Fordham Law Review

Volume 85 | Issue 3 Article 13

2016

Accidental Vitiation: The Natural and Probable Consequence of *Rosemond v. United States* on the Natural and Probable Consequence Doctrine

Evan Goldstick
Fordham University School of Law

ACCIDENTAL VITIATION: THE NATURAL AND PROBABLE CONSEQUENCE OF *ROSEMOND V. UNITED STATES* ON THE NATURAL AND PROBABLE CONSEQUENCE DOCTRINE

*Evan Goldstick**

Actus non facit reum nisi mens sit rea.[1]

Anglo-American criminal law defines a crime as the concurrence of an actus reus and a mens rea. This basic definition of a crime remains unchanged when a defendant is prosecuted as an accomplice, rather than a principal. However, the natural and probable consequence doctrine, an accomplice law doctrine, allows for accomplice liability to exist in the absence of sufficient proof of mens rea. The doctrine came from the common law and, as a result, has seen disparate application among both state and federal courts. To date, the U.S. Supreme Court has not issued a ruling on the wisdom, legality, or constitutionality of the doctrine.

Recently, the Court decided Rosemond v. United States. *In* Rosemond, *the Court had to determine the requisite mental state for aiding and abetting a particular federal crime. While the Court had the opportunity to weigh in on the natural and probable consequence doctrine in* Rosemond, *it declined to do so in footnote 7.*

This Note reviews the natural and probable consequence doctrine, its reception by courts and commentators, and the Court's holding in Rosemond. *This Note then applies the holding of* Rosemond *to several federal cases that employed the doctrine to determine whether, despite footnote 7, the doctrine survives* Rosemond. *Ultimately, this Note concludes the doctrine does not survive and that such a result is desirable*

* J.D. Candidate, 2017, Fordham University School of Law; B.A., 2013, University of Michigan. I would like to thank Professor Ian Weinstein for his wisdom, which knows no bounds, and for taking the time to carefully discuss the reasoning of this Note. I would also like to thank Alyssa Wanderon and the entire *Fordham Law Review* staff for their help in preparing this Note.

1. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932). One legal scholar has glossed this adage of criminal law in the following way: "It is a principle of natural justice, and of our law, that the intent and the act must both concur to constitute the crime." *See* HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 109 (1845) (quoting Fowler v. Padget (1798) 7 TR 514 (Lord Kenyon, C.J.)).

in light of the doctrine's incompatibility with basic principles of Anglo-American criminal law.

INTRODUCTION

Thomas Gaetano Phillip Luparello was involved in a love triangle with his wife and his client turned receptionist, Terri Cesak, who was also married.[2] Both married couples had experienced turmoil, resulting in the separation of Luparello and his wife but not of Cesak and her husband.[3] Cesak, who was pregnant with Luparello's child, decided to remove herself from Luparello's life.[4] After Luparello was informed of Cesak's departure from his apartment, where she had been living, he began a search for her, seeking to contact anyone who may have known her whereabouts.[5] Luparello asked several of his acquaintances, including Carlos Orduna and Johnny Salmon, to aid him in his endeavor.[6] When Orduna and Salmon went to meet Luparello at his apartment, they carried a sword and nunchuks, but they did not have guns.[7] Luparello then asked the two men to go elicit information from Mike Martin, a friend of Cesak's, to which the friends acquiesced.[8] Upon arrival at Martin's house, Orduna approached the house and knocked on the front door.[9] Once Orduna succeeded in getting Martin to step outside on false pretenses, Orduna stepped aside and Salmon gunned Martin down on his porch.[10] Luparello was not present, did not believe Orduna and Salmon were armed with guns (because they did not have any when they left his apartment), and was unaware of the plan or tactics the two men intended to employ in visiting Martin.[11]

Luparello was convicted at trial on two counts: one for conspiracy to commit an assault by means of force likely to produce great bodily injury and a second for murder.[12] On appeal, Luparello argued that the murder was a result of an unintended act committed by his codefendant, Orduna.[13] In affirming his conviction, the court held that Luparello was liable for the crimes that he "naturally, probably and foreseeably put in motion," regardless of the crime he actually intended his confederates to commit.[14] Thus, the court held Luparello liable despite the absence of any proof regarding his *mental state* toward the murder; instead, the court used the natural and probable consequence doctrine to hold evidence of his encouragement to commit any crime sufficient for the unintended crime that was committed.[15]

---

2. People v. Luparello, 231 Cal. Rptr. 832, 835 (Ct. App. 1986).
3. *Id.*
4. *Id.*
5. *Id.* at 835–36.
6. *Id.* at 836.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 835–36.
12. *Id.* at 836.
13. *Id.* at 848.
14. *See id.* at 849. While the conviction discussed here was for conspiracy, the court noted that the analysis was the same under conspiracy and aiding and abetting liability, both of which are types of complicity theories. *See id.* at 848 n.8.
15. *See id.* at 849.

The U.S. Supreme Court, echoing the *actus non facit reum nisi mens sit rea* adage, has stated that crime is a compound concept, requiring the concurrence of a proscribed act and a guilty mind.[16] This conception of crime has long been present in American criminal law.[17] However, *People v. Luparello*[18] employed the natural and probable consequence doctrine to reach a result that is inconsistent with this fundamental principle of criminal law.

There are two distinct ideas embedded within the *actus non facit* adage, as well as the Supreme Court's parallel formulation: actus reus and mens rea, both of which remain at the core of Anglo-American criminal law.[19] The vast majority of federal crimes, with the exception of strict liability crimes,[20] are defined by the concurrence of prohibited conduct—actus reus—and a culpable state of mind—mens rea.[21] Actus reus, Latin for "guilty act," while not susceptible to a precise definition, can be defined as voluntarily committed conduct that gives rise to the harm which the crime aims to prevent or redress.[22] Mens rea, Latin for "guilty mind," looks to the defendant's mental state at the time of the conduct and asks if the conduct and state of mind together deem the defendant culpable.[23] This joint inquiry seeks to determine whether the defendant's conduct and state of mind render him or her worthy of condemnation or blame. However, the employment of the natural and probable consequence doctrine, as described in the above example, allows for liability to attach in the absence of the requisite mens rea.[24]

These two core ideas of criminality have many straightforward applications to individual defendants. Nonetheless, complexity arises when

---

> Luparello errs when he concludes the perpetrator and accomplice must "share" an identical intent to be found criminally responsible for the same crime. Technically, only the perpetrator can (and must) manifest the mens rea of the crime committed. Accomplice liability is premised on a different or, more appropriately, an equivalent mens rea. This equivalence is found in *intentionally* encouraging or assisting or influencing the nefarious act. "[B]y intentionally acting to further the criminal actions of another, the [accomplice] voluntarily identifies himself with the principal party."

Id. (alterations in original) (quoting Sandford Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 349 n.51 (1985)).

16. *See* Morissette v. United States, 342 U.S. 246, 251–52 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, . . . took deep and early root in American soil.").

17. *Id.*

18. 231 Cal. Rptr. 832 (Ct. App. 1986).

19. *See* Sayre, *supra* note 1, at 974 n.3.

20. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.5, at 381 (2d ed. 2003) (describing strict liability crime as "statutory crime-without-fault"). These crimes tend to carry with them small penalties and tend to be misdemeanors. *See id.*

21. *See id.* § 1.2, at 14; *see also* Dennis v. United States, 341 U.S. 494, 500 (1951) (noting that a survey of Title 18 of the U.S. Code reveals a vast majority of crimes to have a statutory mental state).

22. *See* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 205–06 (9th ed. 2012).

23. *See* 1 LAFAVE, *supra* note 20, § 5.1, at 332.

24. *See infra* Part II.A.1–4 (discussing four federal cases that circumvent the mens rea requirement in their use of the doctrine).

two or more individuals combine, through plan or happenstance, to commit a crime and one is liable for the act(s) of another. Whether the government pursues a theory of complicity that the defendant was a principal, conspirator, or accomplice, the law must provide a just and reliable way to impose liability on culpable individuals for the conduct and mental states of others.[25] As a general rule, an accomplice is liable when he or she provides aid to another, or in some way counsels or procures another, in the commission of a crime.[26] But what happens when, for example, an accomplice aids, counsels, or procures another with the intent to facilitate one crime, but, unbeknownst to the accomplice, a confederate intends and commits a wholly different crime? As seen in *Luparello*, when the natural and probable consequence doctrine is applied, an accomplice may be held liable for a crime he or she did not intend to be committed. Numerous courts and commentators have stated that the natural and probable consequence doctrine is inconsistent with basic understandings and principles of Anglo-American criminal law.[27] Not only has this inconsistency been noted, but the doctrine's viability as a whole has been called into question.[28]

The Supreme Court recently took a rare plunge into federal accomplice liability, revisiting its foundations in *Rosemond v. United States*[29] for the first time in roughly thirty years.[30] This decision clarifies aspects of accomplice liability that have been treated inconsistently[31] and should ideally lead to more consistent results in cases involving conduct which was

25. *See* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 589 (8th ed. 2007) (excerpting Sanford H. Kadish, *A Theory of Complicity*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 288 (Ruth Gavison ed. 1987)).

26. *See* 18 U.S.C. § 2 (2012).

27. For an example of this criticism by a state court, see *infra* notes 108–10 and accompanying text. For an example of this criticism by a federal court, see *infra* notes 246–54 and accompanying text. For an example of this criticism in scholarship, see *infra* notes 283–90 and accompanying text.

28. *See infra* Part II.B (discussing three federal courts that have rejected the doctrine); *see also infra* Part II.C (discussing various scholars' and the Model Penal Code's rejection of the doctrine).

29. 134 S. Ct. 1240 (2014).

30. *See* Rory Little, *Opinion Analysis: Justice Kagan Writes a Primer on Aiding and Abetting Law*, SCOTUSBLOG (Mar. 6, 2014, 9:04 AM), http://www.scotusblog.com/2014/03/opinion-analysis-justice-kagan-writes-a-primer-on-aiding-and-abetting-law/ (noting that the Court has not addressed federal accomplice liability since *Standefer v. United States*, 447 U.S. 10 (1980)) [https://perma.cc/GHT3-LGHA]. While there have been cases involving criminal accomplice liability that have reached the Court, these cases have been adjudicated without reaching the foundations of accomplice liability or have been based on state law versions of accomplice liability. *See, e.g.*, Waddington v. Sarausad, 555 U.S. 179 (2009) (basing the holding on the clarity of a state court jury instruction and standards of review for habeas proceedings); Enmund v. Florida, 458 U.S. 782 (1982) (holding that an accomplice to felony murder is not subject to capital punishment under the Eighth Amendment).

31. *Compare infra* Part II.A (discussing cases that use the doctrine and as a result, do not require proof of an accomplice's mental state for all crimes), *with infra* Part II.B. (discussing cases that reversed convictions, when those convictions were predicated on the doctrine, due to the lack of proof of the accomplice's mental state for all crimes).

unanticipated by the accomplice.[32] However, because neither party put forth the natural and probable consequence doctrine as part of their argument in *Rosemond*, the Court did not have an opportunity to weigh in on the viability of the doctrine in federal criminal law and explicitly left this question open in footnote 7 of Justice Kagan's majority opinion.[33] As this Note shows, the Court's recent decision in *Rosemond* should lead to more consistent results in cases that have traditionally applied the natural and probable consequence doctrine.[34]

Part I of this Note describes accomplice liability, the natural and probable consequence doctrine, and the Court's recent holding in *Rosemond*. Part II reviews the doctrine's reception in federal courts and then turns to scholarly critiques of the doctrine. Finally, Part III applies *Rosemond*'s holding to federal criminal cases that have invoked the natural and probable consequence doctrine to determine whether the doctrine survives *Rosemond*. This Note concludes that, despite *Rosemond*'s footnote 7, which explicitly expressed no view on the natural and probable consequence doctrine, *Rosemond* consumes and eliminates the doctrine as a viable complicity theory in federal criminal law. *Rosemond* should, therefore, guide courts in confining accomplice liability to only those who are truly culpable, which is the ultimate goal of Anglo-American criminal law.

I. *ROSEMOND V. UNITED STATES* AND AN OVERVIEW OF THE NATURAL AND PROBABLE CONSEQUENCE DOCTRINE

Before this Note can critique the natural and probable consequence doctrine, it is necessary to locate the doctrine within the context of criminal law and accomplice law. Part I.A reviews the history and development of accomplice law and liability. Part I.B examines the natural and probable consequence doctrine and discusses its treatment in state courts. Then, Part I.C explains the Court's recent decision in *Rosemond* before turning to footnote 7 of the opinion, which declined to pass judgment on the natural and probable consequence doctrine.

