D.C. Criminal Code Reform Commission
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ADVISORY GROUP MEMORANDUM #35

To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: May 18, 2020
Re: Supplemental Materials to the Second Draft of Report #35

This Advisory Group memorandum supplements the Second Draft of Report #35—*Cumulative Update to Sections 201-213 of the Revised Criminal Code.* Appendices attached to this memorandum include red-inked versions of updated RCC § 22E-204, and a copy of the commentary for § 22E-204 from the Second Draft of Report #35, with the portions that have been updated highlighted in yellow. The Second Draft of Report #35 is not in response to Advisory Group comments with respect to the First Draft of Report #50; the CCRC will respond to those comments at a later date.

APPENDIX A: RED-INKED VERSION OF RCC § 22E-204.

(a) *Causation Requirement*. No person may be convicted of an offense that contains a result element unless the person's conduct is the factual cause and legal cause of the result.

(b) *Factual Cause Defined*. A person's conduct is the factual cause of a result if:

(1) The result would not have occurred but for the person's conduct; or

(2) In a situation where the conduct of 2 or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

(c) *Legal Cause Defined*. A person's conduct is the legal cause of a result if ~~the result is not too unforeseeable in its manner of occurrence, and not too dependent upon another's volitional conduct, to have a just bearing on the person's liability.~~:

(1) The result is reasonably foreseeable in its manner of occurrence; and

(2) When the result depends on another person's volitional conduct, the actor is justly held responsible for the result.

(d) Other Definitions. "Result element" has the meaning specified in RCC § 22E201(c)(2).

APPENDIX B: UPDATED COMMENTARY FOR RCC § 22E-204.

The relevant portions of the commentary that have been updated since the First Draft of Report #35 to reflect changes to the statutory text are highlighted in yellow.

RCC § 22E-204. Causation Requirement.

1. RCC § 22E-204(a)—Causation Requirement

Explanatory Note. Subsection (a) establishes that causation is a basic requirement of criminal liability for any offense that requires proof of a result element under the RCC. It provides that the minimum causal nexus between a person's conduct and its attendant results is comprised of two different components: factual causation and legal causation.[1] Together, these two components provide the basis for determining whether a given social harm is fairly attributable to the defendant's conduct, in contrast to other people or forces in the world for which the defendant is not accountable. Because causation is an aspect of the objective elements of a result element offense,[2] both factual causation and legal causation must be proven beyond a reasonable doubt.[3]

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a general statement on causation, the DCCA has addressed the requirement of causation on many occasions. It is well-established in case law that causation is a basic element of criminal responsibility, which requires the government to prove—for all crimes involving result elements—that the defendant was the factual and legal cause of the harm for which he or she is charged.[4]

2. RCC § 22E-204(b)—Definition of Factual Cause

Explanatory Note. Subsection (b) provides a comprehensive definition of "factual cause." In the vast majority of cases, factual causation will be proven under paragraph (b)(1) by showing that the defendant was the logical, but-for cause of a result.[5] The inquiry required by

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[1] *See, e.g.*, *WAYNE R. LAFAVE*, 1 SUBST. CRIM. L. § 6.4(a) (3d ed. Westlaw 2019) ("It is required, for criminal liability, that the conduct of the defendant be both (1) the actual cause, and (2) the 'legal' cause (often called 'proximate' cause) of the result."); *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) ("The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause.") (citing H. HART & A. HONORE, CAUSATION IN THE LAW 104 (1959)).

[2] *See* RCC § 22E-201(c) ("'Objective element' means any . . . result element); *id.* at (c)(2) (defining "result element" as "any consequence *caused* by a person's act or omission that is required establish liability for an offense.") (italics added).

[3] *See* RCC § 22E-201(a) ("No person may be convicted of an offense unless the government proves each offense element beyond a reasonable doubt."); *id.* at § (b) ("'Offense element' includes the objective elements and culpability requirement necessary to establish liability for an offense.").

[4] *See, e.g., McKinnon v. United States*, 550 A.2d 915, 917 (D.C. 1988); *Matter of J.N.*, 406 A.2d 1275, 1287 (Newman, C.J., dissenting); D.C. Crim. Jur. Instr. § 4.230.

