four requirements had to be met for the accomplice liability theory to be applicable: (1) a crime must have been committed by the principal actor;¹⁶ (2) the principal actor must have had the requisite state of

9. *Id.*

10. *Id.* An accessory after the fact is not an accomplice and is dealt with in the 1979 Criminal Code in Chapter 575, Administration of Justice. An accessory after the fact will not be discussed in this comment.

11. For further information, see generally W. LAFAYE & A. SCOTT, CRIMINAL LAW § 63 at 495-501 (1972).

12. RSMO § 556.170 (1969).

13. *State v. West*, 484 S.W.2d 191 (Mo. 1972); *State v. Spic*, 389 S.W.2d 35 (Mo. 1965); *State v. Fredericks*, 85 Mo. 145 (1884); *State v. Ostman*, 147 Mo. App. 422, 126 S.W. 961 (St. L. 1910).

14. For purposes of this comment, principals in the first degree will hereinafter be referred to as "principal," and principals in the second degree and accessories before the fact will hereinafter be referred to as "accomplices" or "accessories."

15. See, e.g., *State v. Gideon*, 453 S.W.2d 938 (Mo. 1970); *State v. Slade*, 338 S.W.2d 802 (Mo. 1960); *State v. Butler*, 310 S.W.2d 952 (Mo. 1958).

16. See *State v. Davis*, 319 Mo. 1222, 6 S.W.2d 609 (En Banc 1928) (reversing an attempted murder conviction on the grounds that no overt step toward the commission of the crime had been taken).

mind;¹⁷ (3) the defendant must have aided or abetted the commission of the crime;¹⁸ and (4) the defendant must have had the purpose of aiding or abetting.¹⁹ If these four requirements were met at common law, the conduct of the principal and the required culpable state of mind were imputed to the aider and abettor, and he could be convicted as if he had personally committed the crime.²⁰

The 1979 Criminal Code section entitled "Responsibility for the Conduct of Another"²¹ makes aiding the commission of an offense a means of imputing only the *conduct* of another person to the accessorial defendant. The guilt of the defendant depends upon his own culpable state of mind. To illustrate the effect of this provision it is helpful to re-analyze *State v. Hayes*,²² a well known Missouri case. The defendant, Hayes, proposed a burglary to Hill who feigned agreement intending to have Hayes arrested. Hayes helped boost Hill through the window but remained outside to receive the stolen goods. Hayes was convicted of burglary upon proof that he was an accomplice to Hill. The Missouri Supreme Court reversed the conviction, holding that since Hill did not intend to permanently deprive the owner of the goods he had not committed a burglary. Hayes did not enter the store, so neither had he committed a burglary as a principal in the first degree. Because there was no burglary committed by a principal in the first degree, there could be no accomplice.

Under the 1979 Criminal Code, the court would have reached a different result. The defendant, Hayes, intended to permanently deprive the owner of the goods.²³ Hayes had the purpose of aiding the conduct of what he believed to be a burglary.²⁴ Under section 562.041 he would be criminally responsible for the conduct of Hill, which was the conduct of entering the premises unlawfully. Only the conduct of Hill would be imputed to Hayes, and when this conduct is combined with Hayes' guilty state of mind, Hayes could be convicted of burglary.

State v. Hayes represents the simpler analysis, since the principal actually committed the acts that constituted burglary. The more difficult fact situation is where the principal actor does not complete the acts of the crime. Suppose Hill had not entered the store, but only opened the window. Hill's conduct would be imputed to Hayes, but since there was no entering, it could not be classified as burglary. However, if opening the window is considered a substantial step in committing a burglary, Hayes

17. See *State v. Hayes*, 105 Mo. 76, 16 S.W. 514 (1891).

18. See generally cases cited note 28 *infra*.

19. See generally cases cited note 66 *infra*.

20. See generally cases cited note 13 *supra*.

21. MO. CRIM. CODE § 562.041 (eff. Jan. 1, 1979).

22. 105 Mo. 76, 16 S.W. 514 (1891).

23. See MO. CRIM. CODE § 562.036 (eff. Jan. 1, 1979) (requires that the accomplice have the requisite state of mind for the underlying felony).

24. See *id.* § 562.041.1(2) (requires that the accomplice have the purpose of promoting the commission of the offense).

could be convicted of attempted burglary.²⁵ If Hill had merely looked in the window, this is the conduct that would be imputed to Hayes. Looking in a window probably is not a substantial step toward the commission of a burglary and would not rise to the level of a criminal attempt. Hayes would have the intent to permanently deprive the owner of the goods, and he would have the purpose of aiding Hill in a burglary. Nonetheless, since there probably is no act of Hayes, nor of Hill that could be imputed to Hayes, that constitutes a burglary or a substantial step towards a burglary, Hayes could not be convicted of either burglary or of attempted burglary.²⁶

B. *Conduct of the Accomplice*

Application of accomplice liability theory is only necessary when the defendant did not commit all of the acts essential for the commission of the offense, but participated in its commission in some manner.²⁷ This means that not only must the state prove the conduct of the principal which constituted the crime, but the state also must prove conduct on the part of the defendant that constituted the aiding. As there are no statutory guidelines to determine what specific acts or conduct constitutes aiding the commission of an offense, it is necessary to examine Missouri case law.

Judicial decisions have made it clear that guilt must be based on some form of affirmative participation, such as counseling, commanding, procuring, encouraging, facilitating, or assisting in the commission of the offense.²⁸ The Missouri Supreme Court has indicated that verbal en-

25. See *id.* § 564.011 (provides that a person is guilty of an attempt to commit an offense if he does any act which is a substantial step in the commission of that offense).

26. This does not mean that Hayes could not be brought to justice. He could still be charged with conspiracy to commit burglary if the agreement between Hayes and Hill could be proved. Hayes is still responsible for his own activities and can be charged with any crimes he commits.

27. See *State v. Gideon*, 453 S.W.2d 938 (Mo. 1970).

28. See *State v. Stockdale*, 415 S.W.2d 769, 772 (Mo. 1967) (affirmed robbery conviction of accomplice who served as lookout and kept passersby away, stating, "[e]vidence fairly showing any form of affirmative participation, or that the accused in any way aided, abetted or encouraged another in the commission of a crime is sufficient to support a conviction."); *State v. Siekermann*, 367 S.W.2d 643 (Mo. 1963) (affirmed abortion conviction of defendant who drove the car to pick up the women and drop them off at the abortion home); *State v. Present*, 344 S.W.2d 9 (Mo. 1961) (affirmed conviction of stealing personal property, holding that there was evidence of one act, going down the platform and looking in a window, which might reasonably have been construed as affirmative act of participation); *State v. Lewis*, 539 S.W.2d 451 (Mo. App., D.K.C. 1975) (fact of noninterference in the criminal act or failure to notify the police is not sufficient to support a charge as a principal or an accomplice); *Kansas City v. Lane*, 391 S.W.2d 955 (K.C. Mo. App. 1965); *State v. Muchnick*, 334 S.W.2d 386, 389 (St. L. Mo. App. 1960) (reversed conviction of "permitting" a person under the age of 21 to assist in the sale of liquor, stating, "[t]o permit or suffer im-

couragement is sufficient, and no physical act of participation is necessary,²⁹ although this may be changed by the 1979 Criminal Code.³⁰

Mere presence at the scene of the crime is not enough, even with knowledge that a crime is being committed and a desire that it be committed successfully.³¹ Even where the defendant is present for the purpose of aiding the commission of the crime, without some form of affirmative participation in furtherance of that purpose there is no liability.³² Presence may raise an inference of complicity and the trier of fact may consider companionship plus conduct before and after the perpetration of the offense to infer participation.³³ Actual presence at the scene of the crime is

plies no affirmative act—involves no intent. It is mere passivity, indifference, abstaining from preventive action.”).

29. *State v. Stidham*, 305 S.W.2d 7 (Mo. 1957); *McMannus v. Lee*, 43 Mo. 206, 208 (1869) (“any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor.”).

30. Verbal encouragement may not be sufficient for liability under the 1979 Criminal Code. *See* text accompanying notes 36-47 *infra*.

31. *See State v. Irby*, 423 S.W.2d 800 (Mo. 1968); *State v. Castaldi*, 386 S.W.2d 392, 395 (Mo. 1965) (conviction of tampering with auto reversed on the grounds that mere presence of the defendant at the scene of the crime was insufficient to render him a participant. There was no evidence from which it could be inferred that the defendant “encouraged or excited the commission of the offense, or participated therein, before or during the occasion when the deputy arrived, by words, gestures, looks, signs, or that he otherwise countenanced, approved or associated himself with the criminal activity . . .”); *State v. Bresse*, 326 Mo. 885, 893, 33 S.W.2d 919, 922 (1930) (reversed stealing conviction of defendant who before and after theft was in the company of the person who stole the car. “Neither the purpose to commit a crime nor the intent to commit a crime, without an act in furtherance of that purpose or intent, is a legal offense. One may not be held criminally responsible for a state of mind unaccompanied by an act.”); *State v. Odbur*, 317 Mo. 372, 295 S.W. 734 (1927) (defendant’s presence at assault and holding of principal’s horse held insufficient to show he aided resulting homicide); *State v. Favell*, 411 S.W.2d 245, 249 (St. L. Mo. App. 1967) (reversing a conviction of theft, the court stated “[t]he crucial point is that the evidence fails to show beyond a reasonable doubt that the defendant participated in the theft or that he sought in any way to make it succeed. At most we may infer that the defendant was present during asportation—that is not enough”); *State v. Mathis*, 129 S.W.2d 20, 22 (St. L. Mo. App. 1939) (reversing a conviction of petit larceny, the court stated that “[a] mere presence combined with a refusal to interfere or with concealing the fact, or a mere knowledge that a crime is about to be committed, or a mental approbation of what is done while the will contributes nothing to the doing will not create guilt”).

32. *See generally* cases cited notes 28 & 31 *supra*.

33. *State v. Gregory*, 406 S.W.2d 662 (Mo. 1966) (affirmed conviction of first degree robbery on the basis of evidence of defendant’s movements, his times of arrival and departure from the gas station where the robbery took place, his immediate proximity at the time of the actual robbery, his apparent acquaintance with the robbers, and his conversations with one or both of them, which created an inference that he aided and abetted in the perpetration of the crime);

not necessary for liability. The defendant may be constructively present if, prior to the offense, he performs some act of procurement, encouragement, or assistance with the purpose of promoting the commission of the offense.³⁴

The net effect of these rules is that an accomplice can be convicted of a crime on the basis of conduct that in an isolated situation would not be considered criminal or constitute any elements of the crime of which he is convicted. For example, standing on a street corner and whistling at the sight of a patrol car is not criminal, nor is it an element of burglary. Yet, if this is done with the purpose of warning someone who is committing a burglary,³⁵ the whistler could be convicted of burglary.