32. *See infra* Part III.B.

33. *Rosemond*, 134 S. Ct. at 1248 n.7.

34. While this Note focuses on federal criminal law, and while *Rosemond*'s holding is not binding on the states, the clarification of the mental state for federal accomplice liability may very likely affect how states view accomplice law. *See* Wesley M. Oliver, *Limiting Criminal Law's "In for a Penny, in for a Pound" Doctrine*, 103 GEO. L.J. ONLINE 8, 10 (2013) (discussing the Court's influence on state criminal law). However, whether proof of mens rea is constitutionally required is beyond the scope of this Note, and this Note presumes there is no such constitutional requirement. *But see* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683–84 (1983) (speculating that the Model Penal Code's requirement of element analysis, which necessarily includes mental states as an element of criminal liability analysis, may have constitutional significance).

A. Accomplice Liability 101

Accomplice liability permits a person to be held liable for the acts of another.[35] This concept comes from the common law and dates back to at least the fourteenth century.[36] At common law, there were distinctions between different types of accomplices, which turned on how directly they were involved with the commission of a crime. In contrast, today's accomplice law holds all accomplices liable as principals.[37] Today, for criminal liability to attach, accomplice law only requires proof that an accomplice provided some type of aid to another in furtherance of a crime—by definition, the accomplice need not, and does not, directly commit the crime.[38]

The modern formulation of accomplice liability, which was adopted by the Court, states that, for an accomplice to be liable, the individual must participate in the charged crime as "something that he wishes to bring about, that he seek by his action to make it succeed."[39] Interestingly, the federal statute codifying accomplice liability, 18 U.S.C. § 2(a), is quite sparse and offers little in terms of the elements the government must prove for accomplice liability to attach.[40] Further, the statute is silent as to the requisite quantity or quality of the aid or encouragement that must be provided for an accomplice to be liable.[41] The general understanding is an accomplice may be held liable as a principal for aiding any element or aspect of a crime without the need for the government to prove that aid was provided for each element of the crime.[42]

While the necessity for accomplice liability is not often questioned,[43] § 2(a)'s silence on the requirements to convict an accomplice has prompted

---

35. *See* 2 LAFAVE, *supra* note 20, § 13.2, at 337.

36. *See* United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

37. *See* Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129, 137–38 (2013). However, accomplices at common law who were considered "accessor[ies] after the fact" remained separate from the other condensed common law accomplice classes. *Id.* at 138.

38. *See* 2 LAFAVE, *supra* note 20, § 13.2, at 337; *see also* United States v. Wesson, 889 F.2d 134, 135 (7th Cir. 1989) ("Aiding and abetting is nothing if not a crime you may commit without performing all of the elements of the substantive offense.").

39. *Peoni*, 100 F.2d at 402; *see also* Wilson-Bey v. United States, 903 A.2d 818, 831 (D.C. 2006). The Court cited the quoted language from *Peoni* in such a way as to make it not just a concept of accomplice liability but also a requirement. *See* Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (using language such as "[i]n order to" and "it is necessary" before citing *Peoni*).

40. *See* 18 U.S.C. § 2(a) (2012). ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

41. *See id.*

42. *See* Rosemond v. United States, 134 S. Ct. 1240, 1246 (2014) (compiling scholarly works to support the proposition that any aid provided to another in furtherance of a crime is sufficient for accomplice liability); United States v. Woods, 148 F.3d 843, 850 (7th Cir. 1998). This view of accomplice liability, which predates § 2, remained unchanged by the codification of § 2 and is not disputed among the federal circuits. *See Rosemond*, 134 S. Ct. at 1246–47, 1246 n.5.

43. *But see* Heyman, *supra* note 37, at 129–33.

significant discussion in the courts and in legal scholarship.[44] As made explicit in *In re Winship*,[45] criminal law requires proof beyond a reasonable doubt as to each and every element of the crime charged.[46] "Element" includes both the proscribed conduct as well as a mental state the defendant must have had when committing the proscribed conduct.[47] However, so long as a crime has been committed,[48] accomplice law allows for liability to attach when there is proof that an individual has committed a *single* element of the charged crime.[49] But how can *Winship* be satisfied for an accomplice when an element of the charged crime includes a mental state, but, as to that single element, the accomplice did not share that mental state in providing aid or encouragement?[50] The tension between accomplice liability and *Winship* exposes the incongruity between the work that the actus reus and the requisite mens rea do during the prosecution of principals, as compared to the prosecution of accomplices, and has resulted in disagreement over the elements of accomplice liability.[51] While the actus reus can be located without too much difficulty in the aid or encouragement provided by an accomplice, the mens rea required for an accomplice in providing such aid is unclear—can the aid be provided negligently or recklessly or must it be provided knowingly or intentionally?[52] Because § 2(a) does not announce or imply a requisite mental state for accomplice liability, there has been disparate application of the mens rea element to accomplice defendants in our courts.[53]

---

44. *See Wilson-Bey*, 903 A.2d at 831–32 & nn.27–28 (D.C. Cir. 2006); *Woods*, 148 F.3d at 847–48 (7th Cir. 1998); United States v. Greer, 467 F.2d 1064, 1069 (7th Cir. 1972); MODEL PENAL CODE § 2.06 cmt. 6(b)–(c) (AM. LAW INST., Official Draft and Revised Comments 1985); 2 LAFAVE, *supra* note 20, § 13.2, at 337; Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1373 (2002).

45. 397 U.S. 358 (1970).

46. *See id.* at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

47. *See* Apprendi v. New Jersey, 530 U.S. 466, 493 (2000) ("[I]ntent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'").

48. While accomplice liability, by its very nature, requires a crime to have been committed, the Supreme Court has held that an accomplice may be held liable even in the absence of his or her confederate principal's conviction, and thus, an accomplice's liability is not dependent on a principal's liability. *See* Standefer v. United States, 447 U.S. 10, 19–20 (1980).

49. *See supra* note 42 and accompanying text.

50. *See infra* Part I.C (explaining the Court's holding in *Rosemond*, which answers this question).

51. *See supra* note 44.

52. *See* 2 LAFAVE, *supra* note 20, § 13.2(b), at 343 ("Considerable confusion exists as to what the accomplice's mental state must be . . . ."); *see also* Rosemond v. United States, 134 S. Ct. 1240, 1253 (2014) (Alito, J., dissenting) (referring to the messiness of the case law surrounding the mens rea required for accomplice liability: "There is some tension in our cases on this point").

53. *Compare infra* Part II.A.1 (discussing a case in which the defendant was convicted as an accomplice to a § 924(c) violation—for possessing a firearm and explosive device during the commission of a crime of violence—on a natural and probable consequence theory), *with infra* Part II.B.2 (discussing a case where the defendant's conviction as an

B. The Natural and Probable Consequence Doctrine: An Overview

The natural and probable consequence doctrine is used to hold individuals criminally liable when they intend to aid in a particular crime but, instead, unintentionally provide aid for a different crime.[54] Part I.B.1 introduces and describes the doctrine, and Part I.B.2 explores its reception by state courts.

1. What Is the Natural and Probable Consequence Doctrine?

The natural and probable consequence doctrine is an exception to a general rule of accomplice liability.[55] This general rule of accomplice liability states that the intent to aid one crime is insufficient as proof of intent to aid a different crime.[56] However, once an accomplice's intent to commit one crime has been established, the natural and probable consequence doctrine allows for that initial intent to be imputed to a subsequent crime if the subsequent crime is deemed a natural and probable consequence of the initial crime, thus providing an exception to the general rule.[57]

The phrase "natural and probable consequence" is used in two distinct ways, which must be distinguished from each other. First, there is the permissive common law presumption, or more accurately stated, a permissive common law *inference*, that one intends the natural and probable consequences of voluntarily committed acts.[58] This distinction between a presumption and an inference is crucial; if the judge allows the jury to *presume* the intent of the defendant, thus shifting the burden to the defendant to prove that he did not intend the natural and probable consequences of his voluntary acts, the defendant's due process rights are violated.[59] However, a judge may instruct the jury, without violating the defendant's right to due process, that they *may* draw this inference but are not required to do so.[60] Second, a prosecutor may employ the doctrine to show that an accomplice's initial conduct naturally and probably resulted in

---

accomplice to a § 924(c) violation was overturned due to the court's rejection of the natural and probable consequence theory used at trial).

54. *See* Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1360 (1998).

55. *See* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 35, at 209 (15th ed. 1993).

56. *See id.*

57. *See* Michael G. Heyman, *Due Process Limits on Accomplice Liability*, 99 MINN. L. REV. 131, 131 (2015). While not the focus of this Note, the doctrine is also in contravention of Anglo-American criminal law's traditional understanding of actus reus. Because no additional action beyond the initial aid provided for the initial crime is required to convict a defendant when the doctrine is employed, the doctrine effectively eliminates the act requirement. *See* Weiss, *supra* note 44, at 1425; *see also infra* Part II.C.

58. *See* 22 C.J.S. *Criminal Law: Substantive Principles* § 39 (2016); *see also* Wilson-Bey v. United States, 903 A.2d 818, 839 n.38 (D.C. 2006). For an example of this version of a natural and probable consequence theory used in a case, see People v. Conley, 543 N.E.2d 138, 143–44 (Ill. App. Ct. 1989).

59. *See* Sandstrom v. Montana, 442 U.S. 510, 524 (1979).

60. *See id.* at 515.

a subsequent crime.[61] It is through the latter use that this Note uses the natural and probable consequence doctrine.

The Supreme Judicial Court of Maine applied the doctrine in the commonly cited case of *State v. Linscott*.[62] In *Linscott*, the defendant, William Linscott, along with three other men, decided to rob a known drug dealer.[63] After arriving at the drug dealer's home, Linscott, armed with knives, and one of his confederates, armed with a shotgun, exited the car and approached the house.[64] The two men planned for Linscott to smash the front window and then for the confederate to thrust his shotgun through the window as a threat to the dealer sitting within, with the hope that the firearm would deter the dealer from defending himself.[65] After Linscott broke the window as planned, the confederate immediately fired his shotgun into the room, striking, and ultimately killing, the dealer.[66]

Linscott was found guilty of robbery, as a principal, and of murder, as an accomplice.[67] The court held that the murder of the dealer was a "reasonably foreseeable consequence" of the robbery.[68] The court disagreed with Linscott's challenge that the use of the natural and probable consequence doctrine was a violation of his right to due process and affirmed the conviction.[69] In affirming the trial court's judgment, the court reasoned the doctrine was predicated on an objective standard of accomplice liability and that proof of the defendant's subjective mental state for the robbery was sufficient, without requiring further proof of Linscott's state of mind as to the murder.[70]

While *Linscott* provides an example of the doctrine at work, it does not discuss when use of the doctrine is apt, or even how the doctrine is invoked. Generally speaking, there are three ways in which the doctrine is used. First, it can be used as a prosecution theory at trial.[71] Second, it can be incorporated into jury instructions at trial.[72] Third, and most commonly

61. *See supra* note 57 and accompanying text. All references in this Note to the natural and probable consequence doctrine, unless otherwise noted, refer only to the second use as just described above.

62. 520 A.2d 1067 (Me. 1987).

63. *Id.* at 1067–68.

64. *Id.* at 1068.

65. *Id.*

66. *Id.*

67. *Id.* Discussion of why the defendant was not charged as a conspirator or with felony-murder is conspicuously absent from the opinion.

68. *Id.* "Reasonably foreseeable" consequence is a synonymous articulation of the "natural and probable" consequence doctrine. *See* People v. Woods, 11 Cal. Rptr. 2d 231, 239–40 (Ct. App. 1992). There exists a third articulation of this doctrine, albeit a much less common one—common design—which this Note does not discuss. *See* Heyman, *supra* note 37, at 132 (discussing common design).

69. *Linscott*, 520 A.2d at 1070–71.

70. *Id.* at 1070.

71. *See, e.g.*, Waddington v. Sarausad, 555 U.S. 179, 202 (2009) (Souter, J., dissenting) (quoting the prosecutor's closing argument, which implicitly invoked the doctrine by use of the idiom, "in for a dime, in for a dollar").