[5] *See, e.g., LAFAVE, supra note 1, at* 1 SUBST. CRIM. L. § 6.4(b) ("In order that conduct be the actual cause of a particular result, it is almost always sufficient that the result would not have happened in the absence of the conduct; or, putting it another way, that 'but for' the antecedent conduct the result would not have occurred."); *Paroline v.*

this paragraph is essentially empirical, though also hypothetical: it asks what the world would have been like if the defendant had not performed his or her conduct.[6] In rare cases, however, when the defendant is one of multiple actors that independently contribute to producing a particular result, factual causation may also be proven under paragraph (b)(2) by showing that the defendant's conduct was sufficient—even if not necessary—to produce the prohibited result.[7] Although in this situation it cannot be said that, but for the defendant's conduct, the result in question would not have occurred, the fact that the defendant's conduct was by itself sufficient to cause the result provides an adequate basis for treating the defendant as a factual cause.[8]

For prosecutions based on an omission, the principles codified in subsection (b) will rarely provide a useful test for assigning liability.[9] Whereas factual causation generally presumes a chain of causal forces that affirmatively change the circumstances of the world, omissions do not affirmatively change the circumstances of the world; at most, they constitute failures to interfere with the changes made by other forces.[10] That said, it is certainly possible for an omission to fall short of satisfying the principles codified in subsection (b).[11] And where this is the case, the government's inability to prove the factual causation requirement beyond a reasonable doubt precludes the imposition of liability for a result element crime under the RCC.

Relation to Current District Law. Subsection (b) broadly accords with District law. While the D.C. Code does not address factual causation, the DCCA has adopted a standard to address issues of factual causation that is substantively similar to the standard reflected in RCC § 22E-204(b). However, the definition of factual cause provided in RCC § 22E-204(b) constitutes a terminological departure—and, in cases involving multiple concurrent causes, potentially a

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United States, 134 S. Ct. 1710, 1719 (2014) (quoting 4 F. HARPER, F. JAMES, & O. GRAY, TORTS § 20.2, p. 100 (3d ed. 2007)) ("The concept of [f]actual cause 'is not a metaphysical one but an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it.'").

[6] This analysis is easiest where the causal chain is direct, and no intervening forces are present. For example, if D shoots at V, who is hit and dies, D is the factual cause of V's death under RCC § 22E-204(b)(1), since, but for D's conduct, V would not have died. However, even where the causal chain is less direct, and includes intervening forces—such as a human intermediary—the analysis remains the same. For example, if D initiates a gun battle with X, and X thereafter returns fire but mistakenly hits a nearby bystander, V, D is still a factual cause of V's death under RCC § 22E-204(b)(1), since, but for D's initiating a gun battle with X, X would not have returned fire, and, therefore, V would not have died.

[7] *See LAFAVE*, *supra note 1*, *at* 1 SUBST. CRIM. L. § 6.4(b) ("[If] *A* stabs *B*, inflicting a fatal wound; while at the same moment *X*, acting independently, shoots *B* in the head with a gun, also inflicting such a wound; and *B* dies from the combined effects of the two wounds[,] *A* has caused *B*'s death.")

[8] For example, where X and Y both shoot at Z in a crowded area at the same moment, and Z thereafter returns fire but mistakenly hits a nearby bystander, X and Y could be considered independently sufficient factual causes of the bystander's injury under RCC § 22E-204(b)(2).

[9] For example, a parent who fails to feed a child, thereby allowing the child to starve, or a parent who permits a child who cannot swim to jump into a pool, thereby allowing the child to drown, may be the factual cause of the child's death in each case. However, the failure of any other person nearby would also be a factual cause under these circumstances, since the intervention by anybody could have also stopped the starvation or drowning.

[10] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 88(d)(4) (Westlaw 2019).

[11] Consider the situation of a parent who fails to seek medical treatment of a child's illness under circumstances where such medical treatment could not have saved, prolonged, or otherwise improved the quality of that child's life. In this situation, it cannot be said that, but for the parent's failure to seek medical attention, the child would have avoided harm. It therefore follows that this parent, if prosecuted for a crime for which causing harm—whether serious mental injury, bodily injury, or death—is a statutorily required element, cannot be held liable under the RCC due to the absence of factual causation.

substantive departure—from the standard currently reflected in District law. This departure improves the clarity and consistency of the RCC.

To address the issue of factual causation, the DCCA has adopted the "substantial factor" test drawn from the Restatement of Torts.[12] Under this test, "[a] defendant's actions are considered the cause-in-fact . . . if those actions 'contribute substantially to or are a substantial factor in a[n] injury.'"[13] "[S]ubstantial cause," in turn, has been defined by the DCCA as "conduct which a reasonable person would regard as having produced the [relevant result]."[14]

Application of the substantial factor test to deal with all issues of factual causation is problematic, however. The test was originally developed in the context of tort law to address those "highly unusual cases" where it is "logically impossible for the government to prove but-for causation because two causes, each alone sufficient to bring about the harmful result, operate[d] together to cause it."[15] By employing the open-textured language of "substantial factor," proponents of the test thought it would provide fact finders with sufficient leeway to ensure that defendants, each of whose conduct constitute independent sufficient causes, would not escape liability.[16] However, the "substantial factor" test has been the source of significant criticism, and, ultimately, has not withstood the test of time."[17]