In many instances, prior Missouri case law will be an adequate guide to determine whether the accomplice aided the principal actor in committing the crime. The new code section 562.041 imposes accomplice liability on one who "aids or agrees to aid or attempts to aid" a person who commits a crime. Conspicuously absent is any reference to either principals in the second degree or the imposition of liability for abetting. The prior Missouri statute referred to principals in the second degree,³⁶ who are "aiders and abettors,"³⁷ and previous Missouri cases almost universally imposed accomplice liability using language such as "aiding and abetting."³⁸ The use of the term aid without others such as abet or encourage, a step not taken in some other jurisdictions,³⁹ may in one sense narrow the scope

State v. Ramsey, 368 S.W.2d 413 (Mo. 1963) (affirmed conviction of second degree burglary; defendant was a passenger in a car that was at the scene of the attempted burglary and burglar tools were found in the back seat; court held that these circumstances raised a fair and reasonable inference of concerted action, which involved the defendant as principal or aider and abettor); State v. Corbin, 186 S.W.2d 469 (Mo. 1945); State v. Jackson, 519 S.W.2d 551 (Mo. App. D. St. L. 1975) (affirmed conviction of second degree burglary on the basis of evidence that the defendant was seen running from the scene of the burglary and his car was parked nearby).

34. State v. Slade, 338 S.W.2d 802 (Mo. 1960).

35. MO. CRIM. CODE § 569.160 (eff. Jan. 1, 1979).

36. RSMO § 556.170 (1969).

37. State v. Stidham, 449 S.W.2d 634, 637 (Mo. 1970) ("aided, abetted, assisted or encouraged"); State v. Clymer, 159 S.W.2d 808, 810 (Mo. 1942) ("aiding and abetting those who actually commit the offense"); State v. Phillips, 24 Mo. 475, 481 (1857) ("aiding and abetting", "aiding and encouraging"). A principal in the second degree is one who is present "aiding and abetting the fact to be done." BLACK'S LAW DICTIONARY 1356 (4th ed. 1951).

38. See notes 28, 29, 31 & 33 *supra*. See also State v. Tripp, 303 S.W.2d 627, 631 (Mo. 1957) ("conspiring and counseling").

39. Other state criminal codes which have recently been adopted retain the terms "encourage" or "abet" in their accomplice liability statutes. See, e.g., ILL. REV. STAT. ch. 38, § 5-2(c) (1973) ("Either before or during the commission of an offense, and the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid such other person in the planning or the commission of the offense."); TEX. PENAL CODE ANN. tit. 2, § 7.02(a)(2) (Vernon 1974) ("A person is criminally responsible for an offense committed by the conduct of

of accomplice liability.⁴⁰ Although aid and abet can be said to be synonyms, the term abet has a more technical meaning than the term aid. Aid means to support, help, assist or strengthen, or act in cooperation with someone.⁴¹ The word aid implies physical participation in the offense on the part of the person giving the aid. The definition of the term abet includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime.⁴² The omission of the word abet from section 562.041 could be interpreted to mean that mere verbal encouragement to commit the crime is no longer sufficient to impose accomplice liability.⁴³

If mere verbal encouragement before or during the commission of the offense is no longer sufficient for a conviction of the underlying crime, the scope of accomplice liability would be narrowed. *State v. Stidham*⁴⁴ could illustrate a possible effect of this interpretation. The defendant was convicted with others of a murder committed on the night of a prison riot. Several prisoners had broken into the cell of a fellow inmate and inflicted multiple wounds upon him, killing him. On appeal, the defendant argued that since there was no evidence that he participated in the killing, he could not be convicted of murder. The Missouri Supreme Court affirmed the conviction, holding that no particular physical acts are necessary, but "mere encouragement is enough in the absence of statutory provisions."⁴⁵ If *Stidham* had been decided under section 562.041, the conviction might have been reversed, unless the state could have shown some physical act of participation, or agreement by the defendant to physically participate.

Because there is flexibility in statutory interpretation, section 562.041 may not limit the scope of accomplice liability. Verbal encouragement could be interpreted to fit within the meaning of the term aid. It is an affirmative act, and if it can be proven that this encouragement was the impetus to the crime or if the principal could not have committed the offense but for the encouragement, then it certainly "supported, helped, or

another if: . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense").

40. It can also be said that the use of the word aid without expansion (such as inclusion of the term "abet" or reference to common law principals in the second degree) will *broaden* the scope of accomplice liability. See discussion in text accompanying notes 99-109 *infra*.

41. *Hines v. State*, 16 Ga. App. 411, 414, 85 S.E. 452, 454 (1915); *Cornett v. Commonwealth*, 198 Ky. 236, 239-40, 248 S.W. 540, 542 (1923). See also cases cited note 28 *supra*.

42. *People v. Terman*, 4 Cal. App. 2d 345, 346-47, 40 P.2d 915, 916 (1935). See also cases cited note 29 *supra* and note 101 *infra*.

43. Section 562.041 covers counseling in the commission of the offense by the use of the term "planning."

44. 309 S.W.2d 716 (Mo. 1957).

45. *Id.* at 15.

assisted" the principal. Holding an accomplice liable for murder because he provided essential moral support is as logically sound as holding him liable for murder because he provided the murder weapon. Because the new statute uses the term aid without others, the courts will be called upon to decide whether it was the legislative intent to impose accomplice liability on this basis.

Section 562.041.1(2) also makes an accomplice liable where he merely "agrees to aid," which rather than physical participation in the offense is only an *agreement* to physically participate. This would cover the situations where the defendant agrees to give aid and is present and ready to give aid if it becomes necessary,⁴⁶ or where he agrees to aid in the commission of the crime, but for some reason does not do so and fails to make an effective withdrawal from the offense.⁴⁷

C. *Attempts to Aid*

Aiding the commission of an offense may take a variety of forms, but the aid given need not actually help the principal perform the criminal act. Section 562.041.1(2) provides that an accomplice is responsible for the conduct of another if he "attempts to aid such other person in planning, committing, or attempting to commit the offense." No Missouri case law discusses what conduct constitutes an attempt to aid, but it can be assumed that, as a minimum, an accomplice attempts to give aid when he takes a substantial step towards giving that aid,⁴⁸ whether or not successful in rendering aid.

For example, suppose A learns that a telegram is being sent to warn B that C is going to kill him. Since A wants C to kill B, A sends another telegram to the telegraph operator, whom he knows, to tell him not to deliver the first telegram, thus preventing delivery of the warning.⁴⁹ The messenger delivers the telegram anyway; A has unsuccessfully tried to aid C. To send a telegram asking the telegraph operator not to deliver the warning is a substantial step in attempting to give aid to C. A would be criminally responsible for the conduct of C and if C kills B, A could also be convicted

46. Cf. *State v. Gooch*, 105 Mo. 392, 16 S.W. 892, 893 (1891) (affirming the conviction of an accomplice for assault with intent to kill indicating in *dicta* that being present to render aid if necessary might be sufficient to impose accomplice liability).

47. See *State v. Forsha*, 190 Mo. 296, 88 S.W. 746 (1905) (affirming a conviction of an accomplice for murder in the second degree even though the accomplice fled the scene of the crime before the fatal shot was fired.)

48. Cf. MO. CRIM. CODE § 564.011 (eff. Jan. 1, 1979) (to be guilty of an attempt crime, a substantial step toward the commission of the offense must be taken).

49. See *State ex rel. Martin v. Tally*, 102 Ala. 25, 15 So. 722 (1894). For further discussion, see generally W. LAFAVE & A. SCOTT, *supra* note 11, § 64 at 504-05.

of murder. This provision is patterned after the Model Penal Code which provides that an attempt to give aid is a basis for liability on the grounds that "attempted complicity ought to be criminal and to distinguish it from effective complicity appears unnecessary when the crime has been committed."⁵⁰

Suppose the murder is not committed in the hypothetical above, and further that C takes a shot at B intending to kill him and misses; C would be guilty of attempted murder. Under both the Missouri Criminal Code and the Model Penal Code A would be criminally responsible for the conduct of C. Therefore, A also would be guilty of attempted murder. But, suppose B leaves the country after receiving the warning, before an attempt to kill him can be made. The Model Penal Code suggests that in such a case the accomplice would be guilty of an attempt to commit murder.⁵¹ Under the Missouri Criminal Code, there would be no liability because A is made responsible for the *conduct* of C.⁵² If C made no substantial step toward killing B, there is no unlawful conduct to impute to A. A's own conduct is probably not a substantial step toward the commission of murder, so neither would A be guilty of attempted murder on the basis of his own conduct.

D. *Irresponsible or Innocent Agents*

Another basis for accomplice liability is the causing of an irresponsible or innocent agent to commit a crime.⁵³ Such an agent could be a mentally incompetent person, a child, or a dupe. At common law, such an intermediary is considered only an instrument; the instigating actor is regarded as the principal in the first degree if he has the requisite state of mind.⁵⁴

In theory, Missouri's new accomplice liability provision parallels the common law in this area. It differs only in terminology. For example, suppose A, with intent to injure B's wheat threshing machine, induces C, a child, to put scrap iron in the wheat to be threshed.⁵⁵ At common law the

50. MODEL PENAL CODE § 2.06(3)(a)(ii) (1962) ("aids or agrees or attempts to aid such other person in planning or committing" the offense).

51. *Id.* § 5.01(3), Comment (Tent. Draft No. 10, 1960).

52. MO. CRIM. CODE § 562.041 (eff. Jan. 1, 1979).

53. Most modern criminal codes deal separately with the two basis of accomplice liability: accomplice liability by aiding the commission of an offense, or accomplice liability by causing an innocent or irresponsible agent to commit an offense. *See, e.g.*, ILL. REV. STAT. ch. 38, § 5-2(a) (1973); TEX. PENAL CODE ANN. tit. 2 § 7.02(a)(1) (Vernon 1974). In this respect, the Missouri Criminal Code differs from other state codes because § 562.041, read in conjunction with § 562.046 which precludes certain defenses, is designed to cover both bases for liability for the conduct of another. MO. PROPOSED CRIM. CODE § 7.070, Comment (Proposed Final Draft, 1972).

54. *State v. Lavin*, 11 Mo. App. 11, at 496-97.

55. *State v. McLain*, 92 Mo. App. 456 (St. L. 1902).

conduct of C would be imputed to A as principal in the first degree, and A's criminal liability would depend upon his own intent to destroy or injure the machine.⁵⁶ The analysis is similar under the 1979 Criminal Code, but A is not made the principal in the first degree. A aided C, by planning the offense and by providing the scrap iron, with the purpose of promoting the property damage and knowing that B's threshing machine would be damaged as a result. Under sections 562.036 and 562.041, A would be criminally responsible for C's conduct because of the aid given. If the damage exceeded \$5000, A would be guilty of property damage in the first degree.⁵⁷ It would be no defense that C lacked criminal capacity.⁵⁸ Both at common law and under the 1979 Criminal Code the conduct of C is imputed to A, and A's liability depends upon his own *mens rea*, without consideration of the actor's state of mind. Common law only applies this analysis in the case of an innocent or irresponsible agent.⁵⁹ The 1979 Missouri Criminal Code applies it in all situations of accomplice liability,⁶⁰ as previously discussed.⁶¹

IV. MENTAL STATE REQUIRED FOR ACCOMPLICE LIABILITY

The former Missouri statute on accomplice liability did not set out the mental state required to hold a person liable for the conduct of another.⁶² As a result, the Missouri case law is unclear in its terminology on this issue.⁶³ Sections 562.036 and 562.041 of the 1979 Missouri Criminal Code

56. If the defendant caused the iron to be concealed in Thompson's wheat with the malicious purpose of damaging or destroying Mrs. Elbacher's separator, *knowing* that in the natural course of events the wheat would be run through the separator with the iron in it and thereby injure the machine, and the injury actually transpired in the manner *contemplated*, then it was caused by the defendant and was intentionally caused by him and he is criminally liable. (emphasis added).