72. *See, e.g.*, Wilson-Bey v. United States, 903 A.2d 818, 826 (D.C. 2006). For the text of the instruction, see *infra* note 111.

seen in case law, an appellate court may employ the doctrine to combat a sufficiency-of-the-evidence appeal.[73] As to the two uses at trial, today its use is generally acceptable so long as it is not conveyed to the jury as a conclusive presumption, which would invade the jury's exclusive role as the trier of fact and impermissibly relieve the government of its burden of proof for the requisite mental state.[74]

Furthermore, a California court has proffered a four-step inquiry to determine when the use of the doctrine is appropriate.[75] This approach illustrates the parameters of the doctrine on a practical level. First, a principal must have committed an initial offense.[76] Second, the accomplice must have aided in the initial offense.[77] Third, the same principal must have committed a subsequent offense.[78] Fourth, the subsequent offense must be a reasonably foreseeable, or a natural and probable, consequence of the accomplice's aid for the initial offense.[79] If an affirmative answer can be given, beyond a reasonable doubt, to each of these four prongs, this inquiry suggests that a jury may convict an accomplice defendant on a natural and probable consequence theory and an appellate court may affirm such a conviction.[80]

2. Treatment of the Doctrine Among the States

There is much uncertainty about the exact number of jurisdictions that have either adopted or rejected the natural and probable consequence doctrine. Some sources suggest a minority of jurisdictions have adopted the doctrine,[81] while other sources say the doctrine has been adopted by most jurisdictions.[82] Regardless of the correct position, there are several certainties regarding the doctrine: it has not been rejected by a majority of

73. *See infra* Part II.A–B (describing seven circuit court cases that all discuss or use the doctrine with respect to a sufficiency of the evidence appeal).

74. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 446 (1978) ("[T]he issue of intent must be left to the trier of fact alone."); Morissette v. United States, 342 U.S. 246, 275 (1952) ("A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.").

75. People v. Woods, 11 Cal. Rptr. 2d 231, 239 (Ct. App. 1992). Because California courts are some of the most frequent users, and strongest supporters, of the doctrine, this four-step inquiry is illustrative of how to properly use the doctrine. *See* John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 329 (2008) (stating California's repetitive use of the doctrine, as well as putting forward a largely similar five-step analysis for the doctrine).

76. *See supra* note 75.

77. *See supra* note 75.

78. *See supra* note 75.

79. *See supra* note 75.

80. *See Woods*, 11 Cal. Rptr. 2d at 239.

81. *See* Wilson-Bey v. United States, 903 A.2d 818, 833 n.28 (D.C. 2006) (stating a minority of jurisdictions adhere to the doctrine); Decker, *supra* note 75, at 312 (stating that there are twenty states that have adopted the natural and probable consequence doctrine).

82. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05, at 475 (6th ed. 2012). *But see Wilson-Bey*, 903 A.2d at 831–32, 831 n.27.

jurisdictions,[83] there is resounding criticism of the doctrine,[84] and the number of jurisdictions rejecting it has been consistently increasing.[85] Because the doctrine comes from the common law,[86] courts' rejections of it tend to be more readily identifiable than adoptions. However, this discussion will begin by turning to supporters of the doctrine.[87]

Texas has supported the use of the natural and probable consequence doctrine since 1892.[88] In *Lyons v. State*,[89] the Texas Court of Appeals held that a defendant may be liable as an accomplice to a homicide if the defendant intentionally encouraged an assault that ultimately leads to death.[90] By the court's language, the doctrine was to be used separately from, and in the absence of, proof that the accomplice had knowledge of his or her confederate's subsequent crime(s).[91] In citing *Lyons*, the California Supreme Court adopted the doctrine in 1910.[92] In 1996, the Supreme Court of California issued a comprehensive decision in *People v. Prettyman*,[93] reaffirming its support for the doctrine.[94] In *Prettyman*, the court stated the doctrine was an "'established rule' of American jurisprudence"[95] and that it had been part of California's pattern jury instructions since 1976.[96] The court reasoned that "[i]t is the intent to encourage and bring about conduct that is criminal," and, therefore, an accomplice should be liable for the foreseeable consequences he or she has set in motion as a result of any intentionally provided aid or encouragement.[97] There are several other

83. *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 190–91 (2007); DRESSLER, *supra* note 82.

84. For further doctrinal criticism, see *infra* Part II.B–C.

85. *See Duenas-Alvarez*, 549 U.S. at 196 (compiling cases).

86. *See* TORCIA, *supra* note 55, § 35, at 209.

87. While the focus of this Note is on the doctrine's use in federal criminal law, there is a greater quantity of case law on the doctrine at the state level, simply because there are many more state jurisdictions than federal ones. As a result, the discussion in this subsection centers on state courts. However, because the doctrine, in the context this Note uses it, is the same regardless of the locus of the court, the reasoning behind state courts' adoptions and rejections of the doctrine is equally relevant and applicable as federal case law is to the analysis of this Note. *Compare* Decker, *supra* note 75, at 249–50 (focusing on the doctrine in the state context), *with* Weiss, *supra* note 44, at 1424–35 (focusing on the doctrine in the federal context).

88. *See* Lyons v. State, 18 S.W. 416, 417 (Tex. Ct. App. 1892).

89. 18 S.W. 416 (Tex. Ct. App. 1892).

90. *Id.* at 417.

91. *See id.*

92. *See* People v. Bond, 109 P. 150, 155 (Cal. Ct. App. 1910).

93. 926 P.2d 1013 (Cal. 1996).

94. *Id.* at 1019.

95. *Id.* (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 6.8(b), at 158 (1986)).

96. *See id.* at 1021.

97. *Id.* at 1020 (quoting People v. Croy, 710 P.2d 392, 398 n.5 (Cal. 1985)). Notice the similarity between the language used by the *Prettyman* Court and the language used by the *Luparello* Court. *See supra* note 14 and accompanying text (discussing how the court held Luparello liable for foreseeable crimes committed as a result of actions he set in motion).

jurisdictions that support the doctrine, including Arizona,[98] Iowa,[99] Maine,[100] and Wisconsin.[101]

Some states have rejected the doctrine and stand in stark contrast to the above supporters. In 1973, Massachusetts rejected the doctrine on the ground that "[o]ne is punished for his own blameworthy conduct, not that of others."[102] The court held that accomplice liability is established by proof that the accomplice's mental state, at the time the accomplice provided his or her aid, was equivalent to the mental state required for the principal.[103] This holding's stance on culpability is in direct opposition to the natural and probable consequence doctrine.[104]

In 1997, New Mexico rejected the doctrine in *State v. Carrasco*.[105] For accomplice liability to exist, New Mexico law requires proof that the accomplice "share[d] the criminal intent of the principal."[106] In rejecting the doctrine, the court disapproved of its ability to allow for liability to attach to foreseen but unintended consequences, holding it to be inconsistent with the criminal law of New Mexico.[107]

In 2002, the Nevada Supreme Court emphatically rejected the doctrine.[108] In its abandonment of it, the court stated that the doctrine is not reconcilable with some of the basic tenets of criminal law because it allows for liability to attach without proof that the accomplice possessed the requisite statutory mental state.[109] Furthermore, the court stated the doctrine allows for liability to extend to crimes that may have been

98. *See* ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008) ("The person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.").

99. *See* State v. Hustead, 538 N.W.2d 867, 870 (Iowa Ct. App. 1995) ("[A]n aider and abettor is liable for any criminal act which in the ordinary course of events was the natural and probable consequence of the criminal act encouraged.").

100. *See supra* notes 62–70 and accompanying text (discussing the Supreme Judicial Court of Maine's use of the doctrine in *Linscott*).

101. *See* State v. Ivy, 350 N.W.2d 622, 626 (Wis. 1984) ("[A]n aider and abettor may be guilty . . . for different crimes committed that are a natural and probable consequence of the particular act that the defendant knowingly aided or encouraged.").

102. Commonwealth v. Richards, 293 N.E.2d 854, 859 (Mass. 1973) (quoting Commonwealth v. Stasiun, 206 N.E.2d 672, 679 (Mass. 1965)). In *Stasiun*, Massachusetts rejected the use of the *Pinkerton* doctrine (although the court did not name it), which is to conspiracy law what the natural and probable consequence doctrine is to accomplice law. *See Stasiun*, 206 N.E.2d at 679.

103. *Richards*, 293 N.E.2d at 860.

104. *Compare id.*, *with supra* note 57 and accompanying text (describing how the doctrine allows for a principle's mental state to be imputed to an accomplice).

105. 946 P.2d 1075 (N.M. 1997).

106. *Id.* at 1079.

107. *Id.* at 1079–80. The court supported its reasoning with both scholarly criticism of the doctrine and the Model Penal Code's criticism of the doctrine. *Id.* at 1079 (citing 2 LAFAVE & SCOTT, JR., *supra* note 95, § 6.8(b), at 157–59, and MODEL PENAL CODE § 2.06 cmt. 6(b) (AM. LAW INST., Official Draft and Revised Comments 1985)); *see also infra* Part II.C (elaborating on these criticisms).

108. Sharma v. State, 56 P.3d 868, 872 (Nev. 2002) (stating "we hereby disavow and abandon the doctrine").

109. *Id.* at 871–72 (referring to specific intent crimes).

foreseeable but which the accomplice never intended and is thus inconsistent with Nevada law and fundamental principles of Anglo-American criminal law.[110]

In 2006, the District of Columbia Court of Appeals also rejected the doctrine in a case involving premeditated murder.[111] The court cited to numerous sources to support its rejection, including case law, legal treatises, and the Model Penal Code (MPC).[112] The court reasoned that allowing a defendant to be convicted without proof of premeditation or intent to kill "dilute[s] the principle that the *mens rea* required" for the crime must be proven and is thus unacceptable.[113] However, this holding goes beyond just premeditated murder and applies to all specific intent crimes, that is, a crime with a requisite mental state.[114]

Several other states have rejected the doctrine, or at minimum, have spoken skeptically of it, including Alaska,[115] Colorado,[116] Maryland,[117] Montana,[118] and Vermont.[119] The remaining state courts' reasoning for rejecting the doctrine is consistent with the cases discussed above, often relying on the same sources.[120] Most notable of these sources, and

110. *Id.* at 872 (citing *Carrasco*, 946 P.2d at 1079–80; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.7(b), at 579 (2d ed. 1986)).

111. *See* Wilson-Bey v. United States, 903 A.2d 818 (D.C. 2006). The court's holding was predicated on the jury instruction for premeditated murder being erroneous. *See id.* at 822. The jury instruction issued at trial read as follows:

> It is not necessary that the defendant have had the same intent that the principal offender had when the crime was committed or *that she have intended to commit the particular crime by the principal offender*. An aider and abett[o]r is legally responsible for the acts of other persons *that are the natural and probable consequences of the crime or criminal venture in which she intentionally participates*.

Id. at 826 (alteration in original).

112. *Id.* at 831, 837.

113. *See id.* at 836, 838.

114. *See id.* at 837–38.

115. *See, e.g.*, Riley v. State, 60 P.3d 204, 221 (Alaska Ct. App. 2002) (relying on the MPC's sections on mental states and complicity in reaching its conclusion that an accomplice's culpable mental state must be assessed separately from the principal's).

116. *See, e.g.*, Bogdanov v. People, 941 P.2d 247, 251 n.8 (Colo. 1997) (stating that Colorado's accomplice statute does not allow for accomplice liability to extend to the reasonably foreseeable consequences of an accomplice's intentionally provided aid or encouragement), *disapproved of on other grounds by* Griego v. People, 19 P.3d 1 (Colo. 2001).

117. *See* Sheppard v. State, 538 A.2d 773, 775 n.3 (Md. 1988) (expressing disapproval of allowing foreseeability to be used in accomplice law while not outright rejecting the doctrine), *abrogated on other grounds by* State v. Hawkins, 604 A.2d 389, 501 (Md. 1992).

118. *See* State *ex rel.* Keyes v. Mont. Thirteenth Judicial Dist. Court, 955 P.2d 639, 643 (Mont. 1988) (rejecting criminal liability for foreseeable yet unintended deaths, stating it as a rejection of transferred intent while not naming the doctrine explicitly).

119. *See* State v. Bacon, 658 A.2d 54, 62 (Vt. 1995) (rejecting felony murder, a form of the doctrine, for violating the basic principle of criminal law that a defendant cannot be convicted absent a culpable mental state).