Insofar as the DCCA's reliance on the test is concerned, two main critiques can be made. First, application of the substantial factor test to deal with *all* issues of factual causation unnecessarily complicates the fact finder's analysis in many cases.[18] In the run-of-the-mill case, the substantial factor test produces the same results as a but-for test, but requires the factfinder to engage in an unnecessarily complex analysis. Why, one might ask, should a factfinder be required to employ a complex test that incorporates "noncausal policy considerations" to deal with standard factual causation issues when a more concrete, intuitive, and straightforward but-for framing of factual causation—such as that provided in § 22E-204(b)(1)—can easily resolve most issues?[19] "In the absence of such special causation problems, there is [simply] no need to employ the substantial factor test, because the 'but-for cause' of a harm is always a substantial factor in bringing about the harm."[20]

Second, for those few cases where application of a more expansive approach is arguably necessary—namely, where the defendant is one of multiple concurrent causes—the substantial factor test offers a highly discretionary standard to support an outcome that a bright line rule would more effectively facilitate. A simple, straightforward statement deeming independently

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[12] *See, e.g., District of Columbia v. Carlson*, 793 A.2d 1285, 1288 (D.C. 2002); *Lacy v. District of Columbia*, 424 A.2d 317, 321 (D.C. 1980); *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003).

[13] *Blaize v. United States*, 21 A.3d 78, 81 (D.C. 2011); D.C. Crim. Jur. Instr. § 4.230.

[14] *Blaize*, 21 A.3d at 82; *see also Roy v. United States*, 871 A.2d 507, 5087 (D.C. 2005) (citing *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003)).

[15] *United States v. Pitt-Des Moines, Inc.*, 970 F. Supp. 1359, 1364-65 (N.D. Ill. 1997) *aff'd*, 168 F.3d 976 (7th Cir. 1999).

[16] *See, e.g.*, David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1264-66 (1978); LAFAVE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.4; W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 41, at 267-68 (5th ed. 1984).

[17] RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Tentative Draft No. 2, 2002).

[18] *See, e.g.*, Eric Johnson, *Criminal Liability for Loss of A Chance*, 91 IOWA L. REV. 59, 87-88 (2005); Model Penal Code § 2.03 cmt. at 259; *United States v. Needle*, 72 F.3d 1104, 1120 (3d Cir. 1995) *amended*, 79 F.3d 14 (3d Cir. 1996) (Becker, J. dissenting).

[19] Robert Strassfeld, *Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 355 (1992); *see* Kimberly Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2201-02 (1994).

[20] *Pitt-Des Moines, Inc.*, 970 F. Supp. at 1364-65.

sufficient causes to be factual causes—such as that provided in RCC § 22E-204(b)(2)—is preferable to the "spectacular vagueness"[21] of the substantial factor test. Indeed, even proponents of the substantial factor test are "uncertain about [its] precise application," and have had a difficult time specify[ing] how important or how substantial a cause must be to qualify."[22]

Given the uncertain scope of the substantial factor test, it's possible—though by no means clear—that replacing it with the approach in RCC § 22E-204(b) could modestly circumscribe the scope of criminal liability under District law in some situations.[23] However, "[g]iven the need for clarity and certainty in the criminal law," this circumscription—to the extent it would occur—better reflects sound policy.[24]

3. RCC § 22E-204(c)—Definition of Legal Cause

Explanatory Note. Subsection (c) provides a comprehensive definition of "legal cause." Under the proscribed definition, legal causation exists where it can be proven that the result was reasonably foreseeable in its manner of occurrence, and not too dependent upon another's volitional conduct to hold the person justly responsible for it.[25] This is a normative evaluation, which requires the factfinder to assess whether it would be appropriate to hold a person criminally responsible for a social harm of which he or she is the cause in fact due to the influence of intervening forces, such as natural events, the conduct of a third party, or the conduct of the victim.[26]

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[21] Johnson, *supra* note 18, at 89 n.190.

[22] *Burrage*, 134 S. Ct. at 892.