Id. at 462. See also *State v. Kramer*, 206 Mo. App. 49, 226 S.W. 643 (K.C. 1920).

57. MO. CRIM. CODE § 569.100 (eff. Jan. 1, 1979).

58. *Id.* § 562.046.

59. See W. LAFAVE & A. SCOTT, *supra* note 11, at 496-97.

60. For some offenses, such as murder and assault, the 1979 Criminal Code is designed to eliminate the need of an accomplice liability analysis by including causation in the statute; therefore the originating actor would be the principal in the first degree. For example, a person is guilty of capital murder if he "unlawfully, willfully, knowingly, deliberately, and with premeditation kills or *causes* the killing of another human being . . ." (emphasis added). MO. CRIM. CODE § 565.001 (eff. Jan. 1, 1979). See also *id.* § 565.050 (similarly inculcating one who *causes* assault in the first degree).

61. See text accompanying notes 15-26 *supra*.

62. RSMO § 556.170 (1969).

63. *State v. Grebe*, 461 S.W.2d 265, 268 (Mo. En Banc 1970) (it is necessary to find that the defendant had "*the intent to encourage and abet the crime committed*"); *State v. Gideon*, 453 S.W.2d 938, 940 (Mo. 1970) ("There can be no doubt that a principal and an accomplice act together with a common purpose in the commission of a crime are equally guilty."); *State v. Odbur*, 317 Mo. 372, 379-80, 295

set out guidelines for a complete analysis of the mental state one must have to be criminally responsible for the conduct of another. Two distinct mental states must be present. An accomplice must have the *purpose* of promoting the commission of an offense,⁶⁴ and he must have the mental state that is required for the crime of which he is to be convicted.⁶⁵

A. *Purposely Promoting the Commission of an Offense*

Section 562.041.1(2) of the 1979 Code provides that a person is criminally liable for the conduct of another if he aids that person with the "purpose of promoting the commission of an offense." It is not sufficient that he merely aids the commission of an offense; he must render the aid with the intention that a particular criminal course of conduct occur.⁶⁶ A

S.W. 734, 737 (1927) (this court considered a variety of mental states: "[t]here is nothing in this to indicate that Shade held [the horses] for the purpose of enabling Odbur to make the assault," and "there is nothing . . . to indicate that Shade had any knowledge of Odbur's intentions . . ." and "[t]here is nothing in the evidence indicating that he intended any fatal consequences to Willet . . ."); State v. Orrick, 106 Mo. 111, 119, 17 S.W. 176, 177 (1891) (approved instruction which allowed the jury to find the defendant guilty if the "defendant was then and there present, willfully, deliberately, premeditatedly, and of his malice aforethought, aiding and abetting such other person in so shooting and killing said Antis . . ."); State v. Phillips, 24 Mo. 475, 481 (1857) (the aider and abettor "must be present, aiding and assisting to the felony with a felonious intent."); State v. Sneed, 549 S.W.2d 105, 106 (Mo. App., D. St. L.) ("there must be knowledge of the intention or purpose to commit the particular crime or of a common purpose as to the particular offense.").

64. This is consistent with the rule of *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) which held that the defendant must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used . . . carry an implication of purposive attitude towards it." The language of *Peoni* has been adopted by Missouri courts. *See, e.g.*, State v. Ramsey, 368 S.W.2d 413, 417 (Mo. 1963); State v. Muchnick, 334 S.W.2d 386, 389 (St. L. Mo. App. 1960).

65. Without directly addressing the issue, a few Missouri opinions have indicated that the accomplice must have the mental state required for the underlying felony. Rather than analyzing it in these terms, the courts have found that the accomplice shared a common intent or common purpose with the principal, which is the same as finding that the accomplice had the required state of mind. *See* State v. Gideon, 453 S.W.2d 938 (Mo. 1970); State v. Gregory, 406 S.W.2d 662 (Mo. 1966); State v. Siekermann, 367 S.W.2d 643 (Mo. 1963); State v. Slade, 338 S.W.2d 802 (Mo. 1960); State v. Jackson, 519 S.W.2d 551 (Mo. App., D. St. L. 1975). On the other hand, the cases imply that finding that the accomplice and the principal did not share a common intent is the same as finding that the accomplice did not have the state of mind required for the crime. *See* State v. Stemmons, 262 S.W. 706 (Mo. 1924); State v. Thompson, 293 Mo. 116, 238 S.W. 786 (1922); State v. Porter, 276 Mo. 387, 207 S.W. 774 (1918); State v. May, 142 Mo. 135, 43 S.W. 637 (1897); State v. Hickam, 95 Mo. 322, 8 S.W. 252 (1888); State v. Sneed, 549 S.W.2d 105 (Mo. App., D. St. L. 1977). *See also*, State v. Greer, 401 S.W.2d 263 (Mo. En Banc 1970); State v. Present, 344 S.W.2d 9 (Mo. 1961); State v. Stidham, 305 S.W.2d 7 (Mo. 1957); State

person could intentionally aid a course of conduct without having the purpose of promoting the commission of a crime.⁶⁷ For example, A sees B and C fighting. Intending to stop the fight, A pulls them apart, enabling B to draw a gun to shoot and kill C. A "aided" B in committing the murder. However, although A intended to pull the two apart, he did not intend to help B kill C and would not be declared B's accomplice.

In other words, it must be the individual's conscious objective to engage in that conduct or to cause that result.⁶⁸ To render aid *knowing* that a crime will be committed is not sufficient to impose liability.⁶⁹ Nor is it enough if the individual *recklessly*⁷⁰ or *negligently*⁷¹ renders aid to the principal actor in the commission of the offense. It must be the individual's *purpose* or *conscious goal* to further that particular course of conduct or result before accomplice liability can be imposed under the 1979 Missouri Criminal Code.

Section 562.041.1(2) is ambiguous in the sense that it does not clearly set forth what course of conduct the accomplice must purposely promote. The precise language of the statute is "with the purpose of promoting the commission of *an* offense."⁷² Must he purposely promote the commission of the offense with which he is charged (strict interpretation), or would the purpose of promoting *any* offense suffice (liberal interpretation)? Either

v. Odbur, 317 Mo. 372, 295 S.W. 734 (1927); State v. Muchnick, 334 S.W.2d 386 (St. L. Mo. App. 1960) (all holding that an accomplice must intentionally give aid).

67. This statement should not be interpreted to mean that an accomplice could avoid liability because he was unaware that the conduct he was aiding was a crime. Here, as in other areas of criminal liability, ignorance of the fact that his acts constituted a crime is no excuse. See MO. CRIM. CODE § 562.031 (eff. Jan. 1, 1979).

68. MO. CRIM. CODE § 562.016 (eff. Jan. 1, 1979) ("A person 'acts purposefully', or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result").

69. A situation where a person knowingly renders aid is in the case of a gun dealer who sells a pistol knowing that the purchaser intends to use it in armed robbery. For support of the proposition that aid with mere knowledge is sufficient, see Backun v. United States, 112 F.2d 635 (4th Cir. 1940). Missouri has rejected the idea that mere knowledge that a crime is about to be committed is sufficient for accomplice liability. See generally cases cited notes 28 & 29 *supra*.

70. See generally W. LAFAVE & A. SCOTT, *supra* note 11, at 510-12. But see Lewis v. State, 220 Ark. 914, 251 S.W.2d 490 (1952); State v. Di Lorenzo, 138 Conn. 281, 83 A.2d 479 (1951); State v. McVay, 47 R.I. 292, 132 A. 436 (1926); Eager v. State, 205 Tenn. 156, 325 S.W.2d 815 (1959).

71. The Missouri Supreme Court has judicially rejected the theory that accomplice liability could be based on criminal negligence. Reversing a conviction of manslaughter, the court stated that "[t]o render a person guilty of negligent homicide the negligent act which caused the death must have been the personal act of the party charged and not the act of another [since] there could be no common design to commit a negligent act." State v. Gartland, 304 Mo. 87, 104, 268 S.W. 165, 170 (1924).

72. MO. CRIM. CODE § 562.041.1(2) (eff. Jan. 1, 1979) (emphasis added).

interpretation is possible under the 1979 Missouri Criminal Code, and to illustrate the complexity of both interpretations, it is helpful to analyze accomplice liability based on a crime of recklessness.⁷³

If this provision is interpreted strictly to mean that he must purposely promote the commission of the offense with which he is charged, crimes of recklessness would be excluded from the scope of accomplice liability. Assume that A and B agree to drag race through a busy residential neighborhood. During the course of the race B collides with an oncoming car, and both B and the driver of the other car are killed. Could A be convicted of manslaughter under the accomplice liability theory? Under the strict interpretation, clearly not. Even though A aided B by participating in the drag race, he did not have the *purpose*⁷⁴ of promoting the death of B or the other driver. Since this was not a result he purposely tried to bring about, he could not be convicted of manslaughter on the basis of accomplice liability.⁷⁵ Under this strict interpretation, an accomplice must intend to aid the particular course of conduct which constitutes the crime with which he is charged, *i.e.*, the collision and resulting death, in order to be held liable for manslaughter. He must give aid with the conscious objective of furthering a particular end result. It would not be sufficient that the person is aware of, or consciously disregards the possibility that the conduct *might* produce such a result;⁷⁶ he must *intend* to produce such a result in order to be liable for that particular offense under accomplice liability theory.

In support of the liberal interpretation, that the purpose of promoting the commission of *any* offense would be sufficient to impose liability, Missouri courts have long held that, in certain circumstances, the intent to commit one crime is sufficient to impose liability for another crime.⁷⁷ It is

73. The following analysis would also apply to crimes based on criminal negligence.

74. "A person 'acts purposely', or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result." MO. CRIM. CODE § 562.016.2 (eff. Jan. 1, 1979).

75. Accomplice liability in crimes of recklessness or criminal negligence is usually only an alternative theory of liability. The foregoing analysis, then, has little effect on existing law, and A, in the drag racing hypothetical, could still be convicted of involuntary manslaughter without being declared an accomplice of B. Accomplice liability theory becomes necessary only when the commission of the crime requires specific enumerated acts and the defendant has not performed any or all of those acts but has intentionally aided someone who has. Crimes of recklessness or of criminal negligence do not enumerate specific acts. If A's own conduct of participating in the drag race was reckless or criminally negligent and was the legal cause of death, then A is guilty of manslaughter on that basis. W. LAFAVE & A. SCOTT, *supra* note 11, § 64 at 511. See also *Jacobs v. State*, 184 So. 2d 711 (Fla. 1966); *Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961).

76. See MO. CRIM. CODE § 562.016.4 (eff. Jan. 1, 1979) (definition of "acts

77. See generally cases cited note 115 *infra*.

therefore conceivable that Missouri courts will choose this interpretation. The impact of choosing the liberal interpretation can be illustrated by the effect it has on A's liability for manslaughter in the hypothetical above. A's conscious objective was to engage in the drag race, and since speeding is an offense, he *purposely* promoted the commission of *an* offense. He intentionally aided that conduct by participating, and he had the requisite mental state by disregarding a substantial and unjustifiable risk that an accident would result. Therefore, B's conduct, *i. e.*, the accident, would be imputed to A who would then be guilty of manslaughter.⁷⁸

In many respects, the liberal interpretation seems to be the most logical since B, had he lived, would clearly be guilty of manslaughter. B did not intend the death of the other driver, but his liability would be based upon his reckless conduct. Under the liberal interpretation, A's liability would also be based ultimately upon his own recklessness. By definition, an individual does not *intend* to commit involuntary manslaughter; he recklessly or negligently causes that result. To require a higher state of mind for the accomplice than that required for the principal actor in this situation would seem contrary to the purpose of accomplice liability theory.