120. Compare the cases compiled in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 196 (2007), with the cases discussed in *supra* notes 115–19 and accompanying text.

probably most influential, is the MPC.[121] While some courts explicitly cite the MPC in their rejections of the doctrine, many of the abovementioned courts were likely influenced by it in their rejections, as evidenced by their apprehension toward allowing foreseeability to support accomplice liability.[122]

C. Rosemond v. United States*: The "Basics" of the Intent Requirement in Accomplice Law and Footnote 7*

In light of the relatively recent trend toward courts' focus on, and scrutiny of, the mens rea component of accomplice liability—as evidenced by the increasing rejections of the natural and probable consequence doctrine—the Supreme Court decided to weigh in on the matter. In March 2014, the Court decided *Rosemond v. United States*,[123] where it resolved the issue of how one aids and abets the distinct crime of using a gun in connection with a drug crime or crime of violence.[124] The facts are as follows: Vashti Perez planned to engage in the sale of one pound of marijuana along with Justus Rosemond and Ronald Joseph, two individuals Perez had enlisted.[125] Unfortunately for Perez, the sale did not go as she hoped. After entering Perez's car to conduct the transaction, the would-be buyer attacked the sellers and fled with the marijuana.[126] Following the assault, one of the sellers—whether it was Rosemond or Joseph was never determined—got out of the car and futilely fired a handgun at the fleeing buyers.[127] When the shooter reentered the car, all three sellers chased the buyers but were stopped by police officers before they could reach them.[128]

The government drew up a four-count indictment, charging Rosemond with, inter alia, violating 18 U.S.C. § 924(c), which forbids the carrying of a firearm during the commission of a drug crime.[129] Because the government anticipated having difficulty proving the identity of the shooter, the

---

121. *See* Robinson & Grall, *supra* note 34, at 683 (stating that a majority of states have adopted MPC-influenced criminal codes). The MPC's rejection of the natural and probable consequence doctrine will be discussed in more detail in Part II.C.

122. *See supra* notes 107, 110, 119 and accompanying text.

123. 134 S. Ct. 1240 (2014).

124. *Id.* at 1243. More specifically, the circuit courts were split between those that required intentional facilitation or encouragement of the gun use by the accomplice versus those that only required the accomplice to have knowledge of a confederate's gun possession. *Id.* at 1244–45.

125. *Id.* at 1243.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*; *see also* United States v. Rosemond, 695 F.3d 1151, 1153 (10th Cir. 2012), *vacated and remanded by* 134 S. Ct. 1240. Section 924(c) is a criminal statute, stating in pertinent parts:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c) (2012).

government pursued the § 924(c) charge against Rosemond on a principal theory and an accomplice theory under 18 U.S.C. § 2.[130] At the conclusion of the trial, the jury issued a general verdict form, finding Rosemond guilty on all counts, but, due to the nature of a general verdict form, the jury did not specify if it found Rosemond guilty of the § 924(c) charge as a principal or an accomplice.[131] Rosemond appealed his conviction, claiming error in the aiding and abetting jury instructions given at trial.[132] Rosemond argued the district court should have instructed the jury that the government must prove Rosemond intended to provide aid in furtherance of his confederate's gun use or had encouraged the gun use.[133] The Tenth Circuit affirmed Rosemond's conviction while acknowledging the circuit split regarding the elements for aiding and abetting a § 924(c) violation.[134]

The Supreme Court vacated the Tenth Circuit's judgment and remanded the case, holding the district court's jury instructions to be erroneous.[135] The Court began its analysis by describing how an individual is held liable under § 2.[136] There, the Court stated that, to be liable as an accomplice, a person must aid[137] at least one element of the predicate offense, and such aid must be given with the intent to aid that offense.[138] The Court rejected Rosemond's argument as to the first element, that he should escape liability because the act or aid "must be directed at the use of the firearm,"[139] holding Rosemond could have aided either the predicate offense or the gun use to satisfy the act element of § 2.[140]

The Court then turned to the thornier issue of the requisite intent for aiding and abetting a § 924(c) violation.[141] The way in which the Court defined the second element of § 2 liability—mental state—is in stark contrast to the first element of § 2 liability—the act—which the Court stated only requires a person to aid *one* element of the crime.[142] As for the mental state, the Court held that the defendant's "intent must go to the specific and entire crime charged."[143] The Court then defined "intent," in

130. *See Rosemond*, 134 S. Ct. at 1243; *see also supra* note 40 (quoting the pertinent language of § 2).

131. *See Rosemond*, 134 S. Ct. at 1244.

132. *Id.*; *see also* Hedgpeth v. Pulido, 555 U.S. 57, 58 (2008) (per curiam) ("A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one.").

133. *See Rosemond*, 134 S. Ct. at 1244; *Rosemond*, 695 F.3d at 1155.

134. *Rosemond*, 134 S. Ct. at 1244–45.

135. *Id.* at 1245.

136. *See id.*

137. Or "abet[], counsel[], command[], induce[] or procure[]." 18 U.S.C. § 2 (2012).

138. *Rosemond*, 134 S. Ct. at 1245 (citing 2 LAFAVE, *supra* note 20, § 13.2, at 337). The Court's reading of § 2 reflects the traditional concepts of criminal liability, which require proof of a mens rea and an actus reus. *See supra* note 16 and accompanying text.

139. *Rosemond*, 134 S. Ct. at 1247.

140. *Id.* at 1245–48.

141. *Id.* at 1248–51.

142. *See supra* notes 138–40 and accompanying text.

143. *Rosemond*, 134 S. Ct. at 1248. In the preceding sentence, the Court stated, "An intent to advance some different or lesser offense is not, or at least not usually, sufficient." *Id.*

the context of § 2, to mean knowledge of the criminal scheme.[144] Knowledge of the criminal scheme, for purposes of § 924(c), does not simply require knowledge of a confederate's possession of the gun in relation to the crime—as the government argued—but foreknowledge of the gun possession.[145] The Court further explained its holding with a metaphor: "[S]o long as the player knew the heightened stakes when he decided to stay in the game," that "player," or accomplice, may be held liable for his confederate's conduct.[146] This is so because the conscious decision to remain in the game, with full knowledge of the crime, evidences the accomplice's desire for the criminal venture to succeed, or to further the metaphor, to play the hand until the bitter end.[147]

In addition to resolving the circuit split, *Rosemond* is significant because it had been more than thirty years since the Court last considered the foundations and parameters of accomplice liability.[148] Tellingly, Wayne LaFave, one of the authorities the Court relied on for the black letter law of accomplice liability, has noted the uncertainty as to the requisite mental state for accomplice liability.[149] *Rosemond* is, therefore, quite significant because it addresses the divergent opinions of the legal community as to the requisite mental state required for accomplice liability.[150] Assuming *Rosemond*'s holding is applicable to accomplice liability generally, proof of an accomplice's intent to aid an initial crime is no longer sufficient to convict that same accomplice of a subsequent crime to which the accomplice provided no further aid.[151] Now, under *Rosemond*, proof of the accomplice's mental state must show that the accomplice both intentionally provided aid or encouragement that furthered the commission of the crime *and* intended the full scope of the crime to be committed.[152] To bolster this formulation of the requisite mental state for an accomplice, the Court cited the *Peoni* standard, laid out in *United States v. Peoni*,[153] which demands that the accomplice subjectively want the crime to succeed.[154] The Court then stated that an accomplice intends the crime's commission when he or she "actively participates in a criminal scheme knowing its extent and

144. *Id.* at 1248–49.
145. *Id.* at 1249–51.
146. *Id.* at 1250.
147. *See id.*
148. *See supra* note 30 and accompanying text.
149. 2 LAFAVE, *supra* note 20, § 13.2, 337 ("There is a split of authority as to whether some lesser mental state will suffice for accomplice liability, such as mere knowledge that one is aiding a crime or knowledge that one is aiding reckless or negligent conduct which may produce a criminal result.").
150. *See Rosemond*, 134 S. Ct. at 1248–51. Despite the Court stylizing the discussion in this section as a review of "some basics," the Court actually clarified the requisite mental state for accomplice liability, which case law has not treated uniformly. *See id.* at 1248.
151. *See id.* ("[T]he intent must go to the specific and entire crime charged—so here, to the full scope (predicate crime plus gun use) of § 924(c).").
152. *See id.*
153. 100 F.2d 401 (2d Cir. 1938).
154. *Id.* (citing Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)). As discussed above, the Court adopted the *Peoni* standard for accomplice liability in *Nye & Nissen*. *See supra* note 39 and accompanying text.

character."[155] Thus, an accomplice may no longer be held liable when there is sufficient proof of aid or encouragement, but proof as to the accomplice's mental state is either lacking or does not meet the requisite mental state.[156]

It is true the Court granted Rosemond's petition for certiorari to resolve the circuit split regarding the elements of aiding and abetting a § 924(c) violation, and that a narrow reading would limit *Rosemond*'s holding to § 924(c) cases.[157] However, the Court's discussion of the mental state component will likely have a more extended application and impact.[158] This Note focuses on the impact the Court's logic from *Rosemond* should have on the natural and probable consequence doctrine, notwithstanding footnote 7.

In footnote 7, the Court explicitly declined to pass judgment on whether the natural and probable consequence doctrine may have been used by the government as an accomplice liability theory:

> Some authorities suggest an exception to the general rule when another crime is the "natural and probable consequence" of the crime the defendant intended to abet. . . . That question is not implicated here, because no one contends that a § 924(c) violation is a natural and probable consequence of simple drug trafficking. We therefore express no view on the issue.[159]

However, the phrase "no one contends"[160] leaves the footnote susceptible to two readings.[161] On the one hand, it could be read as stating that because neither party invoked the natural and probable consequence doctrine, the Court will not address it.[162] Alternatively, it could be read to mean that no reasonable person would, or could, argue that gun use is a natural and probable consequence of a "simple drug trafficking"[163] crime.[164] The first reading is in line with the Court's policy not to address topics sua sponte[165] and suggests the Court did not consider the doctrine at all because neither party raised the issue. The second reading gives rise to the opposite implication, suggesting the Court did consider the doctrine in the context of § 924(c) and decided the doctrine was unavailable based on the record. Either way, if lower courts extend the logic of *Rosemond* beyond § 924(c),

---

155. *Rosemond*, 134 S. Ct. at 1249.
156. *See id.* at 1248.
157. *See id.* at 1245.
158. *See* Stephen P. Garvey, *Reading* Rosemond, 12 OHIO ST. J. CRIM. L. 233, 244 n.45 (2014); Oliver, *supra* note 34, at 12–13.
159. *Rosemond*, 134 S. Ct. at 1248 n.7.
160. *Id.*
161. *See, e.g.*, Garvey, *supra* note 158, at 238 n.20.
162. *See, e.g.*, *id.* This reading would be in line with the Court's general rule of only considering questions or issues that were raised by the parties in their petitions to the Court. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 82 (1938) (Butler, J., dissenting).
163. *Rosemond*, 134 S. Ct. at 1248 n.7.
164. *See* Garvey, *supra* note 158, at 238 n.20.
165. *See* Quong Wing v. Kirkendall, 223 U.S. 59, 63–64 (1912). "[T]here are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account." *Id.* at 64.

the Court may well have significantly impacted the viability of the natural and probable consequence doctrine in federal criminal law, regardless of footnote 7.[166]

While this Note is not the first academic work to take notice of footnote 7,[167] this Note is the first attempt to draw out the implications of *Rosemond*'s holding to determine the impact, if any, on the natural and probable consequence doctrine. While the doctrine is only a subsection of accomplice liability as a whole, it is invoked often enough that its elimination would have a real impact on prosecutors' strategies as well as district court jury instructions.[168] More immediately, the elimination of the doctrine would prevent the community of defendants, who may have been convicted solely on a natural and probable consequence theory, from being held liable for crimes they did not commit nor intend to commit.[169] This Note seeks to take *Rosemond*, read generally, to its logical conclusion in an effort to identify the repercussions it may have on the natural and probable consequence doctrine.

II. THE NATURAL AND PROBABLE CONSEQUENCE DOCTRINE: FEDERAL COURTS AND COMMENTATORS

The natural and probable consequence doctrine has generated some harsh criticism from courts and commentators alike, while lacking equally strong support. This is not to say the doctrine has no supporters but only that the critics of the doctrine are far more vocal.[170] This part analyzes the treatment of the natural and probable consequence doctrine in federal courts. Part II.A discusses four federal cases that used the doctrine to affirm convictions. Part II.B then discusses three federal cases that rejected a use of the doctrine. Finally, Part II.C reviews the scholarly criticism and rejections of the doctrine as well as the MPC's reaction to the doctrine.

A. Federal Cases Deploying the Doctrine to Avoid Proof of Mens Rea for All Crimes Charged

Part II.A introduces the facts and holdings of several federal criminal cases that have upheld appeals in reliance on the natural and probable consequence doctrine.

166. *See, e.g.*, Garvey, *supra* note 158; Oliver, *supra* note 34, at 11. Interestingly, Justice Scalia joined the majority opinion, with the exception of footnote 7 (and 8). Stephen Garvey has guessed that a reason Scalia may not have joined footnote 7 is because he may have believed the footnote could be read as eliminating the natural and probable consequence doctrine. *See* Garvey, *supra* note 158, at 238 n.20.