[23] Consider, for example, the District's current approach to factual causation in gun battle cases, where X and D culpably shoot at one another, and D subsequently hits either an innocent victim or another culpable participant. Under these circumstances, X will be held criminally responsible for D's conduct so long as X's conduct is, *inter alia*, "a substantial factor in bringing about the death. D.C. Crim. Jur. Instr. § 4.230; *see, e.g.*, *Roy v. United States*, 871 A.2d 498, 508 (D.C. 2005); *Bryant v. United States*, 148 A.3d 689, 2016 WL 6543533 (D.C. 2016); *McCray v. United States*, 133 A.3d 205 (D.C. 2016); *Blaize v. United States*, 21 A.3d 78 (D.C. 2011); *Blaine v. United States*, 18 A.3d 766 (D.C. 2011). This approach, which is currently being reconsidered by the DCCA *en banc*, effectively "ignore[s] the actual or but-for cause requirement" governing the District's homicide statutes. *Fleming v. United States*, 148 A.3d 1175, 1187 (D.C. 2016), *reh'g en banc granted, opinion vacated*, 164 A.3d 72 (D.C. 2017) (Easterly, J., dissenting). In contrast, under RCC § 22E-204(b), the government would have to prove that either: (1) but for X's shooting at D, D would not have shot the innocent bystander or another culpable participant; or (2) X's conduct was sufficient—even if not necessary—to lead D to shoot an innocent bystander or another culpable participant. While the RCC's analytical approach differs from that in past DCCA case law, the RCC approach does not preclude liability in gun battle cases. *See, e.g.*, *Phillips v. Com*, 17 S.W.3d 870, 874 (Ky. 2000) (upholding homicide conviction of a defendant who participated in a gun battle but did not fire the shot which caused the death of an innocent bystander notwithstanding state criminal code's traditional factual causation requirement); *Com. v. Gaynor*, 538 Pa. 258, 263, 648 A.2d 295, 298 (1994) (same); *Com. v. Santiago*, 425 Mass. 491, 504, 681 N.E.2d 1205, 1215 (1997) ("By choosing to engage in a shootout, a defendant may be the cause of a shooting by either side because the death of a bystander is a natural result of a shootout, and the shootout could not occur without participation from both sides."); Model Penal Code § 2.03 cmt. at 263 ("[I]f one of the participants in a robbery shoots at a policeman with intent to kill and provokes a return of fire by that officer that kills a bystander . . . the robber who initiates the gunfire could be charged with purposeful murder.").

[24] *Burrage*, 134 S. Ct. at 892.

[25] The phrase "the person" under RCC § 22E-204(c)(2) refers to the defendant, not the "[]other person" whose "volitional conduct" is being considered for its independent causal influence on a particular result.

[26] Note that in cases where a defendant acts with intent to cause a prohibited result, a finding that legal causation is absent will not exculpate the defendant entirely. Instead, it will merely limit liability to that associated with a criminal attempt rather than a completed offense. *See infra* notes 27-28.

The influence of these intervening forces can generally be divided into two categories. The first category, codified under paragraph (c)(1), relates to foreseeability; the focus here is on the extent to which a given result can be attributed to intervening forces—whether human[27] or natural[28]—of a remote and/or accidental nature.[29] The second category, codified under paragraph (c)(2), relates to human volition; the focus here is on whether a person may *justly* be held liable for a given result that can be attributed to the free, deliberate, and informed conduct of a third party[30] or the victim.[31] Under paragraph (c)(2), there is no legal causation when intervening volitional conduct[32] was reasonably foreseeable, if holding the actor criminally liable for causing the result would be unjust. Determining whether a person may justly be held liable is

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[27] For example, imagine X stabs V with intent to kill, but only manages to inflict a minor wound on V's arm before the police intercede. Thereafter, V is taken to the hospital to receive stiches, at which point the attending physician determines that, for reasons unrelated to the gash, V must also undergo a dangerous but medically necessary hernia operation. V ends up dying of complications from the hernia surgery. In this scenario, X is the factual cause of V's death: but for X's infliction of a knife wound, V would not have been subjected to the hernia operation. However, the remote nature of the intervening cause in this scenario—complications from an unrelated medical procedure—is so unforeseeable as to break the chain of legal causation. (Note, though, that X could still be convicted of attempted murder.)

[28] For example, imagine X begins shooting at V from a distance with intent to kill, but V escapes the deadly assault by running down an alley. At the end of the alley, however, V is fatally struck by lightning. In this scenario, X is the factual cause of V's death: but for X's firing of the gun, V would not have been in the location where the lightning struck. However, the accidental nature of the intervening cause in this scenario—the lightning bolt—is so unforeseeable as to break the chain of legal causation. (Note, though, that X could still be convicted of attempted murder.)

[29] Note that reasonable foreseeability is distinct from culpable negligence. For example, X may negligently create a risk of death to V, a young child standing next to the crosswalk, by speeding through a school zone right after school lets out, while unaware that he is driving in a school zone or that V is present. Should X fatally hit V with his vehicle under these circumstances, X would be liable for negligently causing V's death. If, however, X does not hit V but instead his car kicks up a small pebble onto the sidewalk, which V then fatally slips on, legal causation would likely be lacking. Here, the remote and accidental nature of V's manner of death is so unforeseeable as to break the chain of legal causation—notwithstanding the fact that X's conduct was still negligent under the circumstances.