As the foregoing analysis illustrates, the interpretation given to section 562.041.1(2) may be the single most important interpretation of the provision. The section itself is ambiguous in this respect. How the courts choose to interpret this provision will affect not just the application of accomplice liability in crimes of recklessness and criminal negligence but will impact on the application of the natural and probable consequence rule⁷⁹ and the felony murder rule⁸⁰ in accomplice liability situations.

B. *State of Mind for the Underlying Crime*

The analysis does not stop upon finding that the accomplice rendered aid with the purpose of promoting the commission of an offense. One could intentionally aid a particular course of conduct with the purpose of furthering the commission of a crime and still not be declared an accomplice. Section 562.036 of the 1979 Criminal Code provides that a person must have the required culpable mental state to be guilty of an offense committed by his conduct or by another person's conduct for which he is criminally responsible. In other words, the accomplice must have the required state of mind for the underlying crime.⁸¹

78. *But see* State v. Phillips, 24 Mo. 475, 490 (1857) ("Moreover, if the killing was unintentional on the part of Sullivan Phillips, it is not easy to see how there could be aiders and abettors to it.") (dictum).

79. *See* text accompanying notes 113-30 *infra*.

80. *See* text accompanying notes 151-61 *infra*.

81. *Cf.* State v. Taylor, 70 Vt. 1, 39 A. 447 (1898) (accomplice must have state of mind for underlying felony). *See generally* W. LARAVE & A. SCOTT, *supra* note 11, at 506-07.

To illustrate, it is helpful to return to the case of *State v. Hayes*.⁸² Defendant Hayes aided Hill in burglarizing a store; but the court held that neither could be guilty of burglary since Hill, the principal actor, did not have the intent to permanently deprive the owner of the goods. Suppose, though, that Hayes had been the principal actor and had entered the store while Hill waited outside. Hill intentionally aided Hayes in breaking and entering and Hill had the intent that a crime be committed. However, since Hill intended to return the goods, Hill did not have the purpose of permanently depriving the owner of the goods.⁸³ Without the required state of mind for the underlying crime, Hill could not be held criminally responsible for the conduct of Hayes even though Hill intentionally aided the burglary and theft.⁸⁴

The ramifications of requiring that the accomplice have the required culpable state of mind for the crime of which he is convicted is significant in a variety of situations. This requirement makes it possible for the accomplice and the principal to be convicted of different offenses. For example, suppose A and B take C's car for a joyride without his permission. A intends to return the car, but B intends to steal it, and in fact does steal it. A intentionally aided B in taking the car, but he would not be convicted of stealing as an accomplice since he did not have the purpose of permanently depriving C of the car. Since A only intended to deprive C temporarily of the car, A would be convicted of tampering in the second degree⁸⁵ while B would be convicted of stealing.⁸⁶

Requiring that the accomplice have the requisite state of mind for the underlying crime has its greatest impact on crimes that have varying degrees of culpability. The precise state of mind of the accomplice becomes most significant where there can be different degrees of the same offense. Rather than leave this area to judicial interpretation, the draftsmen of the Code specifically provided in section 562.051 that each person who is criminally responsible for an offense is guilty only of the degree of such offense that is compatible with his own state of mind. Two examples serve to illustrate the effect of this provision.

In example number one, the accomplice is convicted of a lesser degree of the offense than the principal. A is looking for C, intending to beat him up, but not intending to seriously injure him. B intends to seriously injure C and agrees to help A search for C. A drives the car, and when they find C, B beats C, severely injuring him. B would be guilty of assault in the first degree.⁸⁷ A could not be convicted of assault in the first degree unless

82. 105 Mo. 76, 16 S.W. 514 (1898). See text accompanying notes 22-26 *supra*.

83. MO. CRIM. CODE § 570.030 (eff. Jan. 1, 1979).

84. See also *Wilson v. People*, 103 Colo. 441, 87 P.2d 5 (1939).

85. MO. CRIM. CODE § 569.090.1(2) (eff. Jan. 1, 1979).

86. *Id.* § 570.030.2(2)(a).

87. *Id.* § 565.050.

there is evidence to show that he knowingly caused C serious physical injury.⁸⁸ Since A did not intend to seriously injure C, A could not be convicted of assault in the first degree, but could be convicted of assault in the second⁸⁹ or third⁹⁰ degree.

In example two, the accomplice is convicted of a higher degree of the offense than is the principal.⁹¹ Assume that B reasonably believes that C has raped his wife. Under extreme emotional distress, B looks for C intending to kill him. A has planned to kill C for some time and agrees to aid B. A lures C into the alley where B is waiting for him, and B shoots C, killing him. B would be convicted of manslaughter since B was under the influence of extreme emotional provocation.⁹² A would be convicted of murder in the first⁹³ or second⁹⁴ degree since he aided B with a premeditated intent to kill C.

It is a departure from former Missouri law to hold an accomplice liable only for the degree of the offense that reflects his culpable state of mind. The repealed Missouri statute on accomplice liability provided that an aider and abettor would be charged, tried, convicted and punished in the same manner as the principal.⁹⁵ In *State v. Tolias*,⁹⁶ under a fact situation similar to example number one above, a conviction of an accomplice for assault with intent to kill was affirmed by the Missouri Supreme Court without the court determining whether he had that intent. In the past, in order to obtain the conviction of an accomplice, the state has had to prove that the *principal* had the culpable state of mind required for the crime charged.⁹⁷ The 1979 Criminal Code now makes it necessary for the state to

88. *Id. Cf.* *State v. Taylor*, 70 Vt. 1, 39 A. 447 (1898) (accomplice must have state of mind for underlying felony). *But cf.* *State v. Tolias*, 326 S.W.2d 329 (Mo. 1959); *State v. Chernick*, 278 S.W.2d 741 (Mo. 1955) (both courts affirmed conviction of accomplice for assault with intent to kill without showing accomplice had that intent).

89. MO. CRIM. CODE § 565.060 (eff. Jan. 1, 1979).

90. *Id.* § 565.070.

91. *But cf.* *State v. Recke*, 311 Mo. 581, 278 S.W. 995 (1925) (reversed on the grounds that a manslaughter instruction should have been given since an accomplice could not be convicted of a higher degree of homicide than the principal). Courts today in Missouri would hold differently under section 562.051 since an accomplice may now be convicted of a higher degree of offense than the principal.

92. RSMO § 559.070 (1969).

93. RSMO § 559.010 (1969).

94. RSMO § 559.020 (1969).

95. RSMO § 556.170 (1969). *See generally* cases cited note 13 *supra*.

96. 326 S.W.2d 329 (Mo. 1959).

97. *See, e.g.*, *State v. Hayes*, 262 S.W. 1034 (Mo. 1924) (the court stated that an accomplice is guilty of murder in the same degree as the principal, but to prove that he was guilty of murder in the first degree it is necessary to show that the *principal* committed the crime deliberately, premeditatedly, and with malice aforethought); *State v. Hayes*, 105 Mo. 76, 16 S.W. 514 (1891) (held that the accomplice could not be convicted of burglary and larceny since the *principal* did not have felonious intent).

prove the defendant-accomplice's state of mind, rather than the principal's.

C. *Accomplice's Knowledge of Principal's Criminal Intent*

It has already been pointed out that section 562.041 uses the term aid without abet, encourage, or other words of expansion, and may thereby limit the scope of accomplice liability by requiring physical participation on the part of the accomplice.⁹⁸ The word abet, however, means more than just counsel and encouragement. It has been interpreted to mean that the accomplice must have had knowledge of the wrongful purpose of the principal.⁹⁹ A superficial interpretation could be that the omission of the term abet from the 1979 Criminal Code also expands liability by eliminating the requirement that the accomplice know of the principal's wrongful purpose or intent,¹⁰⁰ and thereby exposes to liability someone who innocently aids the commission of an offense. Further analysis indicates that the omission of this requirement is consistent with the statutory scheme of accomplice liability under the 1979 Code and does not expose an innocent aider to liability.

In order to examine the practical effect of this omission, it is helpful to re-analyze a Missouri case which reversed a conviction because there was evidence neither that the accomplice knew of the wrongful intention of the principal nor that there was a common purpose or intent among the parties.¹⁰¹ In *State v. Porter*,¹⁰² the defendant and another man, named Mills, answered the call of a woman who was alone in an alley with two men. She was apparently frightened of the two men and asked the defendant if he would see her home. The defendant and one of the men in the alley began fighting. During the fight Mills pulled a knife and killed the man with whom the defendant was fighting. The defendant was convicted of second degree murder. The Missouri Supreme Court reversed, holding that an instruction in either degree of murder was unauthorized because there was

98. See text accompanying notes 36-45 *supra*.

99. *People v. Terman*, 4 Cal. App. 2d 345, 346-47, 40 P.2d 915, 916 (1935). See also cases cited note 101 *infra*.

100. See *State v. Sears*, 296 A.2d 218, 220 (Vt. 1972) ("aiding is a broader concept than 'aiding and abetting'").

101. It should be noted that normally when Missouri courts have addressed the issue of whether the accomplice knew of the wrongful purpose of the principal, they have also determined whether the accomplice and principal shared a common purpose or intent, *i.e.*, state of mind for the underlying felony. See note 60 *supra*. The opinions do not differentiate between the two issues and seem to treat them synonymously. See generally *State v. Stidham*, 305 S.W.2d 7 (Mo. 1957); *State v. Odbur*, 317 Mo. 372, 295 S.W. 734 (1927); *State v. Stemmons*, 262 S.W. 706 (Mo. 1924); *State v. Porter*, 276 Mo. 387, 207 S.W. 774 (1918); *State v. Hickam*, 95 Mo. 322, 8 S.W. 252 (1888); *State v. Sneed*, 549 S.W.2d 105 (Mo. App., Div. 3, 1977).

102. 276 Mo. 387, 207 S.W. 774 (1918).

no evidence that the defendant knew of Mills' intention or purpose to commit the murder, and because there was no "like criminal intent in the minds of Mills and the appellant."¹⁰³ Essentially, the court found that the defendant, Porter, did not have the intent to commit murder.

Under the 1979 Criminal Code, an accomplice cannot be convicted of an offense unless he had the state of mind required for that offense.¹⁰⁴ Therefore, the result in *Porter* would be the same under the new Code, even though it would not be necessary for liability that Porter know of Mills' wrongful intention. Likewise, a person who is unaware of the wrongful purpose of the principal actor and who innocently aids him to commit a crime is not liable since the innocent aider lacks the requisite state of mind for the underlying felony. The 1979 Code makes the *principal's* state of mind and the *accomplice's* knowledge of it irrelevant to the inquiry, for once the state proves that the principal actor engaged in the criminal *conduct*, it will not matter whether the principal actor is guilty of the crime or not. After the state proves that the principal committed the conduct of the crime, it must then prove that the accomplice is criminally responsible for this conduct.¹⁰⁵ To do this, the state must show that either before or during the commission of the crime, the accomplice aided, attempted or agreed to aid the principal in planning, committing or attempting to commit the offense.¹⁰⁶ The aid must be some form of affirmative participation, and it must be intentional with the purpose of promoting the commission of an offense.¹⁰⁷ Finally, the state must offer evidence to show that the accomplice had the state of mind required for the crime.¹⁰⁸ The degree of the offense of which he may be convicted depends upon his own guilt and not upon the guilt of the principal.¹⁰⁹

V. THE LIMITS OF ACCOMPLICE LIABILITY

The limits of accomplice liability were previously defined by the judiciary in Missouri. The 1979 Criminal Code sets statutory limits on imposing criminal responsibility for the conduct of another and changes some well-settled principles of Missouri law. For instance, the application of the natural and probable consequence rule is modified, if not totally abrogated, by the new provision. Application of the felony murder rule in accomplice liability may also be abrogated. Certain defenses that were available at common law have been precluded.¹¹⁰ Withdrawal is now an affirmative defense,¹¹¹ and certain persons are specifically exempted from

103. *Id.* at 394, 207 S.W. at 776.