167. *See, e.g.*, Garvey, *supra* note 158, at 238 n.20; Oliver, *supra* note 34, at 12–13, 13 n.42.

168. *See infra* Part II.A–B (discussing the doctrine's use in seven federal cases).

169. *See infra* Part III.B.

170. *Compare infra* Part II.A, *with infra* Part II.B–C.

1. *United States v. Wills*

United States v. Wills[171] involved the use of a destructive device in connection with a bank robbery.[172] Following the trial, a jury found defendant Eural Wills II guilty on four counts, including armed bank robbery and violation of § 924(c).[173] Wills was found guilty as a principal to the robbery[174] and as an accomplice to the § 924(c) charge.[175]

The robbery began when Wills entered the bank via its roof, armed with a handgun, a backpack, and a radio.[176] Sometime after, Wills's accomplice, who was stationed on the roof as a lookout, radioed Wills that the police had arrived, prompting Wills to flee the bank.[177] During Wills's exit from the bank, his accomplice threw a destructive device at the arriving police.[178]

On appeal, Wills contested the sufficiency of the evidence supporting his conviction for aiding and abetting the use of the destructive device.[179] In rejecting his contention, the Ninth Circuit reasoned that the evidence supported a finding that Wills "could have reasonably foreseen" his accomplice's use of the destructive device.[180] The court predicated its holding on the following four facts, believing that, together, they formed sufficient evidence upon which the jury could base an inference as to Wills's guilt: (1) Wills possessed a radio during the bank robbery, (2) Wills used the radio to communicate with his accomplice on the roof, (3) the accomplice told Wills to "hurry up" because the police were arriving, and (4) Wills responded to the accomplice's warning that he was hurrying.[181]

---

171. 88 F.3d 704 (9th Cir. 1996).

172. *Id.* at 708.

173. *Id.* The jury was instructed that, to hold Wills guilty of aiding and abetting, the government must prove beyond a reasonable doubt that

> the defendant knowingly and intentionally aided, counseled, commanded, induced or procured someone to commit the crime; . . . [i]t is not enough that the defendant merely associated with whomever committed the crime, or was present at the scene of the crime, or unknowingly or unintentionally did things that were helpful to the principal.

Id. at 720.

174. *See id.* at 719–20.

175. *See id.* at 719. There were actually two § 924(c) charges in this case: one for Wills's use of a firearm during the commission of the bank robbery, which this Note is unconcerned with, and the other, which this Note is concerned with, for his accomplice's use of a destructive device during the commission of the bank robbery. *See id.* at 708.

176. *Id.*

177. *Id.*

178. *Id.* The destructive device is also referred to as an "incendiary device" throughout the opinion. *Id.*

179. *Id.* at 720. Wills made numerous objections to the trial court on appeal, although not a single objection was directed at his guilt as to the robbery itself but rather to various procedural aspects of the trial. *See id.* (the court does not describe each objection in any one place of the opinion, but rather, begins each new section of the opinion with a new objection raised on appeal).

180. *Id.* at 720–21. Despite the Ninth Circuit's conclusion that Wills could have "reasonably foreseen" his accomplice's use of the destructive device, and therefore his conviction must stand, the jury was actually instructed that the government must prove that Wills "knowingly and intentionally aided . . . someone to commit the crime." *Id.* at 720.

181. *Id.* at 721.

Without inquiring into Wills' mental state with respect to the use of the destructive device, the court held that the four abovementioned facts were sufficient to uphold Wills's conviction for aiding and abetting the use of the destructive device.[182]

Although the Ninth Circuit used the phrase "reasonably foreseen" instead of natural and probable language, its holding was nonetheless grounded in the natural and probable consequence doctrine.[183] The court's reasoning underlying its holding was that the accomplice's use of the destructive device was a natural and probable consequence of Wills's bank robbery, of which he was the "mastermind," and to which his accomplice was an aider and abettor.[184] Because the court held that the accomplice's use of the destructive device was foreseeable in the context of the criminal scheme, the court affirmed Wills's conviction for aiding and abetting the § 924(c) crime.[185]

2. *United States v. Vaden*

In *United States v. Vaden*,[186] the Fifth Circuit affirmed correctional guard Troy Vaden's conviction on all three counts.[187] The first count charged the defendant with conspiring to violate an inmate's rights.[188] The second and third counts charged the defendant with aiding and abetting the assault of the same inmate and the assault of the defendant's fellow guard.[189] Vaden contested the aiding and abetting charge, arguing the evidence was insufficient to support his conviction.[190]

Vaden, a guard at the Texas Department of Corrections, conspired with several inmates to kill inmate Juan Rivera.[191] On the day in question, Vaden and his colleague Officer Slater were responsible for escorting Rivera from the showers back to his cell.[192] Prior to passing by the cells of his coconspirators, Vaden ditched the escort without warning Officer Slater.[193] Once the one-man escort reached the coconspirators' cells, the attack commenced, resulting in the stabbing of Rivera and an assault on Officer Slater.[194]

On appeal, the Fifth Circuit rejected Vaden's argument that the assault on Officer Slater was not a natural and probable consequence of the initial

182. *See id.* ("The record supports an inference that Wills was the mastermind of the crime. As such, he was liable for the conduct of his accomplice.").

183. *See id.* at 720–21; *see also supra* note 68 and accompanying text (explaining that "reasonably foreseeable" and "natural and probable" are synonymous).

184. *See Wills*, 88 F.3d at 720–21.

185. *See id.*

186. 912 F.2d 780 (5th Cir. 1990).

187. *See id.* at 781.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* Officers Slater and Vaden worked in the protective custody unit, which had a policy requiring two-guard escorts for inmates. *Id.*

193. *Id.*

194. *Id.*

crime and confirmed his conviction on all counts.[195] In coming to its holding, the court put forward two elements of accomplice liability. First, in language closely resembling *Peoni*'s formulation of accomplice liability, the court stated an accomplice must "seek[] by his actions to make" the criminal venture succeed.[196] Second, the court stated an accomplice is liable for the natural and probable consequences of the crime to which aid was provided.[197]

Here, the initial crime that Vaden aided was the conspiracy to assault Rivera.[198] The court, in rejecting Vaden's argument, held Vaden's deliberate action to ditch the escort, which allowed his coconspirators to assault Rivera, naturally and probably resulted in the subsequent crime, which was the assault on Officer Slater.[199] The court reasoned that the ultimate result was foreseeable because Vaden "knew" that the two-man escort policy existed for the protection of the escortee.[200] Therefore, Vaden's aid to the initial crime naturally and probably resulted in the subsequent crime because Vaden's unannounced departure from the escort enabled the attack on Rivera, which then required Officer Slater to protect Rivera, and thus naturally and probably caused the assault on Officer Slater.[201] However, the opinion lacks any substantive discussion of Vaden's mental state with respect to the assault on Officer Slater other than the court's statement that because he knew of the purpose behind the escort he knew his actions would result in the assault on Officer Slater.[202]

3. *United States v. Jones*

In *United States v. Jones*,[203] the D.C. Circuit affirmed the defendant's conviction for armed robbery and assault with a deadly weapon.[204] A group of four men, including the defendant, planned and executed a bank robbery.[205] During the course of the robbery, Police Officer Furr was alerted to its commission and approached the bank.[206] When he approached, he saw the four men, one of whom possessed a gun, and an exchange of gunfire ensued.[207] According to three eyewitnesses, the man

195. *Id.* at 783.
196. *Id.*
197. *Id.*
198. *Id.* at 781.
199. *Id.* at 783.
200. *Id.* In stating that Vaden "knew that the job of an escorting guard was to protect the inmate from attack," the court did not provide any evidence of Vaden's intent to cause harm to Slater. *Id.*
201. *Id.*
202. *Id.* This opinion also is problematic because the court never states the requisite mental state for the assault on Slater.
203. 517 F.2d 176 (D.C. Cir. 1975).
204. *Id.* at 177.
205. *Id.*
206. *Id.*
207. *Id.*

in possession of the gun wore a white trench coat and was later identified as the defendant by one of these witnesses.[208]

On appeal, the defendant claimed there was insufficient evidence to support his conviction for assault with a deadly weapon.[209] First, the court rejected appellant's arguments as to the sufficiency of the evidence with respect to the armed robbery charge.[210] Next, relying on the natural and probable consequence doctrine, the court stated there is no "more natural and probable consequence of armed robbery than that the arms will be used and someone injured."[211] Further, while recognizing "the primary objection" to the doctrine—"that it imputes guilt for a crime for which the necessary mental state may be lacking"—the court reasoned that this objection was not persuasive in the context of this trial because the defendant was the only robber identified with a gun.[212] Therefore, the court held that the subsequent crime—assault with a deadly weapon—was a natural and probable consequence of armed robbery, the initial crime.[213] Other than the brief mention of mental state in discussing the primary objection to the doctrine, the court made no inquiries into the defendant's mental state for the assault with a deadly weapon.[214]

4. *United States v. Miller*

In *United States v. Miller*,[215] the Eleventh Circuit affirmed Jessie Miller Jr.'s convictions for, inter alia, conducting an illegal gambling business[216] and aiding and abetting the interstate telephonic transmission of wagering information.[217] The trial court found Miller to be a "sub-bookie" of the gambling business.[218] As a sub-bookie, Miller was responsible for relaying the wagering information provided to him by Doolittle, the head of the gambling operation, to Miller's bettors.[219] Once the bettors decided their wager, Miller was responsible for collecting the wagers and reporting back to Doolittle.[220]

208. *Id.* at 177–78.
209. *Id.* at 180–81. The defendant actually contested the sufficiency of the evidence as to both counts, but this Note is only concerned with his appeal of the assault with a deadly weapon charge. *Id.*
210. *Id.* at 180.
211. *Id.* at 181.
212. *Id.* (citing *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 515–17 (1972)).
213. *Id.*
214. *Id.*
215. 22 F.3d 1075 (11th Cir. 1994).
216. *Id.* at 1077.
217. *Id.* at 1078.
218. *Id.* at 1077.
219. *Id.*
220. *Id.*

Section 1084 of Title 18 of the U.S. Code prohibits individuals from "knowingly" transmitting sports betting information across state lines.[221] On appeal, Miller contested his aiding and abetting conviction on the ground that the evidence was insufficient to prove he knew that Doolittle's wager information was the fruit of interstate telephonic transmissions.[222] In affirming his conviction, the Eleventh Circuit held it was unnecessary for the prosecution to prove that Miller had personal knowledge of Doolittle's source of the wagering information.[223] The court then applied the natural and probable consequence doctrine, reasoning that the interstate receipt of wagering information was a natural and probable consequence of conducting an illegal gambling business, thus making Miller an accomplice to Doolittle's violation of § 1084.[224] Unlike the previous three examples, where the courts were largely silent as to the mental state needed for the subsequent crime,[225] the Eleventh Circuit explicitly held that proof of the defendant's mental state for the subsequent crime was unnecessary.[226]

B. Federal Cases Rejecting the Doctrine to Ensure Proof of Mens Rea Exists for All Crimes Charged

Part II.B introduces three federal cases that have either refused to apply the natural and probable consequence doctrine or reversed convictions on grounds that are inherently at odds with the doctrine.