[30] For example, imagine X and D have been in a longstanding competitive basketball rivalry, marked by regular bouts of violence by D perpetrated against his teammates after his losses. Nearing the final few seconds of a championship game, and down by one point, X is about to shoot the game winning shot against D after a game marked by many missteps by X's teammate V, at which point X realizes that D will almost certainly (and in fact appears to be preparing to) assault V once the loss is formalized. Nevertheless, D decides to disregard this risk and score the final two points necessary for the win. Immediately thereafter, D does as expected: he becomes enraged and viciously beats V on the court. In this scenario, X is the factual cause of V's injuries: but for X's scoring the game-winning basket, D would not have gone on to assault V. Under these circumstances, D's violent response to X's game winning basket was entirely foreseeable. Although D's response was foreseeable, it would be unjust to hold X criminally liable the injuries to V. X's conduct, winning a basketball game, is not inherently wrongful, and X did not desire that V or anyone else suffer injuries.

[31] For example, consider a hypothetical where A intends to end a romantic relationship with B, and B says that as a result he will commit suicide. A does not want B to commit suicide, but is practically certain that he will do so. A ends the relationship, and as a result B commits suicide. Even though B's actions were reasonably foreseeable, it would be unjust to hold A criminally liable for causing B's death. A's conduct was not inherently wrongful, and A did not desire to cause the death of another. *Compare with, United States v. Hamilton*, 182 F. Supp. 548, 549 (D.D.C 1960) (The defendant severely beat the decedent, causing him to fall into a semi-comatose state. While in the hospital, the decedent pulled out his breathing tubes, which caused death by asphyxiation. The Court found the defendant guilty of manslaughter, despite the decedent's intervening act.)

[32] Intervening volitional conduct may include both acts and omissions of others. For example, if a driver speeds through an intersection and strikes a child, initially causing minor injury. If the child's parent does not seek medical care which causes the child's injury to become much more severe, the driver may argue that the parent's omission negates legal causation as to the degree of injury.

a normative judgment that depends on analysis of the totality of the facts of a given case, including the inherent wrongfulness of the actor's conduct, whether the actor desired the prohibited result to occur, and the amount of time between the initial conduct and the intervening act. Inherent wrongfulness of the conduct, desire to cause the prohibited result[33], and short passage of time[34] are not required in order to find legal causation. However, all else being equal, inherent wrongfulness of the conduct, desire to cause the result, and short passage of time between the initial act and intervening act weigh in favor of finding legal causation.

There is no precise formula for determining the point at which intervening influences becomes so great as to break the causal chain between a defendant's conduct and the prohibited result for which he or she is being prosecuted.[35] Rather, the legal causation standard enunciated in subsection (c) simply (and necessarily) calls for an "intuitive judgment"[36] that revolves around whether "although intervening occurrences may have contributed to [a result], the defendant can still, in all fairness, be held criminally responsible for [causing it]."[37]

Relation to Current District Law. Subsection (c) codifies, clarifies, and changes District law. While the D.C. Code does not address legal causation, the DCCA has adopted a standard to address issues of legal causation that focuses on reasonable foreseeability. The definition of legal cause in RCC § 22E-204(c) is intended to incorporate and refine this aspect of District law in a manner that makes it more accessible and coherent. At the same time, RCC § 22E-204(c) also potentially expands District law by clarifying that the volitional conduct of another actor is a relevant causal influence—independent of reasonable foreseeability—to be considered by the factfinder.

It is well established in the District that "a criminal defendant proximately causes, and thus can be held criminally accountable for, all harms that are reasonably foreseeable consequences of his or her actions."[38] Reasonable foreseeability is thus at the heart of legal causation under District law—a point reflected in the D.C. Criminal Jury Instructions on homicide which state that "A person causes the death of another person if . . . it was reasonably

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[33] This issue may be especially likely to arise with offenses that require recklessness or negligence as to causing the result element. For example, if a person fires several gunshots in a crowded theater, and in the ensuing panic a person is trampled and suffers injuries, legal causation may be appropriate if the actor was reckless, but did not desire to cause the injury.

[34] For example, if A seriously but non-fatally injures B, and B dies days later because B fails to fully comply with his physician's complex instructions, legal causation may be appropriate despite this passage of time between the initial injury and B's failure to follow the physician's instructions.

[35] *See, e.g., Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 n.13 (1982) ("[T]he principle of proximate cause is hardly a rigorous analytic tool."); LLOYD L. WEINREB, *Comment on Basis of Criminal Liability; Culpability; Causation: Chapter 3*, in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 144 (1970)) (noting the difficulty of reducing the requirement of legal causation to "readily understood rules").

[36] Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 439 (1988); *see, e.g., Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 351-52 (Andrews, J., dissenting) (defining legal causation in terms of "a rough sense of justice," wherein "the law arbitrarily declines to trace a series of events beyond a certain point"); Model Penal Code § 2.03 cmt. at 260 (one advantage of "putting the issue squarely to the jury's sense of justice is that it does not attempt to force a result which the jury may resist.").