104. MO. CRIM. CODE § 562.036 (eff. Jan. 1, 1979).

105. *Id.* § 562.041.

106. *Id.*

107. *Id.*

108. *Id.* § 562.036.

109. *Id.* § 562.051.

110. *Id.* § 562.046.

111. *Id.* § 562.041(2)(g).

accomplice liability.¹¹² The basic principles of accomplice liability have already been set out and discussed in detail. An examination of the limits of accomplice liability is an exercise in applying those basic principles.

A. *Natural and Probable Consequence Rule*

The natural and probable consequence rule tests the outer limits of the mental state required to hold one person responsible for the conduct of another person.¹¹³ The rule provides that an accomplice is liable for all crimes committed by a co-felon that are a natural and probable consequence of the intended offense; it is similar to the felony murder rule, except that it applies to all crimes.¹¹⁴ Missouri applies the natural and probable consequence rule,¹¹⁵ but the 1979 provisions on accomplice liability will either modify application of the rule or abrogate it altogether. This depends upon how the courts interpret the provision that the accomplice must have the purpose of promoting the commission of an offense.¹¹⁶ If it is interpreted to mean that he must purposely promote the commission of the crime with which he is charged (strict interpretation), the natural and probable consequence rule will no longer be applicable because the accomplice would only have the conscious objective of promoting the intended offense, and the fact that the offense charged is a natural and probable consequence of the intended offense would not be sufficient to impose liability. If it is interpreted to mean that the purpose of promoting any offense is sufficient to impose liability (liberal interpretation), the rule will still be applicable, but greatly modified because the accomplice will still be

112. *Id.* § 562.041.2(1) and (2).

113. *See generally* W. LAFAVE & A. SCOTT, *supra* note 11, at 515.

114. *Id.*

115. *State v. Paxton*, 453 S.W.2d 923 (Mo. 1970) (accomplice convicted of first degree murder committed by co-felon during robbery; natural and probable consequence rule discussed in dicta, felony murder rule applied); *State v. Tolia*, 326 S.W.2d 329 (Mo. 1959) (accomplice convicted of assault with intent to kill committed by co-felon); *State v. Chernick*, 278 S.W.2d 741 (Mo. 1955) (accomplice convicted of assault with intent to kill committed by co-felon during robbery); *State v. Recke*, 311 Mo. 581, 278 S.W. 995 (1925) (defendant convicted of murder committed by men he sent to persuade non-union members to stay off a job); *State v. Hayes*, 262 S.W. 1034 (Mo. 1924) (defendant convicted of murder committed by person he hired to assault victim); *State v. Darling*, 216 Mo. 450, 115 S.W. 1002 (1909) (accomplice convicted of manslaughter committed by co-felon during assault); *State v. Williams*, 522 S.W.2d 327 (Mo. App., D. St. L. 1975) (felony murder in connection with robbery; natural and probable consequence rule discussed in dicta).

116. MO. CRIM. CODE § 562.041.1(2) (eff. Jan. 1, 1979) ("A person is criminally responsible for the conduct of another when . . . (2) Either before or during the commission of an offense *with the purpose of promoting the commission of an offense*, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense.") (emphasis added).

required to have the state of mind necessary for the offense with which he is charged.¹¹⁷ In order to fully understand this analysis, it is helpful to re-examine, under both interpretations, a Missouri case dealing with the natural and probable consequence rule.

In *State v. Chernick*¹¹⁸ the defendant and two companions robbed a bank. The defendant was the driver of the getaway car and did not enter the bank. During the course of the robbery, one of his companions shot and wounded a policeman. The Missouri Supreme Court observed that the defendant could be convicted of assault with intent to kill because assault with intent to kill was the natural and probable consequence of armed robbery.¹¹⁹ If a court accepts the strict interpretation that the accomplice must purposely promote the commission of the offense for which he is charged, Chernick could not be convicted of assault with intent to kill on an accomplice liability theory unless he had the intent to kill *and* purposely promoted the assault.

If Chernick had agreed with his co-felons prior to the robbery that they would "shoot it out if necessary," it could be argued that he purposely promoted the assault with the intent to kill, and could therefore be convicted of assault in the first degree¹²⁰ under an accomplice liability theory. If there was no agreement, express or implied, then the most that can be said is that Chernick consciously disregarded a substantial and unjustifiable risk that an assault would result from the armed robbery.¹²¹ In other words, he purposely promoted the robbery, and he recklessly promoted the assault, which is not sufficient under this strict interpretation to convict him of assault in the first degree under an accomplice liability theory.¹²² If the Missouri courts adopt this interpretation of section 562.041.1(2), the natural and probable consequence rule must be abandoned; the inquiry will turn upon whether or not the accomplice purposely promoted the resulting offense with the required culpable state of mind and not upon whether it was the natural and probable consequence of the intended offense.

117. *Id.* § 562.036.

118. 278 S.W.2d 741 (Mo. 1955).

119. *Id.* at 746 (the conviction was reversed on other grounds). Assault with intent to kill is assault in the first degree under the 1979 Code. MO. CRIM. CODE § 565.050 (eff. Jan. 1, 1979).

120. MO. CRIM. CODE § 565.050 (eff. Jan. 1, 1979).

121. *Id.* § 562.016.4.

122. This does not mean to suggest that Chernick could not be convicted of assault on the basis of his own conduct, rather than by applying an accomplice liability theory. Section 565.060.1(2) of the 1979 Missouri Criminal Code provides that a person is guilty of assault in the second degree if he recklessly causes serious physical injury to another person. If Chernick's own conduct in taking part in the robbery, knowing that his companions were armed, is considered to be reckless and a legal cause of the assault, Chernick could be convicted of assault in the second degree on the basis of his own conduct, rather than the conduct of another person. See also note 75 *supra*.

If the liberal interpretation of section 562.041.1(2) is adopted by the Missouri courts, *i.e.*, that the purpose to promote any offense will be sufficient to impose liability, the natural and probable consequence rule will still be valid, but its use will be limited. In *Chernick*, the defendant intentionally aided the robbery with the purpose of promoting the robbery and with the purpose of forcibly stealing another's property. Therefore, the defendant is criminally responsible for the conduct which constituted the robbery committed by his co-felons.¹²³ It is clear that he can be convicted of robbery, even though he did not commit the acts of stealing. But, can he be convicted of assault with the intent to kill? By driving the getaway car, he intentionally aided the robbery, and it can be argued that this also aided the assault since assault is the natural and probable consequence of armed robbery. He also had the purpose of promoting the commission of an offense, *i.e.*, the robbery. He is therefore under the liberal interpretation criminally responsible for the conduct which constituted the assault committed by his co-felons.¹²⁴ This is only half of the problem—he must also have the culpable mental state required for assault,¹²⁵ and then he is only guilty of the degree of assault that is compatible with his own state of mind.¹²⁶ If there was a prior agreement to “shoot it out if necessary,” then it may be argued he had the intent to kill and could be convicted of assault in the first degree. If there was no prior agreement, but if he knew that his co-felons had guns, he may be reckless or criminally negligent as to the shoot-out during the robbery and may be convicted of assault in the second¹²⁷ or third¹²⁸ degree. It is also likely that the accomplice may not have the required culpable state of mind for any degree of assault, and a conviction would not be upheld.

Thus, the natural and probable consequence rule is limited by the 1979 Criminal Code, even if the liberal interpretation of section 562.041.1(2) is adopted. The offense charged must still be the natural and probable consequence of the intended offense,¹²⁹ and this conduct can still be imputed to an accomplice if all of the other requirements are met. The liability of the accomplice will nonetheless ultimately be determined by his own culpability with regard to the offense charged and not to the offense intended.¹³⁰ The practical effect of this will be to severely limit the use of the natural and probable consequence rule.

123. MO. CRIM. CODE § 562.041 (eff. Jan. 1, 1979).

124. *Id.*

125. *Id.* § 562.036.

126. *Id.* § 562.051.

127. *Id.* § 565.060.

128. *Id.* § 565.070.

129. See *State v. Thompson*, 293 Mo. 116, 238 S.W. 786 (1922); *State v. Sneed*, 549 S.W.2d 105 (Mo. App., D. St. L. 1977).

130. Under the first interpretation of § 562.041.1(2), as discussed in notes 75 and 122 *supra*, the accomplice may still be convicted of a degree of the resulting offense if by his *own* conduct he was reckless or criminally negligent as to that

Because Missouri courts will be faced with a choice of adopting either an interpretation which would abrogate the natural and probable consequence rule or one that would retain it in modified form, it may be helpful to examine what other jurisdictions have decided on this issue.

The Illinois Supreme Court in *People v. Kessler*¹³¹ confronted the question of whether Illinois' recently adopted accomplice liability statute,¹³² which is similar to Missouri's, abrogated or modified the common design principle. This principle is Illinois' equivalent of the natural and probable consequence rule. In *Kessler*, the defendant was tried and convicted of burglary and attempted murder. During the course of the burglary, defendant's companions shot at the owner of the tavern and during the escape shot at several policemen. The question on appeal was whether the application of the common design principle under the statute was appropriate to hold a defendant accountable for attempted murder, a crime which was committed by someone else and which the defendant did not intend. Affirming the conviction and upholding the application of the common design principle, the Illinois Supreme Court held that the word "conduct" in the statute encompasses any criminal act done in furtherance of the planned and intended act.¹³³

Although the Missouri and Illinois statutes are similar, there are several important differences that would preclude a Missouri court from reaching the same conclusion under an identical set of facts. First, Illinois has statutorily defined the term conduct as "an act or a series of acts, and the *accompanying mental state*"¹³⁴ (emphasis added). Missouri has not statutorily defined the term, so one may assume that the term as used in the statute was intended to have its ordinary meaning. Conduct is defined as "personal behavior, deportment, mode of action, any positive or negative act."¹³⁵ It does not imply a mental state.

Second, and most important, is the difference in the two statutes themselves. The Illinois statute provides that "[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 . . ." ¹³⁶ The equivalent Missouri statute provides that "[a]

result. Practically speaking, this is the same result reached under this second interpretation of section 562.041.1(2), because the accomplice's own state of mind determines his culpability. The difference lies in the analysis. Under the first interpretation of § 562.041.1(2), accomplice liability would not apply at all, but he could be convicted on the basis of his own conduct. In the second interpretation, accomplice liability would apply and he could be convicted on the basis of his criminal responsibility for the conduct of another person.