1. *United States v. Greer*

In *United States v. Greer*,[227] the Seventh Circuit sought to determine the extent of accomplice liability required in situations when unintended crimes are committed subsequent to intended crimes.[228] The initial and subsequent crimes in *Greer* were a conspiracy to violate three separate federal laws and the interstate transportation of stolen goods, respectively.[229] The trial court established that defendant Edward Greer informed several confederates of a load of copper located in a nearby town in Indiana that was ripe for the (illegal) taking.[230] The confederates successfully committed the theft, returned to Chicago, and stored their copper haul in several locations.[231] One confederate testified to speaking with Greer twice after the heist: first,

221. *Id.* at 1078; *see also* 18 U.S.C. § 1084(a) (2012). The trial court found that Doolittle received his wagering information by placing calls to Nevada from his native Georgia, thus creating liability under § 1084. *See Miller*, 22 F.3d at 1077.
222. *Miller*, 22 F.3d at 1078.
223. *Id.*
224. *Id.* at 1078–79.
225. *See supra* Part II.A.1–3.
226. *Miller*, 22 F.3d at 1078–79.
227. 467 F.2d 1064 (7th Cir. 1972).
228. *See id.* at 1069.
229. *See id.* at 1066–67.
230. *Id.* at 1067.
231. *Id.*

regarding the location of the proceeds from the heist and second, to arrange a meeting to distribute them.[232]

Greer appealed his conviction for aiding and abetting the interstate transportation of the stolen copper, arguing the evidence to be insufficient.[233] In reversing the conviction on this charge, the Seventh Circuit rejected the government's natural and probable consequence argument that Greer's aiding of the theft was sufficient to support his conviction for aiding the subsequent interstate transportation of the copper.[234] The Seventh Circuit stated that adopting the government's argument would make accomplice liability "far too broad."[235] Because transportation of stolen items will always be a "likely" consequence of theft, the government's position would "effectively obliterate [the] distinctions" between the two separate crimes of theft and interstate transportation of stolen goods.[236]

The court then turned to a broader discussion of accomplice liability, including a discussion of *Peoni*.[237] The Seventh Circuit read *Peoni* as putting forth two elements of accomplice liability: an act of aid and the requisite intent.[238] Commenting on the natural and probable consequence doctrine, the court stated that allowing a jury to impute an accomplice's intent from an initial crime to a subsequent crime, merely because the subsequent crime was "a foreseeable consequence" of the initial crime, would be to predicate accomplice liability on "negligence rather than criminal intent."[239] Before concluding its discussion on accomplice liability, the court stated that it would allow for an application of the doctrine in certain scenarios, such as when there is proof that the accomplice was "substantially involved in the chain of events leading immediately to" the subsequent crime.[240] However, when the initial and subsequent crimes are too far attenuated, as they were in *Greer*, the doctrine is unavailable.[241]

2. *United States v. Powell*

In *United States v. Powell*,[242] the D.C. Circuit dealt with a case consisting of an undercover operation that led a police officer into an apartment building basement where a significant amount of base cocaine

232. *Id.*
233. *Id.* (Greer had been held liable under 18 U.S.C. § 2).
234. *See id.* at 1068.
235. *Id.*
236. *Id.*
237. *Id.* at 1068–69.
238. *Id.*
239. *Id.* at 1069 (citing MODEL PENAL CODE § 2.04 cmt. (AM. LAW INST., Tentative Draft No. 1, 1953)). Although *Greer* does not call the natural and probable consequence doctrine by name, a "foreseeable consequence" is synonymous with a "natural and probable consequence," as discussed in Part I.B.1. *See supra* note 68 and accompanying text.
240. *Greer*, 467 F.2d at 1069.
241. *Id.*
242. 929 F.2d 724 (D.C. Cir. 1991).

was discovered.[243] In addition to the drugs, the officer also identified a man in the basement who possessed a gun.[244] Defendant Powell, who led the officer downstairs, was subsequently convicted at trial for possessing cocaine with intent to distribute and for aiding and abetting a § 924(c) violation.[245]

In reversing the latter conviction,[246] the D.C. Circuit rejected an application of the natural and probable consequence doctrine and held that the government must prove an accomplice had knowledge of a confederate's gun use before he can be held liable as an accomplice to a § 924(c) violation.[247] Similar to the Seventh Circuit in *Greer*,[248] the D.C. Circuit held that an application of the doctrine to the case at hand would obliterate the distinctions Congress had created between the separate crimes of possessing drugs with intent to distribute and § 924(c).[249] In criticizing the doctrine, one objection the court raised was the uncertainty of "how likely the forbidden act must have appeared to the accomplice" to be considered a natural and probable consequence of the initial crime.[250] In the court's view, the degree of probability that courts have required when using this objectionable analysis has varied depending on the circumstances.[251] The court ultimately held that in the context of a § 924(c) violation, the circumstances were irrelevant—the same degree of knowledge as to the likelihood the subsequent forbidden act will occur is required whether the underlying crime was, for example, a bank robbery or a drug deal.[252] This then "puts the accomplice on a level with the principal, requiring the same knowledge for both."[253] Thus, for the doctrine to apply to a fact pattern such as that in *Powell*, the evidence must show that the accomplice had knowledge of a confederate's possession of a gun at the time the accomplice aided an initial crime.[254]

---

243. *Id.* at 724–25.
244. *Id.* at 725.
245. *Id.* For the pertinent language of § 924(c), see *supra* note 129.
246. *Powell*, 929 F.2d at 725.
247. *Id.* at 727–28. At this point, it may seem contradictory that this Note uses the D.C. Circuit to show federal cases both supporting the doctrine, *see supra* Part II.A.3, and rejecting the doctrine, as discussed in Part II.B.2. However, this Note does not argue that a circuit split, with regard to the use of the doctrine, exists. Rather, this Note argues the foundations which the doctrine has been premised on have been criticized by courts and commentators and that the Court's decision in *Rosemond* may provide a strong basis upon which rejection of the doctrine may be based. As a result, the fact that the same circuit, in two cases decided sixteen years apart from each other, used the doctrine in one case and rejected the doctrine's use in the other is not contradictory and does not detract from the value of either D.C. Circuit case discussed.
248. *See supra* note 236 and accompanying text.
249. *See Powell*, 929 F.2d at 725.
250. *Id.* at 726. Although the court did not provide a citation for this proposition, the language closely parallels that in *United States v. Peoni*, 100 F.2d 401 (1938), which reads, "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct." *Id.* at 402.
251. *Powell*, 929 F.2d at 726.
252. *Id.* at 726–27.
253. *Id.* at 727.
254. *See id.*

3. *United States v. Andrews*

In *United States v. Andrews*,[255] the Ninth Circuit rejected an application of the natural and probable consequence doctrine in its reversal of multiple aiding and abetting convictions of defendant Ivan Andrews.[256] After being woken and informed of a recent altercation between his sister, Paula Andrews, and Stephen Lowery, Ivan accompanied his sister and friends back to the site of the altercation to "get" Lowery and "trash" his car.[257] Upon arriving, Ivan exited his car and Lowery exited his.[258] Ivan then approached Lowery and shot him dead.[259] After the initial shooting, Paula exited the car she was in and opened fire on Lowery's car, striking two individuals within Lowery's car and killing a third, Steven Williams.[260] Ivan was convicted for, inter alia, the murder of Lowery, aiding and abetting the murder of Williams, and aiding and abetting attempted voluntary manslaughter of the two individuals in Lowery's car.[261]

Unlike the courts discussed in Part II.A, the Ninth Circuit focused its analysis of the aiding and abetting convictions on Ivan's mental state.[262] First, the court stated that Ivan "must have 'knowingly and intentionally aided and abetted' Paula in each essential element of the crimes."[263] The court then held there was no evidence showing Ivan intended for Paula to open fire on Lowery's car.[264] Second, the court turned to the natural and probable consequence doctrine, stating it was unconvinced that a rational juror could infer the requisite mental state for Ivan by applying the doctrine to the evidence.[265] To the Ninth Circuit, an application of the doctrine that would allow a juror to infer that Ivan's involvement naturally and probably led to Paula opening fire on the car would contradict basic principles of criminal law.[266] No rational juror could find that Ivan met the *Peoni* standard—there was insufficient evidence for a juror to conclude that Ivan's

255. 75 F.3d 552 (9th Cir. 1996).
256. *Id.* at 554, 556.
257. *Id.* at 554.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *See id.* at 555 (listing four elements that the evidence must establish to uphold the aiding and abetting convictions).
263. *Id.* (quoting United States v. Dinkane, 17 F.3d 1192, 1196 (9th Cir. 1994)).
264. *Id.* at 556.
265. *Id.* In reasoning that Ivan's actions fell outside the scope of the crime he intended to commit, the court compared Paula to the oft-cited robber in a hypothetical put forward by Wayne LaFave. *Id.* (citing 2 LAFAVE & SCOTT, JR., *supra* note 95, at 158). This hypothetical considers a group of robbers who plan to steal a safe, and while doing so, one of them robs the building's watchman. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 6.8, at 636 (3d ed. 2000). LaFave concludes that the robbery of the watchman is outside the scope of the crime intended by the other robbers, therefore, preventing liability from extending to all involved. *Id.* (citing State v. Lucas, 7 N.W. 583, 584 (Iowa 1880), which held "if the accessory order or advise one crime, and the principal intentionally commit another . . . the accessory will not be answerable").
266. *Andrews*, 75 F.3d at 556 (citing LAFAVE & SCOTT, JR., *supra* note 95, § 6.8, at 158; DRESSLER, *supra* note 82).

participation in the criminal venture could be evidence of a desire for Paula's shooting of the car to succeed in injuring those within.[267]

C. The Doctrine in Scholarship: An Unfavorable Reception

While criticism of the natural and probable consequence doctrine is voluminous and widespread among scholars, most, if not all, of the criticism comes in one particular flavor: a focus on the incompatibility of the doctrine with the single most important concept in criminal law: mens rea.[268] This section explores the various scholarly works critiquing the doctrine and then turns to the MPC's criticism of the doctrine.

The incompatibility between the doctrine and mens rea can further be broken down into two parts: the negation of the mens rea requirement and the ability for a lesser mens rea to suffice for accomplice liability when the statute at issue requires more of the principal. The discussion of the former begins with Wayne LaFave, one of the most cited scholars on accomplice liability and the natural and probable consequence doctrine.[269] LaFave states that the doctrine "tests the outer limits of the mental state requirement for accomplice liability"[270] and that its "general application . . . is unwarranted."[271] LaFave continues his criticism by analogizing the doctrine to the widely rejected theory of imputed or transferred intent,[272] stating that the intent to commit one crime cannot be used as evidence of intent to commit a different crime, which is exactly what the doctrine seeks to do.[273] Citing this logic, Paul Robinson also notes that most objections to the doctrine are based on "its imputation of requisite mental states."[274] Additionally, Robinson recognizes another category of criticism, which is similar to the Seventh Circuit's view on the doctrine,[275] and objects to the doctrine when there is a "weak causal connection" between the initial and subsequent crimes.[276]

---

267. *See id.*

268. *See* Gary V. Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 351 (1966) ("[T]he *mens rea* concept has come, by an almost inexplicable course, to symbolize what is generally recognized to be the most significant exculpatory concept in criminal law theory."); *see also* Dennis v. United States, 341 U.S. 494, 500 (1951) ("The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.").

269. *See, e.g.*, Rosemond v. United States, 134 S. Ct. 1240, 1248 (2014) (citing LaFave for accomplice liability intent concepts); Sandstrom v. Montana, 442 U.S. 510, 525–26 (1979) (citing LaFave for the intent element and its relationship to a natural and probable consequence presumption). Wayne LaFave has several individual works, and he also has collaborated with Austin Scott Jr. resulting in two additional works: *Substantive Criminal Law* and the *Handbook on Criminal Law*.

270. LAFAVE, *supra* note 265, § 6.8(b), at 636–37.

271. *Id.* § 6.8(b), at 591.

272. *See id.* § 3.11(d), at 273–74 (explaining the concept of transferred intent).

273. *See id.* § 6.8(b), at 590–91.

274. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 636 & n.98 (1984).

275. *See supra* note 241 and accompanying text (disfavoring the doctrine when the initial and subsequent crimes are too far attenuated).

276. *See* Robinson, *supra* note 274, at 636 & n.98.

Another scholar who has focused on accomplice liability and the natural and probable consequence doctrine is Michael Heyman. To him, the most disturbing aspect of the doctrine is its "rejection of [the] bedrock concept of personal responsibility."[277] Similarly, Audrey Rogers proclaims that the "doctrine flouts the most fundamental tenet of criminal law that punishment be based on blameworthiness."[278] Furthermore, the doctrine violates both due process and the *Winship* doctrine, which states that every element of a crime must be proved beyond a reasonable doubt.[279] According to Heyman, not only does the natural and probable consequence doctrine stretch the requirement for criminal culpability beyond its breaking point, it seemingly eliminates the requirement for proof of the defendant's mental state.[280]

Heyman's criticism provides a nice segue into the second aspect of the mens-rea-focused critique of the doctrine: the lowering of the statutory mental state. While Heyman argues the doctrine eliminates the need to prove mens rea, other scholars argue the doctrine impermissibly lowers the mens rea required for an accomplice relative to that required for a principal.[281] These same commentators argue that if there should be any disparity between the mental states required for accomplice liability, versus liability as a principal, an accomplice should have a *higher* requisite mental state, not a lower one than that of the principal.[282]

The drafters of the MPC, as alluded to in Part I.B.2, also refused to adopt the natural and probable consequence doctrine.[283] While the MPC is only a model, and not a part of federal criminal law, its views on mens rea are highly touted and influential,[284] even in the federal context.[285] Before getting to the MPC's comments that explicitly reject the doctrine, its rejection seems obvious in light of § 2.06(3)(a)(ii).[286] The comments to

277. Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129, 168 (2013).