[37] *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting).

[38] *Blaize*, 21 A.3d at 81 (quoting *McKinnon v. United States*, 550 A.2d 915, 918 (D.C. 1988)).

foreseeable that death or serious bodily injury could result from such conduct."[39] Notwithstanding the centrality of the phrase "reasonably foreseeable" in the District's law of causation, however, it is far from clear what it actually means.

District courts have made a wide range of statements on the nature of reasonable foreseeability. Relying on the requirement of reasonable foreseeability, for example, the DCCA has held that a defendant "may not be held liable for harm actually caused where the chain of events leading to the injury appears 'highly extraordinary in retrospect.'"[40] Reasonable foreseeability is also the basis of the DCCA's observation that "[a]n intervening cause will be considered a superseding legal cause that exonerates the original actor if it was so unforeseeable that the actor's . . . conduct, though still a substantial causative factor, should not result in the actor's liability."[41]

The diversity and complexity of statements regarding the nature of reasonable foreseeability perhaps explains why at least some District judges have refrained from providing jurors with any further elaboration of the concept in their instructions—notwithstanding specific requests from jurors for further clarification.[42] This is unfortunate, however, given that these statements all revolve around a basic and intuitive moral question (which is reflected in the case law): can the defendant, given all of the "intervening occurrences [that] may have contributed to" producing the result for which he or she is being prosecuted, "in all fairness[] be held criminally responsible" for that result?[43]

Paragraph (c)(1) is intended to give voice to this principle by codifying the requirement of reasonable foreseeability in terms of whether the manner in which a result occurs is, in fact, reasonably foreseeable. Thereafter, the explanatory note provides further clarity on this inquiry by highlighting that "the focus here is on the extent to which a given result can be attributed to intervening forces—whether human or natural—of a remote or accidental nature," while providing numerous illustrative examples of how such considerations operate in practice. Viewed collectively, these provisions articulate the unnecessarily legalistic and complicated DCCA case law on reasonable foreseeability in a more accessible and transparent way.

Paragraph (c)(2) addresses a different problem reflected in the District approach to legal causation: the failure of reasonable foreseeability to account for the independent causal significance of the volitional conduct of another. The following scenario is illustrative:

Basketball Rivals. X and D have been in a longstanding competitive basketball rivalry, marked by regular bouts of violence by D perpetrated against his teammates after his losses. Nearing the final few seconds of a championship game, and down by one point, X is about to shoot the game winning shot against D after a game marked by many missteps by X's teammate V, at which point X realizes that D will almost certainly (and in fact appears to be preparing to) assault V once the loss is formalized. Nevertheless, D decides to disregard this risk and score the final two points necessary for the win. Immediately thereafter, D does as expected: he becomes enraged and viciously beats V on the court.

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[39] D.C. Crim. Jur. Instr. § 4.230.
[40] *Blaize*, 21 A.3d at 83; *Majeska v. District of Columbia*, 812 A.2d 948, 951 (D.C.2002) (citing *Morgan v. District of Columbia*, 468 A.2d 1306, 1318 (D.C.1983) (en banc)).
[41] *Butts*, 822 A.2d at 418 (citing Restatement (Second) of Torts § 440 (1965)).
[42] *Blaize*, 21 A.3d at 84.
[43] *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting); *see, e.g.*, *McKinnon*, 550 A.2d at 917.

In this scenario, X is the factual cause of V's injuries: but for X's scoring the game-winning basket, D would not have gone on to assault V. But is X the legal cause of V's injuries? Intuitively, it would seem that the answer to this question should be "no" given that D freely chose to assault, while X did not in any way desire D to engage in such conduct—rather, D merely desired to win the game. Thus, after accounting for all of the "intervening occurrences [that] may have contributed to" producing V's injury—namely, D's volitional conduct—it cannot be said that "in all fairness" X should "be held criminally responsible" for V's injuries.[44] And yet, under a strict reasonable foreseeability approach it would appear that X *must* be deemed the legal cause of V's injury since D's intervening conduct was in no way a surprise—indeed, D's intervening conduct was specifically foreseen by X.