131. 57 Ill. 2d 493, 315 N.E.2d 29, *cert. denied*, 419 U.S. 1054 (1974).

132. ILL. REV. STAT. ch. 38, § 5-2 (1973).

133. 57 Ill. 2d at 497, 315 N.E.2d at 32.

134. ILL. REV. STAT. ch. 38, § 4 (1973).

135. BLACK'S LAW DICTIONARY 367 (4th ed. 1968).

136. ILL. REV. STAT. ch. 38, § 5-1 (1973).

person with the *required culpable mental state* is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible"¹³⁷ As a condition precedent to accountability, Missouri specifically requires the defendant to have the culpable state of mind for the underlying felony.¹³⁸ On the facts of *People v. Kessler* and under either interpretation of section 562.041.1(2) of the 1979 Criminal Code, Missouri could not automatically apply the natural and probable consequence rule to hold the defendant in this case guilty of attempted murder. In Missouri, even under the liberal interpretation, the state would at least have to prove that he intentionally aided and promoted conduct¹³⁹ that was a substantial step in the commission of a crime,¹⁴⁰ and that he had the intent to commit murder.¹⁴¹

Some states have avoided the problems of judicial interpretation by specifically including a provision which provides an accomplice can be held liable for all the crimes that are a result of the intended offense.¹⁴² The Missouri legislature failed to do this, and by wording the statute as it did, it can be inferred that the legislative intent was to at least modify, if not eliminate, the natural and probable consequence rule.

The natural and probable consequence rule has been criticized as inconsistent with the fundamental principles of our criminal justice system.¹⁴³ Application of this rule results in liability being predicated upon negligence where the crime involved requires a different state of mind.¹⁴⁴ Because this would not be possible for one who has personally committed the crime, it should not apply to accomplice liability either.¹⁴⁵ For exam-

137. MO. CRIM. CODE § 562.036 (eff. Jan. 1, 1979) (emphasis added).

138. *Id.*

139. *Id.* § 562.041.

140. *Id.* § 564.011.

141. *Id.* § 562.036.

142. KAN. STAT. § 21-3205(2) (1974) (a person criminally responsible for crimes of another "is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by him as a probable consequence of committing or attempting to commit the crime intended"); MINN. STAT. ANN. § 609.05 (West 1964) (same as Kansas); WIS. STAT. ANN. § 939.05 (West 1977) (a person criminally responsible for crimes of another on conspiracy or procuring basis "is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime").

143. W. LAFAVE & A. SCOTT, *supra* note 11, at 516.

144. *Id.* See also MODEL PENAL CODE § 2.04(3), Comment (Tent. Draft No. 1, 1953) ("Probabilities have an important evidential bearing on these issues; to make them independently sufficient is to predicate the liability on negligence when, for good reason, more is normally required before liability is found.").

145. W. LAFAVE & A. SCOTT, *supra* note 11, at 516. "[W]hile a defendant can be convicted when he has both the *mens rea* and commits the *actus reus* required for a given offense, he cannot be convicted if the *mens rea* related to one crime and the *actus reus* to another." *Id.* at 243. See also G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 174 (2d ed. 1961).

ple, the intent to commit one crime cannot be substituted for the intent to commit another.¹⁴⁶ If C lights a candle to aid in a theft and as a result burns the premises, C's intent to steal would not sustain a conviction of arson; it would be necessary to show that C knowingly started the fire.¹⁴⁷ Therefore, application of the natural and probable consequence rule should not justify holding an accomplice liable for one crime just because it was a foreseeable result of another crime he intended to commit.¹⁴⁸ Following this reasoning, the purpose of promoting one crime should not be substituted for the purpose of promoting another, and the proper interpretation of section 562.041.1(2) would be that the accomplice must purposely promote the crime with which he is charged.

However, it should be noted that either interpretation of section 562.041.1(2) would eliminate the conceptual inconsistencies of the natural and probable consequence rule. Even if the statute is interpreted to mean that the purpose of promoting one crime can be substituted for the purpose of promoting another,¹⁴⁹ the accomplice must still have the required culpable state of mind necessary for the conviction of that offense under the 1979 Criminal Code.¹⁵⁰ Therefore, even if the purpose of promoting one crime would be substituted for the purpose of promoting another, the intent to commit one crime would not be substituted for the intent to commit another, and this objection to the natural and probable consequence rule would be eliminated.

B. Felony Murder Rule

Because the felony murder rule in accomplice liability cases is a special application of the natural and probable consequence rule,¹⁵¹ it is necessary to discuss how it may be affected by the new Code. Unlike the natural and probable consequence rule, in Missouri the felony murder rule is statutory. It essentially provides that a person who unlawfully kills another person,

146. W. LAFAVE & A. SCOTT, *supra* note 11, at 516. See also MODEL PENAL CODE § 2.03(2), (3) (1962), which provides that the element of purposely or knowingly causing a particular result is not established when the actual result is not within the purpose or contemplation of the actor, and that the element of recklessly or negligently causing a particular result is not established when the actual result is not within the risk of which the actor is or should be aware; both provisions have limited exceptions.

147. W. LAFAVE & A. SCOTT, *supra* note 11, at 516. See also *Regina v. Faulkner*, 13 Cox Crim. Cas. 550 (1877).

148. W. LAFAVE & A. SCOTT, *supra* note 11, at 516-17.

149. This is another way of stating the second proposed interpretation of section 562.041(2)—that the purpose of promoting *any* offense would be sufficient to impose liability for the offense charged. See text accompanying notes 72-73 *supra*.

150. MO. CRIM. CODE § 562.036 (eff. Jan. 1, 1979).

151. This is another way of stating the second proposed interpretation of section 562.041(2)—that the purpose of promoting *any* offense would be sufficient to impose liability for the offense charged. See text accompanying notes 72-73 *supra*.

without premeditated intent to cause that death, is guilty of first degree murder if the killing is committed in the perpetration of arson, rape, robbery, burglary, or kidnapping.¹⁵²

The theory of the felony murder rule has been extended to convict of first degree murder an accomplice to one of the enumerated felonies.¹⁵³ For example, if A aids B in robbing a tavern and B shoots and kills C during the course of the robbery, A could also be convicted of first degree murder under the felony murder rule and accomplice liability theory.¹⁵⁴ The 1979 Criminal Code supplies an analytical framework within which the Missouri courts would have the option to either abrogate or retain this application of the felony murder rule in an accomplice liability situation, depending upon how the courts interpret section 562.041.1(2), *i.e.*, "the purpose of promoting the commission of an offense."

It is helpful to examine the legislative history of section 562.041.1(1). This subsection provides that a person is criminally responsible for the conduct of another person when "[t]he statute defining the offense makes him so responsible."¹⁵⁵ This subsection broadens the scope of accomplice liability by allowing the legislature to pass statutes which create greater liability for an accomplice. In the 1972 Proposed Draft, this subsection was utilized in the drafting of the felony murder rule, which specifically made an accomplice liable for felony murder committed during the commission of arson, rape, robbery, burglary, or kidnapping.¹⁵⁶ In the final draft, however, this provision was omitted from the felony murder rule.¹⁵⁷ Because subsection 562.041.1(1) was adopted by the legislature, it can be assumed that if a particular statute does not specifically provide for criminal responsibility of an accomplice, liability is subject to the interpretation and principles of the general accomplice liability provisions. Since the felony murder rule does not contain a provision that makes an accomplice liable for any killing committed during one of the enumerated felonies, it would be subject to these rules.

The analysis for felony murder would be identical to the analysis for the natural and probable consequence rule.¹⁵⁸ The result depends upon how the courts interpret section 562.041.1(2). If it is interpreted to mean that the accomplice must purposely promote the commission of the offense with which he is charged (strict interpretation), the felony murder rule will no longer be applicable in accomplice liability theory, unless the state can show that the accomplice purposely aided or promoted the death. On the other hand, if it is interpreted to mean that the purpose of promoting any

152. MO. CRIM. CODE § 565.003 (eff. Jan. 1, 1979).

153. *See, e.g.*, State v. Paxton, 453 S.W.2d 923 (Mo. 1970).

154. *Id.*

155. MO. CRIM. CODE § 562.041.1(1) (eff. Jan. 1, 1979).

156. MO. PROPOSED CRIM. CODE § 10.020(1)(d) (1973).

157. MO. CRIM. CODE § 565.003 (eff. Jan. 1, 1979).

158. *See* text accompanying notes 118-30 *supra*.

offense is sufficient to impose liability (liberal interpretation), the felony murder rule's application in accomplice situations will be preserved intact.

To illustrate how the felony murder rule as applied in accomplice liability would be retained under the liberal interpretation, it is helpful to go through a complete analysis. Suppose A helps B plan the robbery of a tavern. While A buys beer to draw the attention of the employee, B goes to the back of the tavern to rob the owner. During the course of the robbery, B shoots and kills the owner.¹⁵⁹ Clearly, B could be convicted of first degree murder under the felony murder rule.¹⁶⁰ The question is, can A? A intentionally aided B plan the robbery with the purpose of promoting the commission of an offense, *i.e.*, the robbery. Under section 562.041, A would be criminally responsible for the conduct of B, but normally he must still have the required culpable state of mind for the crime of which he is convicted, here first degree murder.¹⁶¹ However, section 565.003 of the 1979 Criminal Code specifically provides that a person may be convicted under the felony murder rule of first degree murder without a premeditated intent to cause the death of that particular individual. Because a premeditated intent is not required, and since under section 562.041 A is criminally responsible for B's conduct, A could be convicted of first degree murder under the felony murder rule if the courts accept the liberal interpretation. Therefore, the interpretation given to section 562.041.1(2) will be determinative of whether the felony murder rule will be altered in accomplice liability theory.

C. *Defenses Precluded*

1. Acquittal of Principal

It is generally accepted that an accomplice may be convicted notwithstanding the fact that the principal has not been convicted or has been acquitted.¹⁶² The Missouri Supreme Court held in *State v. Phillips*¹⁶³ that an acquittal of the principal in the first degree did not operate to discharge an aider and abettor. The court stated that since there was no longer any distinction between the different types of parties, all were principals and as long as the murder was proved it was irrelevant who actually did the act.¹⁶⁴

Section 562.046(1) codifies the common law by providing that it is no defense for an accomplice that the principal has been acquitted or has not been convicted.¹⁶⁵ But, regardless of whether the principal has been con-

159. See *State v. Paxton*, 453 S.W.2d 923 (Mo. 1970).

160. MO. CRIM. CODE § 565.003 (eff. Jan. 1, 1979).

161. *Id.* § 562.036.

162. *State v. Phillips*, 24 Mo. 475 (1857); *State v. Ostman*, 147 Mo. App. 422, 126 S.W. 961 (St. L. 1910); *Singletary v. State*, 509 S.W.2d 572 (Tex. Ct. App. 1974).

163. 24 Mo. 475 (1857).

164. *Id.* at 488. Published by University of Missouri School of Law Scholarship Repository, 1979

165. MO. CRIM. CODE § 562.046(1) (eff. Jan. 1, 1979).

victed or acquitted, the act of the principal must still be proved as part of the evidence against the accomplice.¹⁶⁶ At common law this meant that the principal must have committed the material elements of the crime with the culpable state of mind required for each element.¹⁶⁷ In some instances it was a defense for an accomplice if the principal did not have the requisite culpability for the crime. *State v. Hayes*,¹⁶⁸ which has already been discussed at length,¹⁶⁹ serves as an excellent example.