278. Rogers, *supra* note 54, at 1379.

279. *See* Heyman, *supra* note 57, at 135; *see also supra* note 46 (quoting the holding of *In re Winship*, 397 U.S. 358 (1970)).

280. *See* Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 395 (2010). Heyman also criticizes the doctrine for disposing of the causation analysis normally present in criminal law. *Id.* The doctrine also can be used to eliminate the actus reus requirement. *See id.*; Weiss, *supra* note 44, at 1429. While these two criticisms are consonant with the overall reasoning of this Note, they are beyond its scope and will not be discussed further.

281. *See* DRESSLER, *supra* note 82, at 476; LAFAVE & SCOTT, JR., *supra* note 110; Rogers, *supra* note 54, at 1361 & n.33; *see also* MODEL PENAL CODE § 2.06 cmt. 6(b), at 312 & n.42 (AM. LAW INST., Official Draft and Revised Comments 1985).

282. *See* DRESSLER, *supra* note 82, at 476; LAFAVE, *supra* note 265, § 6.7(b), at 624–25; *see also* MODEL PENAL CODE § 2.06 cmt. 6(b), at 312 n.42.

283. *See* MODEL PENAL CODE § 2.06 cmt. 6(b), at 312 & n.42.

284. *See* Robinson & Grall, *supra* note 34, at 691–92.

285. United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978) ("The ALI Model Penal Code is one source of guidance upon which the Court has relied.").

286. *See* MODEL PENAL CODE § 2.06(3)(a)(ii), at 296 ("A person is an accomplice of another in the commission of an offense if . . . with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it . . . .").

§ 2.06(3)(a)(ii) state that for liability to attach, an accomplice must have had the commission of the crime for which they are charged as their "conscious objective" at the time they provided aid or encouragement.[287] The MPC then explicitly rejects the doctrine for extending accomplice liability to crimes beyond that which an accomplice intended to aid.[288] It also takes issue with predicating accomplice liability on foreseeability, which invokes a mens rea of negligence, when the statute proscribing the conduct often will require a higher mental state.[289] This comment section concludes that the doctrine's ability to produce disparity between the requisite mental states required for an accomplice and a principal is "both incongruous and unjust."[290] As evidenced by the numerous citations to the abovementioned comment sections of the MPC, and the MPC itself, the drafters of the MPC were not alone in believing the doctrine should be rejected.[291]

III. THE DOCTRINE AND ITS BLATANT CIRCUMVENTION OF PROOF OF MENS REA

The natural and probable consequence doctrine has been accused of stretching mens rea in accomplice law to its breaking point,[292] being incompatible with fundamental criminal law concepts,[293] and being unjust.[294] This part applies the proper requirements for an accomplice's mental state from *Rosemond v. United States*[295] to the doctrine to determine whether the criticism of the doctrine is valid and whether the doctrine survives *Rosemond*.[296]

Rosemond, read beyond its limited § 924(c) holding, requires the government to prove that an accomplice intended the ultimate commission of the crime, in addition to having intentionally provided aid in furtherance of the crime.[297] Part III seeks to determine the immediate effect of the Court's holding in *Rosemond* on the natural and probable consequence doctrine. First, Part III.A applies the cases discussed in Part II.A to *Rosemond*, and then Part III.B concludes that courts can, and should, read *Rosemond* to have provided tools with which they can reject the doctrine and that such rejection is desirable.

287. *See id.* § 2.06 cmt. 6(b), at 310; *see also* Robinson & Grall, *supra* note 34 at 738.
288. *See* MODEL PENAL CODE § 2.06 cmt. 6(b), at 312; *see also* Robinson & Grall, *supra* note 34, at 738.
289. *See* MODEL PENAL CODE § 2.06 cmt. 6(b), at 312 & n.42.
290. *Id.* § 2.06 cmt. 6(b), at 312 n.42.
291. *See supra* notes 107, 114, 118, 121, 245 and accompanying text.
292. *See supra* note 280 and accompanying text.
293. *See supra* note 27 and accompanying text.
294. *See supra* note 290 and accompanying text.
295. 134 S. Ct. 1240 (2014).
296. *See infra* Part III.A (applying *Rosemond* to the four cases from Part II.A), *see also infra* Part III.B (discussing the scholarly criticism in light of *Rosemond*).
297. *See supra* Part I.C.

A. The Doctrine Under Rosemond

Part III.A retroactively applies the holding of *Rosemond* to the cases discussed in Part II.A, and, in each example, this Note concludes the cases cannot withstand the holding of *Rosemond*.

1. *Wills* Under *Rosemond*

Defendant-Appellant Wills's appeal from his conviction for aiding and abetting the use of a destructive device, in violation of § 924(c), was unsuccessful.[298] In rejecting Wills's arguments, the Ninth Circuit held that, because Wills was the mastermind of the bank robbery, Wills's accomplice's use of the destructive device was a reasonably foreseeable consequence of the criminal scheme.[299] In coming to this conclusion, the court relied on four pieces of circumstantial evidence, which it believed gave rise to an inference upon which Wills's guilt could be based.[300]

Even assuming the circumstantial evidence established that Wills likely had knowledge of his accomplice's possession of the destructive device, a criminal defendant's guilt must be established beyond a reasonable doubt.[301] Because the *Wills* Court relied on the natural and probable consequence doctrine to hold that Wills's intent for the bank robbery, coupled with the circumstantial evidence, was sufficient to prove accomplice liability for the § 924(c) violation, this holding is not consistent with *Rosemond*.[302] Under *Rosemond*, an accomplice must have had the requisite intent for the crime charged before he or she can be held liable.[303] With respect to *Wills*, this means that Wills must have intended his accomplice to use the destructive device, which logically means that Wills must have known his accomplice possessed such a device.[304] The court made no attempt to assess whether Wills had actual knowledge of the destructive device—it simply drew an inference from the circumstantial evidence that Wills could have "reasonably foreseen" his accomplice's use of a destructive device.[305] While drawing inferences is certainly permissible in a criminal trial, the inference drawn by the Ninth Circuit, while using the doctrine, allows for accomplice liability to attach in the

298. *See supra* notes 173–78 and accompanying text (laying out the facts of the case).
299. *See supra* notes 184–85 and accompanying text.
300. *See supra* notes 181–82 and accompanying text.
301. *See supra* note 46 and accompanying text.
302. *See supra* notes 179–85 and accompanying text (describing the court's holding and reasoning).
303. *See supra* notes 151–56 and accompanying text. One way the requisite intent may be evidenced, particularly in the § 924(c) context, is by way of the card game analogy put forward in *Rosemond*. *See supra* note 146 and accompanying text. This analogy states that, so long as the defendant continued on in the commission of the crime with knowledge of the "heightened stakes," which in *Wills* was the accomplice's destructive device, the defendant may be held liable for his accomplice's conduct. *See supra* note 146 and accompanying text.
304. *See supra* notes 142–45 and accompanying text (describing *Rosemond*'s holding that foreknowledge is required for accomplice liability under § 924(c)).
305. *See supra* notes 179–85 and accompanying text (describing the court's holding and reasoning).

absence of proof beyond a reasonable doubt of a defendant's mental state.[306] This violates *Rosemond*'s holding that an accomplice must have the requisite mental state as to the full scope of a crime before liability can attach.[307]

The *Wills* Court's use of the natural and probable consequence doctrine does exactly what some scholars have feared—it lowers the mental state for accomplice liability when a higher mental state is required for the principal.[308] In this case, not only was this fear realized but an even worse transgression occurred. The jury was instructed that the government must prove that Wills "knowingly and intentionally" aided or abetted his accomplice's use of the destructive device to find Wills guilty as an accomplice.[309] The instruction contained no natural and probable or reasonably foreseeable language.[310] Yet, by using the doctrine, the court allowed for reasonably foreseeable conduct to satisfy a crime for which the jury had been charged that the government must prove a "knowingly and intentionally" mental state.[311] Thus, the Ninth Circuit affirmed a conviction when proof of the requisite mental state was insufficient.[312]

This use of the doctrine is particularly troublesome because the jury instructions seemingly guarded against the possibility of allowing an impermissibly lower mental state to prove sufficient, yet such a result occurred nonetheless.[313] As the *Rosemond* Court held, the intent for one crime to be committed does not ordinarily allow for that intent to be imputed to a different crime.[314] Therefore, this impermissible lowering of the mental state cannot be rescued by the fact that Wills was undoubtedly liable as a principal for the bank robbery.[315] Ultimately, because the doctrine's use by the *Wills* Court allowed for accomplice liability to attach without sufficient proof of the mens rea required either by § 924(c)[316] or the aiding and abetting jury instruction,[317] this holding violates *Rosemond*.[318]

2. *Vaden* Under *Rosemond*

The Fifth Circuit affirmed Troy Vaden's conviction for, inter alia, aiding and abetting the assault on his colleague, Officer Slater.[319] Before

306. *See supra* notes 59–60 and accompanying text (discussing permissive inferences).
307. *See supra* notes 151–56 and accompanying text (describing the Court's general holding on accomplice mental states in *Rosemond*).
308. *See supra* notes 281–82 and accompanying text.
309. *See supra* note 173 (quoting the jury instruction on aiding and abetting).
310. *See supra* note 173.
311. *See supra* notes 173, 180 and accompanying text.
312. *See supra* note 173 (quoting the jury instruction on aiding and abetting).
313. *See supra* notes 173, 180 and accompanying text.
314. *See supra* note 143 and accompanying text.
315. *See supra* note 179.
316. *See supra* notes 281–82 (describing § 924(c)'s statutory mens rea).
317. *See supra* note 173 (quoting the jury instruction that aid or encouragement must be "knowingly and intentionally" rendered).
318. *See supra* note 152 and accompanying text (describing the general holding of *Rosemond* as it relates to an accomplice's mens rea).
319. *See supra* notes 187–94 and accompanying text (laying out the facts of the case).

affirming the conviction, the court laid out two aspects of the legal standard surrounding accomplice liability: the *Peoni* formulation and the natural and probable consequence doctrine.[320] The court then held Vaden's ditching of the escort, which was part of the crime Vaden intended to aid, naturally and probably led to the assault on Officer Slater.[321]

While *Vaden* Court's use of the doctrine is less flagrant than *Wills* Court's, the holding in *Vaden* still would not stand in a post-*Rosemond* world. Admittedly, there is a degree of attraction to the doctrine's use in this context because, but for Vaden's ditching of the escort, the assault on Rivera would probably not have occurred, meaning the assault on Officer Slater would probably not have occurred.[322] Therefore, the assault on Officer Slater was a natural and probable consequence of the assault on Rivera, which Vaden aided by ditching the escort.[323] However, in the absence of sufficient proof as to the requisite mental state, but-for causation alone does not satisfy *Rosemond*'s holding and neither does simply stating that one crime was the natural and probable consequence of another.[324] Under *Rosemond*, accomplice liability requires proof that the accomplice had the statutory mens rea for the specific crime charged, thus foreclosing the possibility that sufficient proof of intent for an initial crime may be imputed to a subsequent crime.[325] In this regard, the Fifth Circuit erred in two respects: first, it did not state what the requisite mental state was and second, it did not show that the government sufficiently proved the mental state.[326] With respect to Vaden's mental state, the court only mentioned that, based on Vaden's knowledge of the purpose behind the two-guard escort policy, he could have foreseen that ditching the escort would result in an assault on Officer Slater.[327] While this may give rise to a permissible inference of a mental state of negligence or recklessness, it does not establish the requisite mental state beyond a reasonable doubt.[328] Simply

320. *See supra* notes 196–97 and accompanying text.

321. *See supra* note 199 and accompanying text.

322. *See supra* notes 191–94, 200–01 and accompanying text (describing the facts of the case and the court's natural and probable consequence reasoning).

323. *See supra* notes 192–94, 199–01 and accompanying text.

324. *See supra* notes 277–80 and accompanying text (explaining scholarly criticism that the doctrine does away with the fundamental principle of criminal law that a mens rea must be proven for all crimes); *see also supra* note 16 and accompanying text (describing the Court's statement that a guilty mind is a necessary aspect of all crimes). For the sake of argument, even if the doctrine were allowed to be used to satisfy the actus reus, the doctrine cannot be used to impute the mental state of an initial crime to a subsequent crime, and therefore, the requirement of mens rea would still remain unsatisfied. *See supra* note 273 and accompanying text.

325. *See supra* notes 143, 151–52 and accompanying text.

326. *See supra* note 202 and accompanying text.