District law and practice does recognize that potentially foreseeable intervening acts may nonetheless negate legal causation. The District's criminal jury instructions, specifying when medical treatment constitutes an intervening cause state: "[A]s a matter of law, grossly negligent medical treatment is not reasonably foreseeable if it is the sole cause of death . . . ."[45] This rule, which effectively allows for grossly negligent medical treatment to break the chain of legal causation, is sensible. For example, where X inflicts a minor injury on V, only to have medical professional D give V a fatal dose of a sedative mislabeled by D as Tylenol, it's intuitive that D's gross negligence would break the chain of legal causation. But here again, the rule is not necessarily contingent upon considerations of foreseeability.[46] For the outcome would appear to be the same even if the assault took place in a small town with a single hospital with a known penchant for grossly negligent medical care.[47]

One additional aspect of District law that weighs in favor of viewing the volitional conduct of another as a distinct consideration independent of reasonable foreseeability is the law of accomplice liability. The law of accomplice liability, both inside and outside the District, constitutes the primary method for holding one actor responsible for the criminal conduct of another.[48] Yet in order to attribute criminal responsibility in this way, a mere showing of reasonable foreseeability *will not suffice*.[49] Instead, the would-be accomplice must act with a "purposive attitude towards" the other person's/principal's criminal conduct.[50] So, for example, where X sells D a baseball bat, believing that D will subsequently use it to assault V, X cannot be held criminally liable for D's conduct as an accomplice.[51] True, D's conduct may have been

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[44] *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting).

[45] D.C. Crim. Jur. Instr. § 4.230.

[46] *See also* LAFAVE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.4(f)(4) (noting that "there may well be instances . . . in which the refusal [of medical treatment] is so extremely foolish as to be abnormal," and that "voluntary harm-doing usually suffices to break the chain of legal cause").

[47] *Id.*

[48] *See generally* Commentary on RCC § 22E-210: Accomplice Liability.

[49] *Wilson-Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006) (*en banc*) ("We therefore conclude that it serves neither the ends of justice nor the purposes of the criminal law to permit an accomplice to be convicted under a reasonable foreseeability standard when a principal must be shown to have specifically intended the decedent's death and to have acted with premeditation and deliberation, and when such intent, premeditation, and deliberation are elements of the offense.").

[50] *Id.* at 831.

[51] *Id.* ("To establish a defendant's criminal liability as an aider and abettor, [] the government must prove . . . that the accomplice . . . *wished to bring about* [the criminal venture] . . . . "); *see, e.g., Robinson v. United States*, 100 A.3d 95, 106 (D.C. 2014); *Gray v. United States*, 79 A.3d 326, 338 (D.C. 2013); *Joya v. United States*, 53 A.3d 309, 314 (D.C. 2012); *Ewing v. United States*, 36 A.3d 839, 846 (D.C. 2012).

foreseen by X (and was surely reasonably foreseeable under the circumstances). Nevertheless, absent proof that X "designedly encouraged or facilitated"[52] D's subsequent assault of V, the law of accomplice liability will not support the attribution of criminal responsibility.

This stringent approach to dealing with the attribution of criminal responsibility is founded upon the general belief that "the way in which a person's acts produce results in the physical world is significantly different from the way in which a person's acts produce results that take the form of the volitional actions of others."[53] As such, it would be inappropriate to view criminal responsibility for the volitional actions of others as solely being a matter of reasonable foreseeability. Conceptually, this would reduce the culpable choices of others to mere "caused happenings," rather than the independently blameworthy subjects of prosecution that the criminal law assumes them to be.[54] And as a matter of practice, it would effectively negate—by rendering superfluous—the District's well-established principles of accomplice liability.[55]

Paragraph (c)(2) is intended to give voice to the above considerations by stating that—in addition to assessing reasonable foreseeability—"when the result depends on another person's volitional conduct," the fact finder must consider whether the "actor is justly held responsible for the result." Thereafter, the explanatory note provides further clarity on this inquiry by noting that whether a person may be justly responsible requires an analysis of all facts of a given case, including the inherent wrongfulness of the actor's conduct, whether the actor desired a prohibited result to occur, and the passage of time between the initial conduct and the intervening act, while providing numerous illustrative examples of how such considerations operate in practice.

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[52] *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)); *Evans v. United States*, 160 A.3d 1155, 1161 (D.C. 2017); *see also English v. United States*, 25 A.3d 46, 53 (D.C. 2011) ("The key question is whether, drawing all reasonable inferences in the prosecution's favor, an impartial jury could fairly find beyond a reasonable doubt that Anderson intentionally participated in English's reckless flight from the pursuing officer, and that he not only wanted English (and his passengers) to succeed in eluding the police (which Anderson undoubtedly did), but that he also took concrete action to make his hope a reality.").

[53] Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 327, 369-70 (1985) (other people's criminal conduct are not typically viewed "as caused happenings, but as the product of the actor's self-determined choices, so that it is the actor who is the cause of what he does, not [the individual] who set the stage for his action."); *see, e.g.,* H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 326 (2d ed. 1985) ("The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."); JOHN KAPLAN ET AL., CRIMINAL LAW 261 (6th ed. 2008) ("Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions.").

[54] Kadish, *supra* note 51, at 391.

[55] As the DCCA has observed:

> A rule imposing criminal liability upon an accomplice for foreseeable consequences, without proof that the accomplice intended those consequences (while, by contrast, a principal must be shown to have the proscribed intent), is also contrary to the underlying purpose of aiding and abetting statutes, which is to "abolish the distinction between principals and accessories and [render] them all principals."