2. Non-Culpable Mental State of Principal

The Missouri Supreme Court held in *Hayes* that an accomplice could not be held liable if the principal was not acting with felonious intent. Under the 1979 Code, the principal's state of mind is irrelevant because only the principal's conduct is imputed to the accomplice.¹⁷⁰ The conviction in *Hayes* would be upheld if the Code analysis were applied, because the criminal acts had been completed.¹⁷¹ It is therefore no longer a defense under the 1979 Criminal Code that the principal was not acting with the required culpable state of mind.

This result seems to be the most logical in light of the fact that the 1979 Code has specifically precluded an accomplice from defending on the grounds of other personal defenses of the principal.¹⁷² By statutorily precluding these defenses, the drafters of the Code reinforced the proposition that the principal's state of mind should have no bearing on the guilt or innocence of an accomplice, whose guilt should be dependent solely upon his own culpability.

However, the statute contains an incongruity which deserves mention and which can best be illustrated by the following example. Suppose that C instigates a fight between himself and B, and B reasonably believes that C is going to kill him. During the fight, A renders aid to B with the intention of trying to kill C. In self defense, B kills C. B would not be guilty of any degree of homicide because he acted in self defense. It is not as clear whether the 1979 Code would impose liability on A for C's death in this situation. A aided B with the purpose of promoting the commission of an

166. See generally cases cited note 162 *supra*.

167. *State v. Hayes*, 105 Mo. 76, 16 S.W. 514 (1891). See also *State v. Hayes*, 262 S.W. 1034 (Mo. 1924).

168. 105 Mo. 76, 16 S.W. 514 (1891).

169. See text accompanying notes 22-26 and 82-86 *supra*.

170. MO. CRIM. CODE § 562.041 (eff. Jan. 1, 1979).

171. But see *State v. Lourie*, 12 S.W.2d 43 (Mo. 1928) and its companion case, *State v. Davis*, 319 Mo. 1222, 6 S.W.2d 609 (En Banc 1928). The defendant, Davis, and his paramour, Alberdina Lourie, hired a police undercover agent to kill Lourie's husband. The policeman went to the victim's home, according to plan, but had no intention of killing him. The Missouri Supreme Court reversed both convictions of attempted murder on the grounds that no overt act toward the commission of the crime had been completed.

172. MO. CRIM. CODE § 562.046 (eff. Jan. 1, 1979).

offense and with a premeditated intent to kill C. Therefore, under the Code, A would be criminally responsible for the *conduct* of B,¹⁷³ and since personal defenses of the principal actor are precluded from the accomplice,¹⁷⁴ A could not defend on grounds of self defense.

The problem with this analysis lies in the precise language of section 562.041.1(2) which provides that the accomplice must aid or agree to aid or attempt to aid "such other person in planning, committing or attempting to commit the *offense*." There was no *offense* committed in this situation because B was justified in killing C on the theory of self defense.¹⁷⁵ Therefore, if greater emphasis is placed upon the offense provision of the statute than upon the provision that makes an accomplice responsible for the *conduct* of the principal, A would not be liable for the death of C since B committed no offense. Yet, A is as culpable in this situation as he would be in a situation where the principal actor intended to kill C, and a distinction between the two situations seems artificial.

The analysis which protects A also runs afoul of the entire statutory scheme of the 1979 Code which bases liability on personal culpability rather than on the culpability of a third person.¹⁷⁶ In this situation, A's liability would be mitigated on the basis of B's state of mind, rather than his own. It should also be noted that section 562.046, which precludes certain defenses, contains a catch-all provision that precludes the defense that the principal actor is not amenable to justice. This could be interpreted to mean that since B acted in self defense, he is not amenable to justice, and A would be statutorily precluded from defending on this ground. Therefore, the more logical interpretation would be that the accomplice is responsible for the *conduct* of the principal actor, and the word "offense" as used in the statute does not provide a loophole through which an accomplice may avoid punishment in this situation. This would be consistent with the principal of imposing liability based on individual culpability.

3. Conviction of Principal for Different Offense

The 1979 Missouri Criminal Code provides that when two or more persons are criminally responsible for an offense, each person is guilty of the degree of that offense as is compatible with his own culpable mental state,¹⁷⁷ and it is no defense to an accomplice that the principal has been convicted of some other degree of the offense.¹⁷⁸ Both sides of this issue

173. MO. CRIM. CODE § 562.041 (eff. Jan. 1, 1979).

174. *Id.* § 562.046.

175. W. LAFAYE & A. SCOTT, *supra* note 11, at 391. "His intentional infliction of . . . physical harm upon the other . . . is said to be justified when he acts in proper self-defense, so that he is not guilty of any crime."

176. See text accompanying notes 81-97 *supra*.

177. MO. CRIM. CODE § 562.051 (eff. Jan. 1, 1979).

178. *Id.* § 562.046.

were examined in *Reece v. State*,¹⁷⁹ in which the Texas Court of Criminal Appeals interpreted a statute¹⁸⁰ similar to Missouri's. The principal was convicted of aggravated robbery and the accomplice was convicted of simple robbery. The principal argued on appeal that he could not be convicted of aggravated robbery since the jury had found his accomplice guilty of only simple robbery, thereby determining that no deadly weapon had been used. The accomplice argued for a reversal on the grounds that since the principal had been found guilty of aggravated robbery, he himself could only be guilty of aggravated robbery since his criminal responsibility was derived from the conduct of the principal. The court held that nothing in this statute precluded the jury from finding one defendant guilty of a lesser included offense and another guilty of the greater offense, a result also appropriate under the new Missouri Criminal Code.

4. Principal's Lack of Capacity or Knowledge

Other defenses are also precluded under the 1979 Code. For instance, it is no defense to an accomplice if the principal lacked criminal capacity or was unaware of the accomplice's criminal purpose.¹⁸¹ These two provisions are designed to cover the case of an irresponsible or innocent agent.¹⁸² The former would also include the situation where the principal is not the agent of the accomplice, but nevertheless is legally incapable of criminal activity.¹⁸³ The provision that the principal need not be aware of the accomplice's criminal purpose may go beyond the case of an innocent agent, and may also be interpreted to include the situation where the principal is not even aware of the accomplice's aid.¹⁸⁴

5. Principal's Immunity From Prosecution or Lack of Capacity to Commit Offense

It is not a defense if the principal is immune from prosecution.¹⁸⁵ For example, this would cover the situation where the principal had diplomatic immunity. The fact that the principal is not amenable to justice would not be a defense for an accomplice.¹⁸⁶ This provision is sufficiently vague to cover a variety of situations and may serve as a catch-all

179. 521 S.W.2d 633 (Tex. Ct. App. 1975).

180. TEX. PENAL CODE ANN. tit. 2, § 7.03 (Vernon 1974).

181. MO. CRIM. CODE § 562.046 (eff. Jan. 1, 1979).

182. See text accompanying notes 53-61 *supra*.

183. MO. CRIM. CODE §§ 562.081 and 562.086 (infancy and lack of responsibility because of mental disease or defect).

184. *But cf.* Hicks v. United States, 150 U.S. 442 (1893) (an uncommunicated intent to give aid is insufficient to render one an accomplice).

185. MO. CRIM. CODE § 562.046 (eff. Jan. 1, 1979).

186. *Id.*

provision. It could cover the case of *State v. Hayes*¹⁸⁷ where the principal lacked the culpable state of mind for burglary. It would also cover the case of an innocent agent, or almost any situation where the principal could not be convicted of the crime.

There are some crimes that by statutory definition can only be committed by a certain class of persons. Rape, for example, can only be committed by a person not married to the victim.¹⁸⁸ A wife or husband could not be convicted of personally raping his or her own spouse. The crime of incest can only be committed by two people of a certain degree of relationship to each other.¹⁸⁹ Only a public servant could personally commit the crimes of official misconduct,¹⁹⁰ acceding to corruption,¹⁹¹ or misconduct in the administration of justice.¹⁹² It is nonetheless possible that someone who did not personally commit these crimes could be convicted of them as an accomplice. Section 562.046(2) provides that in a prosecution for an offense in which the criminal responsibility of the defendant is based on the conduct of another it is no defense that the defendant does not belong to that class of persons legally capable of committing the offense in an individual capacity. This section codifies Missouri case law. In *State v. Drope*,¹⁹³ A helped B, C, and D rape his wife by tying her down to the bed. The Missouri Supreme Court affirmed the conviction of rape based on accomplice liability theory even though the defendant could not have committed the crime of rape against his own wife absent the activity of B, C, and D.

For an accomplice to be convicted, it is necessary for the principal to belong to the class of persons who are legally capable of committing the offense. The Missouri Supreme Court addressed the issue in *State v. Baker*.¹⁹⁴ The defendant was charged as an accessory to concealing a birth in aiding her husband to secretly bury their daughter's newborn child. Their daughter, the mother of the child, took no part in the burial. Under the applicable statute, only the mother of the child could have been the principal in the first degree. The court held that since there was no principal, there could be no accessory. Presumably, it would still be a defense for an accomplice if the principal actor did not belong to the class of persons legally capable of committing the offense in an individual capacity, although it is possible to analyze this situation under the 1979 Code as imposing liability on the accomplice. Because the principal actor does not

187. 105 Mo. 76, 16 S.W. 514 (1891). See also text accompanying notes 22-26, 82-86, & 167-69 *supra*.

188. MO. CRIM. CODE § 566.030 (eff. Jan. 1, 1979).

189. *Id.* § 568.020.

190. *Id.* § 576.040.

191. *Id.* § 576.020.

192. *Id.* § 575.320.

193. 462 S.W.2d 677 (Mo. 1971).

194. 297 Mo. 249, 248 S.W. 956 (1923).

belong to the class of persons legally capable of committing the offense in an individual capacity, he is not amenable to justice.¹⁹⁵ Under section 562.046, an accomplice could not raise the defense that the principal was not amenable to justice, and the accomplice could then be held liable. The courts will eventually be called upon to decide if the new Criminal Code has legislatively overruled *Baker*.

D. *Exceptions to Accomplice Liability*

There are some exceptions to the general principles that a person who aids the commission of an offense is guilty as an accomplice. Section 562.041.2(a) exempts the victim of the offense from accomplice liability, even though his conduct assisted in the commission of the crime. The rationale is that, "[t]he business man who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or even may be thought immoral; to view them as involved in the commission of the crime confounds the policy embodied in the prohibition."¹⁹⁶ Willing or consenting victims would also be excluded from the scope of accomplice liability.¹⁹⁷

Section 562.041.2(b) exempts a person whose conduct is necessarily incident to the commission of the offense. Unless otherwise specified in the statute defining the offense, this subsection extends protection to persons who do not fall neatly into the category of victims.¹⁹⁸ Exemptions would include a purchaser in an illegal sale,¹⁹⁹ the unmarried participant in a charge of adultery,²⁰⁰ or the patron of a prostitute.²⁰¹ Section 562.041.2(b) further provides that if the incidental conduct constitutes a related but separate offense, the party is criminally responsible for that offense, but not for the conduct or offense committed or attempted by the principal actor. In the above example, a patron of a prostitute could not be held guilty of prostitution²⁰² based on accomplice liability, but under the 1979 Code he would be guilty of the support crime of patronizing prostitution.²⁰³ The prostitute would not be guilty of patronizing prostitution under the accomplice liability principles. Each individual would be criminally responsible only for his or her own conduct in this type of situation.