327. *See supra* note 200 and accompanying text.

328. *See supra* note 239 and accompanying text (explaining *Greer*'s rejection of the doctrine for allowing criminal liability to be predicated on foreseeability); *supra* notes 281–82 and accompanying text (discussing several sources that object to the doctrine's ability to lower the mental state for accomplice liability when more is required of the principal); *supra* note 289 and accompanying text (discussing the MPC's rejection of negligence as a sufficient mens rea for an accomplice when a heightened mental state is required for the principal). Because the Fifth Circuit failed to mention the requisite mental state in *Vaden*,

stating that a result was the natural and probable consequence of initially wrongful conduct does not satisfy *Rosemond*'s holding, which requires the government to prove the requisite intent for each crime charged.[329]

3. *Jones* Under *Rosemond*

The defendant in *Jones* unsuccessfully appealed his conviction for aiding and abetting assault with a deadly weapon in the course of a bank robbery.[330] In affirming the defendant's conviction, the D.C. Circuit reasoned that there is no more natural and probable consequence of armed robbery than the use of those firearms in the course of the robbery.[331]

In the opinion, the D.C. Circuit noted that one of the primary objections to the natural and probable consequence doctrine is its ability to impute intent from an initial crime to a subsequent crime when the requisite mental state would otherwise be lacking.[332] However, because the court did not believe such an objection was persuasive in a trial with seemingly weighty inculpatory evidence, it dismissed the objection and proceeded to use the doctrine anyway.[333] The court's dismissal of its objection—which was raised sua sponte—is notable because this objection is the very reason why this Note, in light of *Rosemond*, finds the doctrine's use in this case to be deplorable.

Rosemond held that an accomplice must have the requisite intent for the full scope of the crime(s) charged.[334] When the doctrine is employed, this holding is clearly violated because imputing the intent from an initial crime to a subsequent crime effectively eliminates the need for the government to prove the requisite mental state.[335] Even in this case, with an unsympathetic defendant, the basic tenets of Anglo-American criminal law remain unchanged, and the requisite mental state must still be proven beyond a reasonable doubt.[336] Allowing the doctrine to fill in the gaps that a prosecutor is unable to prove is simply impermissible and, under *Rosemond*, should no longer be regarded as plausible.[337] The D.C. Circuit

---

see supra note 202, this argument rests on the assumption that the requisite mental state for the assault on Officer Slater is something akin to knowledge or purposeful intent, which are both more demanding mental states than negligence or recklessness. *See* MODEL PENAL CODE § 2.02(2), at 225–26 (AM. LAW INST., Official Draft and Revised Comments 1985).

329. *See supra* notes 151–52 and accompanying text.

330. *See supra* notes 205–08 and accompanying text (laying out the facts of the case).

331. *See supra* note 211 and accompanying text.

332. *See supra* note 212 and accompanying text.

333. *See supra* note 214 and accompanying text.

334. *See supra* note 152 and accompanying text.

335. *See supra* note 234 and accompanying text (judicial criticism); *supra* notes 272–82 and accompanying text (scholarly criticism).

336. *See supra* note 16 and accompanying text (noting the Court's description of crime as a compound concept of evil act and an evil mind in *Morissette*); *supra* note 21 and accompanying text (describing crime as the concurrence of actus reus and mens rea); *supra* note 277 and accompanying text (explaining Heyman's view that the doctrine ignores the principle of criminal culpability).

337. *See supra* notes 71–74 and accompanying text (describing prosecutorial use of the doctrine); *see also infra* Part III.B (rejecting the doctrine in light of *Rosemond*).

erred in not heeding its noted objection to the doctrine, and so its holding would not stand in a post-*Rosemond* world.

4. *Miller* Under *Rosemond*

Miller was convicted for, inter alia, aiding and abetting the interstate transmission of wagering information.[338] The Eleventh Circuit affirmed his conviction, holding Miller liable as an accomplice to the crime.[339] In so holding, the court reasoned that the receipt of interstate wagering information was a natural and probable consequence of participating in the illegal gambling operation and that Miller did not need to have personal knowledge of the source of the information to be held liable as an accomplice.[340]

Of the four cases described in this section, this case is the most flagrant violation of bedrock principles of Anglo-American criminal law. *Rosemond* held that an accomplice may intend a crime's commission when he or she participates in it, knowing its full extent and character.[341] In the absence of proof that Miller knew the source of the information, or that the information crossed state lines, under *Rosemond* it would be impossible for Miller to be held liable as an accomplice because Miller could not have known the full extent of the crime.[342] The reasoning employed by the Eleventh Circuit completely disposed of the need to prove a mental state for the subsequent crime once proof for the initial crime was established.[343] This is the exact fear of those who oppose the doctrine: its ability to negate the mens rea for every element of a crime.[344] For the reason that the Eleventh Circuit allowed accomplice liability to attach in the absence of mens rea, the holding in *Miller* is not consistent with *Rosemond*'s holding.

*B. The Doctrine in a Post-*Rosemond *World: Technical Knockout*

It is impossible to know whether the Court decided not to discuss the doctrine because it was not raised below or simply because they did not believe gun use was a natural and probable consequence of a simple drug

338. *See supra* notes 215–21 and accompanying text (laying out the facts of the case).
339. *See supra* note 217 and accompanying text.
340. *See supra* notes 223–26 and accompanying text.
341. *See supra* note 155 and accompanying text (quoting the Court's "extent and character" language).
342. *See supra* notes 215–22 and accompanying text (showing that Miller had no knowledge of the source of the information); *see also supra* notes 155–56 and accompanying text (quoting the Court's "extent and character" language, which shows that in the absence of knowing the full extent of a crime, there cannot be accomplice liability).
343. *See supra* notes 223–26 and accompanying text (describing the court's holding and reasoning).
344. *See supra* notes 113, 266 and accompanying text; *supra* Part II.C; *see also supra* note 20 and accompanying text (excepting strict liability crimes from this statement).

deal.[345] Regardless of the Court's intentions, the practical effects of footnote 7 on the opinion are the same; the Court did not believe its decision implicated the doctrine.[346] This Note argues that, notwithstanding footnote 7, the Court's logic behind its holding, specifically the reasoning surrounding the requisite mental state for accomplice liability, extends beyond a narrow application to aiding and abetting a § 924(c) crime and actually destroys the foundation upon which the natural and probable consequence doctrine is based.[347]

The foundations of the doctrine rely on foreseeability being a sufficient basis for accomplice liability, irrespective of the statutory mens rea that the government must prove for a principal to the same crime.[348] The logic used by the Court in *Rosemond* provides a persuasive argument that these very foundations have been eradicated.[349] This Note argues that *Rosemond*'s holding, read as applying to federal criminal law generally, would prevent the affirmative application of the doctrine because *Rosemond*'s holding is at odds with the premises on which the doctrine is based.[350]

If the theoretical basis of the doctrine has been negated, as this Note argues it has been, federal criminal law will be directly impacted.[351] Prosecutors, defense attorneys, and even the courts will feel the effects of the doctrine's vitiation.[352] Prosecutors will no longer be able to rely on a natural and probable consequence theory in pursuing accomplices, forcing prosecutors to prove an accomplice had the requisite mental state for each crime charged.[353] Defense attorneys will be able to better defend alleged accomplice clients, knowing that their client's liability can no longer be predicated on a lesser mental state than that which is required for the principal.[354] Lastly, district courts will have to be wary of foreseeable and natural and probable language in their jury instructions to ensure that charges, based solely on a natural and probable consequence theory, do not

345. This ambiguity has not stopped commentators from trying to determine footnote 7's meaning. *See supra* notes 162–69 and accompanying text (discussing possible interpretations of footnote 7).

346. *See supra* notes 159–66 and accompanying text (discussing footnote 7).

347. *See supra* notes 148–56 and accompanying text (discussing the logic behind *Rosemond*'s holding); *see also supra* note 166 and accompanying text (discussing two scholars who separately raise the question, without answering it, of whether or not the Court implicated the doctrine despite footnote 7).

348. *See supra* note 79 and accompanying text.

349. *See supra* notes 148–56 and accompanying text (discussing the logic behind *Rosemond*'s holding). Because the Court granted certiorari for *Rosemond* to resolve the intent requirement for § 924(c) violations, the opinion as a whole is mens rea heavy. *See supra* notes 124, 150 and accompanying text.

350. *See supra* Part III.A.1–4.

351. *See supra* notes 71–74 and accompanying text (describing the various uses of the doctrine).

352. *See supra* notes 71–74 and accompanying text.

353. *See supra* note 71 and accompanying text (discussing how a prosecutor uses the doctrine); *supra* note 152 and accompanying text (describing *Rosemond*'s holding as to accomplice mental states).

354. *See supra* Part II.A.1–4 (describing four cases that affirmed convictions of accomplices in the absence of proof of the requisite mental state).

go to the jury.[355] Perhaps most importantly, defendants will be positively impacted by potentially avoiding criminal liability for crimes they neither committed themselves nor intended to be committed by their confederates.[356]

The vitiation of the doctrine is desirable primarily because of the positive impact it would have on defendants who may be indirectly involved in unintended crimes but lack criminal culpability. Anglo-American criminal law is so well respected because of its focus on individual culpability.[357] The MPC recognized this and essentially consolidated the common law principles of mens rea and actus reus into a coherent body of model law.[358] The doctrine is simply a direct contradiction of Anglo-American criminal law's requirement for proof of a defendant's mental state with regard to the crime he or she is charged with.[359] Whether or not the doctrine is used to lower the statutory mens rea, or to circumvent proof of mens rea entirely, its use after *Rosemond* should no longer be regarded as just or viable. While the Court in *Rosemond* did not intend to pass judgment on the doctrine,[360] the Court's statement of the "basics" of accomplice law's mens rea—that the "intent must go to the specific and entire crime charged"[361]—completely undermines the doctrine's logic, which allows for the intent as to a subsequent crime to go unproven.[362]

CONCLUSION

Returning to the example from the introduction, Luparello undoubtedly set in motion the events that led to Martin's death. However, this should not mean that Luparello is automatically guilty for any and all crimes committed that have a but-for causal relationship to him. To the contrary, as the Court held in *Rosemond*, an accomplice's intent must go to the whole crime charged. Thus, because Luparello only wanted his confederates to elicit information from Martin, and therefore could not have intended Martin's death, Luparello should never have been held liable for the murder. Only by invoking the natural and probable consequence doctrine could the court affirm Luparello's conviction. Despite Luparello being culpable for some crime, Luparello was not culpable for murder. In a world where the doctrine does not exist, Luparello would be punished only for those crimes that he is culpable for and not for those that may have been foreseeable but which he did not intend to occur.

---

355. *See, e.g.*, *supra* note 111 (citing a natural and probable consequence jury instruction).

356. *See supra* notes 20–23 and accompanying text.

357. *See supra* note 268.

358. *See supra* note 284 and accompanying text.

359. *See supra* notes 277–79 and accompanying text.

360. *See supra* note 159 (quoting the text of footnote 7).

361. *See supra* note 143 and accompanying text.

362. *See supra* notes 142–47 and accompanying text (laying out *Rosemond*'s holding as to accomplice mental states); *see also supra* notes 55–57 and accompanying text (explaining the basic concept behind the doctrine).

While this Note undoubtedly takes a strong position as to the wisdom and viability of the doctrine, disapproval of it certainly is not unique. At least nine different states have already rejected the doctrine, many of which have done so in the last twenty years. At least three different circuits have rejected use of the doctrine, albeit some more emphatically than others. Several prominent scholars also have rejected the doctrine—often quite aggressively. In light of the foregoing, it is clear that calling for the end of the doctrine is not a radical notion.

While the Supreme Court has not yet intentionally weighed in on the legality or constitutionality of the doctrine, *Rosemond* could serve the same purpose as an opinion explicitly condemning the doctrine. Because the primary objections to the doctrine focus on its interaction (or lack thereof) with mens rea, *Rosemond*, as a mens-rea-focused opinion, does the same work the aforementioned hypothetical opinion would do.

The door is certainly open for courts to read *Rosemond* as abrogating the doctrine. To put forward an old idiom, *Rosemond* may be the proverbial straw that broke the natural and probable consequence camel's back. However, even though *Rosemond* can be read to vitiate the doctrine, in all likelihood, the absolute rejection of the doctrine will require a Supreme Court case directly on point for which certiorari was granted to address the doctrine directly. *Rosemond* certainly has laid the groundwork for the Court to grant certiorari on such a case. The natural and probable consequence doctrine has been subject to substantial criticism from courts and commentators alike, and the time is now ripe to let the doctrine go softly into the night.