Wilson-Bey, 903 A.2d at 837 (quoting *Standefer v. United States*, 447 U.S. 10, 19, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980)).

Viewed collectively, these provisions expand the District approach to legal causation in a manner that better coheres with District law as a whole.

These provisions clarify operative causal principles governing second-degree murder.[56] Specifically, the District law governing homicides arising from gun battles dictates that where X and D culpably shoot at one another, and D subsequently hits either an innocent bystander or another culpable participant, that X may be held criminally responsible for D's conduct if "it was reasonably foreseeable that death or serious bodily injury could result."[57] In *Fleming v. United States,* DCCA held that "the intervening actions of a third party do not by themselves defeat proximate cause if those actions were reasonably foreseeable to the defendant,"[58] rejecting the argument raised by appellant that an intervening volitional act categorically negates legal causation. However, the DCCA did not hold that reasonable foreseeability is the *only* relevant consideration in determining whether an actor legally caused a prohibited result. The Court specifically declined to decide whether a significant passage of time between the initial actor's conduct and the intervening act of another can negate legal causation, even when the intervening act is reasonably foreseeable.[59] The Court provided a model instruction to guide juries' decision making in accordance with the principles set forth in *Fleming.* However, the Court noted that the model instruction is only to be used in second-degree murder cases, and that the instruction "leaves open whether causation operates differently under [the] felony-murder statute."[60] The model instruction includes bracketed language suggesting that the passage of time may negate legal causation, but "does not attempt to provide any concrete guidance about that issue, because the issue was not raised in this case."[61] Although holding that an actor may be held liable for results caused by the intervening volitional act of another, the Court recognized that in a variety of situations, intervening acts may negate legal causation even when they are reasonably foreseeable. However, the DCCA did not specify when reasonably foreseeable intervening acts negate causation, or which factors are relevant in making this determination.

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[56] *Compare Roy v. United States*, 871 A.2d 498, 502 (D.C. 2005) (upholding jury instruction that permitted the jury to find that the defendant, by engaging in a gun battle in a public space, was responsible for causing the death of an innocent bystander killed by a stray bullet even if it was not the defendant who fired the fatal round, provided that the death was reasonably foreseeable), *with Fleming v. United States*, 148 A.3d 1175, 1177 (D.C. 2016) (Easterly, J., dissenting) ("[E]ven assuming arming oneself with a gun and firing it could satisfy the direct causation requirement, the volitional, felonious act of someone else then shooting and killing the decedent is an 'intervening cause' that breaks this chain of criminal causation.").
The DCCA noted in *Fleming* that "[t]he causation principles we have discussed in this case are generally applicable in second-degree-murder cases, not special principles applicable in some distinctive way to gun battles." *Fleming v. United States*, No. 14-CF-1074, 2020 WL 488651, at *9 (D.C. Jan. 30, 2020).

[57] D.C. Crim. Jur. Instr. § 4.230; *see, e.g.*, *Roy v. United States*, 871 A.2d 498, 508 (D.C. 2005); *Bryant v. United States*, 148 A.3d 689, 2016 WL 6543533 (D.C. 2016); *McCray v. United States*, 133 A.3d 205 (D.C. 2016); *Blaize v. United States*, 21 A.3d 78 (D.C. 2011); *Blaine v. United States*, 18 A.3d 766 (D.C. 2011).

[58] *Fleming v. United States*, No. 14-CF-1074, 2020 WL 488651, at *7 (D.C. Jan. 30, 2020) (en banc).

[59] The DCCA provided a model jury instruction which addresses "the issue of temporal attenuation," but "does not attempt to provide any concrete guidance about that issue, because the issue was not raised in this case." *Fleming v. United States*, No. 14-CF-1074, 2020 WL 488651, at *9 (D.C. Jan. 30, 2020). This suggests that legal causation may be negated even when an intervening act is reasonably foreseeable if too much time passes between an actor's initial conduct and the intervening act. Notably, at oral argument, "the United States took the position that a person who started a deadly feud between two groups might not properly be held criminally responsible for reasonably foreseeable killings that took place years or even a day after the person's initial conduct." *Id.* at 6.

[60] *Fleming v. United States*, No. 14-CF-1074, 2020 WL 488651, at *9 (D.C. Jan. 30, 2020) (en banc).

[61] *Id.* at 9.

In contrast, the RCC clarifies that although an intervening volitional act does not *necessarily* negate legal causation, it will in cases where it would be unjust to hold the actor responsible for the act of another. The commentary further clarifies that the determination of whether it is just to hold an actor liable for the acts of another depends on analysis of the totality of facts of a given case, and identifies three particularly relevant factors.