195. MO. CRIM. CODE § 562.046 (eff. Jan. 1, 1979).

196. MODEL PENAL CODE § 2.04, Comment (Tent. Draft No. 1, 1953).

197. *Cf.* *Gebardi v. United States*, 287 U.S. 112 (1932) (consenting victim in a violation of the Mann Act); *Regina v. Tyrell*, 17 Cox Crim. Cas. 716 (1893) (victim in statutory rape).

198. MO. PROPOSED CRIM. CODE § 7.070, Comment (1973).

199. *See* *United States v. Farrar*, 281 U.S. 624 (1930).

200. *See Ex parte Cooper*, 162 Cal. 81, 121 P. 318 (1912).

201. *See* *People v. Anonymous*, 161 Misc. 379, 292 N.Y.S. 282 (1936).

202. MO. CRIM. CODE § 567.020 (eff. Jan. 1, 1979).

Applicability of these exclusions is a matter of statutory interpretation. For example, *Ex parte Cooper*²⁰⁴ held that an unmarried woman could not be an aider and abettor to the crime of adultery because of the inapplicability of the statute to unmarried persons. The court indicated that the result would be otherwise if there were a statutory provision which included unmarried persons.²⁰⁵ These subsections do not prevent such persons from being criminally liable, they only require that the statute defining the offense specifically include them.²⁰⁶

E. Withdrawal

Under certain circumstances, after an accomplice has agreed to aid or has rendered aid, he may escape liability if he withdraws from the commission of the offense. Prior Missouri statutes did not provide for an opportunity to escape liability after aid had been given.²⁰⁷ Missouri judicially recognized the defense,²⁰⁸ but there is little case law on the subject.

Section 562.041.2(c) provides that withdrawal is an affirmative defense if *before* the commission of the offense the person who rendered aid abandons his purpose *and* gives timely warning to law enforcement authorities or otherwise makes proper effort to prevent the commission of the crime. This subsection provides an affirmative defense only when there has been some effort to prevent the crime, and the crime has been committed in spite of the preventive effort.²⁰⁹ The burden of injecting the issue and the burden of persuasion is on the defendant.²¹⁰ The drafters of the Code included the defense to encourage the prevention of crime and as an inducement to the disclosure of crimes before they occur.²¹¹

Because Missouri has virtually no case law discussing what constitutes an effective withdrawal, it is helpful to look at general principles formulated in other jurisdictions.²¹² The rule that an accomplice may withdraw from the commission of a crime is widely recognized, but a defendant may successfully raise the defense only under certain circumstances. Sudden flight from the scene of the crime,²¹³ quiet

204. 162 Cal. 81, 121 P. 318 (1912).

205. *Id.* at 84, 121 P. at 319.

206. MO. PROPOSED CRIM. CODE § 7.070, Comment (1973).

207. RSMO § 556.170 (1969).

208. *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909).

209. MO. PROPOSED CRIM. CODE § 7.070, Comment (1973).

210. *Id.*

211. *Id.*

212. *See generally* 22 C.J.S. *Criminal Law* § 89 (1961); W. LAFAVE & A. SCOTT, *supra* note 11, at 519-20.

213. *Jeter v. State*, 9 Md. App. 575, 267 A.2d 319 (1970), *aff'd*, 261 Md. 221, 274 A.2d 337 (1971); *State v. Forsha*, 190 Mo. 296, 88 S.W. 746 (1905).

withdrawal,²¹⁴ or mere change of heart²¹⁵ is not sufficient for an effective withdrawal. Some jurisdictions go so far as to examine the motives of the accomplice in attempting to withdraw. In these jurisdictions, if his motive to withdraw is based upon fear of apprehension or mere postponement of the crime, it is not an effective withdrawal.²¹⁶

Under section 562.041.2(c) of the 1979 Missouri Criminal Code, there are two ways an accomplice can make an effective withdrawal: By giving timely warning to law enforcement authorities, or by otherwise making a proper effort to prevent the commission of the crime. The first method is straightforward and unambiguous. If an accomplice warns the proper police authority while there is still time to prevent the commission of the crime, he has effectively removed himself from liability. The second method depends upon each fact situation, and Missouri courts will have to interpret what constitutes a "proper effort" to prevent the commission of the crime.

To make a proper effort to prevent the commission of the crime implies some sort of affirmative action on the part of the accomplice. It probably would not be sufficient if the accomplice merely communicated his intent to withdraw to his co-felons, although Missouri and some jurisdictions have held this to be sufficient for an effective withdrawal.²¹⁷ Other jurisdictions apply a stricter test by requiring that the accomplice must do everything practicable to repudiate his prior aid and prevent the consummation of the crime.²¹⁸ It is also generally accepted that this repudiation must be communicated to the accomplice's co-felons.²¹⁹

Based on the 1979 Code provision, Missouri courts will probably adopt the strict test. For an example, suppose A supplies burglary tools to B who

214. *Karnes v. State*, 159 Ark. 240, 252 S.W. 1 (1923); *People v. Marx*, 291 Ill. 40, 125 N.E. 719 (1919); *People v. Lacey*, 49 Ill. App. 2d 301, 200 N.E.2d 11 (1964); *State v. Carver*, 30 Ohio App. 2d 115, 283 N.E.2d 662 (1971), *aff'd*, 30 Ohio St. 2d 280, 285 N.E.2d 26, *cert. denied*, 409 U.S. 1044 (1972).

215. *Karnes v. State*, 159 Ark. 240, 252 S.W. 1 (1923); *People v. King*, 30 Cal. App. 2d 185, 85 P.2d 928 (1938); *People v. Ortiz*, 63 Cal. App. 662, 219 P. 1024 (1923).

216. *State v. Morris*, 10 N.C. 388 (1824); *People v. Nichols*, 230 N.Y. 221, 129 N.E. 883 (1921); *Pollack v. State*, 215 Wis. 200, 253 N.W. 560 (1934), *aff'd on rehearing*, 215 Wis. 200, 254 N.W. 471 (1934). *See also* CONN. GEN. STAT. ANN. § 53a-10(b) (West 1972).

217. *State v. Klein*, 97 Conn. 321, 116 A. 596 (1922); *State v. Allen*, 47 Conn. 121 (1879); *People v. Brown*, 26 Ill. 2d 308, 186 N.E.2d 321 (1962); *People v. Rybka*, 16 Ill. 2d 394, 158 N.E.2d 17 (1959); *Jeter v. State*, 9 Md. App. 575, 267 A.2d 319 (1970), *aff'd*, 261 Md. 221, 274 A.2d 337 (1971); *State v. Peterson*, 213 Minn. 56, 4 N.W.2d 826 (1942); *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909); *State v. Carver*, 30 Ohio App. 2d 115, 283 N.E.2d 662 (1971), *aff'd*, 30 Ohio St. 2d 280, 285 N.E.2d 26, *cert. denied*, 409 U.S. 1044 (1972); *Galan v. State*, 44 Ohio App. 192, 184 N.E. 40 (1932).

218. *See* cases cited note 215 *supra*.

will commit the actual burglary. Prior to the burglary, A decides to withdraw from the crime. In order to make an effective withdrawal, he must give timely warning to law enforcement authorities, or he must reacquire the burglary tools²²⁰ and communicate his intention of withdrawing from the criminal enterprise to B. If the reacquisition of the burglary tools is reasonably sufficient to prevent B from committing the burglary, A will have made an effective withdrawal. If, however, A's reacquisition of the burglary tools would in no way prevent B from committing the crime, A would have to take additional measures to try to prevent the commission of the crime.

The final requirement for an effective withdrawal is that the withdrawal be "timely." It is too late for an accomplice to withdraw if the criminal acts are in the process of consummation or have already been completed.²²¹ There must be some appreciable interval between the alleged withdrawal and the criminal act.²²² The reasons for this requirement are twofold. First, there must be sufficient opportunity for his co-felons to follow his example and refrain from further action.²²³ Second, there must be sufficient opportunity for persons other than the co-felons to prevent the commission of the offense.²²⁴ In either case, prevention of the crime is the goal.

Clearly, Missouri's new statute is aimed at *prevention* of crime²²⁵ and serves as an escape route for an accomplice only when preventive measures have been taken. It is not necessary that the crime actually be prevented,²²⁶ although some jurisdictions recognize the withdrawal only if the eventual commission of the crime is attributable to some cause independent of the original aid furnished.²²⁷ Comments to the 1972 Proposed Code indicate that the Missouri legislature did not intend to impose this

220. MODEL PENAL CODE § 2.04, Comment (Tent. Draft No. 1, 1953).

221. *Karnes v. State*, 159 Ark. 240, 252 S.W. 1 (1923); *People v. Lacey*, 49 Ill. App. 2d 301Q 200 N.E.2d 11 (1964); *State v. Peterson*, 213 Minn. 56, 4 N.W.2d 826 (1942); *State v. Bailey*, 383 S.W.2d 731 (Mo. 1964).

301, 200 N.E.2d 11 (1964); *State v. Peterson*, 213 Minn. 56, 4 N.W.2d 826 (1942); *State v. Bailey*, 383 S.W.2d 731 (Mo. 1964).

222. *People v. King*, 30 Cal. App. 2d 185, 85 P.2d 928 (1938); *People v. Ortiz*, 63 Cal. App. 662, 219 P. 1024 (1923); *People v. Lacey*, 49 Ill. App. 2d 301, 200 N.E.2d 11 (1964); *People v. Nichols*, 230 N.Y. 221, 129 N.E. 883 (1921); *Pollack v. State*, 215 Wis. 200, 253 N.W. 560, *aff'd on rehearing*, 215 Wis. 200, 254 N.W. 4M1 (1934).

223. *People v. Lacey*, 40 Ill. App. 2d 301, 200. 200, 253 N.W. 560, *aff'd on rehearing*, 215 Wis. 200, 254 N.W. 471 (1934).

223. *People v. Lacey*, 40 Ill. App. 2d 301, 200 N.E.2d 11 (1964); *People v. Nichols*, 230 N.Y. 221, 129 N.E. 883 (1921); *Pollack v. State*, 215 Wis. 200, 253 N.W. 560, *aff'd on rehearing*, 215 Wis. 200, 254 N.W. 471 (1934).

224. See cases cited note 223 *supra*.

225. MO. PROPOSED CRIM. CODE § 7.070, Comment (1973).

226. *Id.* See also *State v. Allen*, 49 Cal. App. 2d 199 (1963).

227. *People v. Ortiz*, 63 Cal. App. 662, 219 P. 1024 (1923).

heavy burden on an accomplice who attempts to escape liability by making an effective withdrawal.²²⁸ Instead, the accomplice carries only the burden of persuading the jury that he made proper efforts to prevent the commission of the crime.²²⁹

VI. CONCLUSION

Although the new Missouri Criminal Code institutes several major theoretical changes, the new provisions will in practice affect only a few cases. The Code generally provides clear and consistent guidelines for the imposition of accomplice liability. The judiciary must of course interpret to fill the interstices, and this comment has attempted to suggest areas the courts may consider and ideas they might adopt. The Code's most notable features are the state of mind requirements. By providing that a defendant's punishment shall be assessed according to his personal culpability rather than that of a third party, it aligns Missouri accomplice liability theory with accepted principles of modern criminal justice.

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228. MO. PROPOSED CRIM. CODE § 7.070, Comment (1973).

229. *Id.*