



**D.C. Criminal Code Reform Commission**  
441 Fourth Street, NW, Suite 1C001S, Washington, D.C. 20001  
(202) 442-8715 [www.ccrc.dc.gov](http://www.ccrc.dc.gov)

**ADVISORY GROUP MEMORANDUM #21**

**To:** Code Revision Advisory Group  
**From:** Criminal Code Reform Commission (CCRC)  
**Date:** March 12, 2019  
**Re:** Supplemental Materials to the First Draft of Report #35

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This Advisory Group Memorandum supplements the First Draft of Report #35, Cumulative Update to Sections 201-213 of the Revised Criminal Code (Report), with relevant background materials. The first set of background materials, placed in Appendix A, provide the CCRC staff's disposition of Advisory Group written comments, and other changes recommended by the CCRC staff on RCC §§ 201-213. The second set of background materials, placed in Appendix B, compile the relation to national legal trends entries previously produced by the CCRC staff in conjunction with prior drafts of the legislation addressed in the Report. The third set of background materials, placed in Appendix C, compile the original Advisory Group written comments, which are addressed by CCRC staff in Appendix A.

**APPENDIX A:**

**DISPOSITION OF ADVISORY GROUP WRITTEN COMMENTS  
& OTHER CHANGES FROM DRAFT DOCUMENTS**

**RCC § 22E-201. PROOF OF OFFENSE ELEMENTS BEYOND A REASONABLE DOUBT.**

(1) *PDS, App. C at 018, recommends revising RCC § 22E-201(a) to clarify that the burden of proof rests with the government, and to make more explicit the connection between the proof beyond a reasonable doubt requirement and a person’s liability for an offense.<sup>1</sup> PDS says these changes will “correct the too common misconception that mistake and accident are ‘defenses’ and will prevent the unconstitutional burden shifting that can result from such misconception.”*

- The RCC partially incorporates PDS’ recommendation by clarifying that the burden of proof rests with the government. The CCRC agrees that a defendant’s mistakes and accidents that prevent the defendant from forming the required culpable mental state are not general defenses, but a failure to prove an element. However, the RCC does not make more explicit the connection between the proof beyond a reasonable doubt requirement and a person’s liability for an offense as proposed by PDS. That point is already sufficiently clear and the proposed language may be confusing because proof of each element beyond a reasonable doubt does not create liability where the conditions giving rise to a general justification or excuse defense exist.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 004-005, recommends revising the definition of result element, which currently utilizes the undefined term “conduct.” OAG recommends replacing this term—which is not defined elsewhere in the RCC—with the phrase “act or omission.”*

- The RCC incorporates OAG’s recommendation by substituting “act or omission” for “conduct” in the definition of result element.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *PDS, App. C at 142, proposes amending the definition of “culpability requirement” to include premeditation and deliberation and any lack of mitigation. PDS says that, for offenses requiring any of these broader aspects of culpability, the requirements for accomplice liability would be lowered.*

- The RCC incorporates PDS’ point by revising the definition of “culpability requirement.” Specifically, RCC § 22E-201(d)(3) incorporates the phrase: “Any other aspect of culpability specifically required by an offense.” The explanatory note accompanying RCC § 22E-201(d)(3) then clarifies that this language refers to, among other possibilities, premeditation, deliberation, and the absence of mitigation.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends striking “causation requirement” from the definition of “culpability requirement.” This revision is recommended because the causation requirement is more precisely and accurately described as part of what must be proven in*

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<sup>1</sup> Specifically, PDS recommends the following language: “No person may be convicted of an offense *unless the government establishes the person’s liability by proving each offense element is proven* beyond a reasonable doubt.”

*order to hold someone liable for a completed result element offense. This is reflected in the fact that “result element” is defined in the RCC as “any consequence **caused** by a person’s act or omission **that is required** to establish liability for an offense.” This revision is also recommended because, while all inchoate crimes and accomplice liability require proof of the “culpability requirement” governing the target offense, proof that the result element of the target offense is consummated is clearly not necessary.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

*(5) The CCRC recommends adding an “other definitions” subsection, which highlights terms employed in one section of the general part that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

*(6) The CCRC recommends that the commentary incorporate a footnote highlighting that the same verb employed in an offense definition may constitute either a combined conduct/circumstance element or conduct/result element depending upon how the crime was committed in a given case. To illustrate, the footnote gives two examples involving a theft where the causal relation between the defendant’s act or omission and the prohibited social harm is mediated by another person or object.*

- This revision may change District law by clarifying the operation of element analysis in particularly complex situations. To the extent such a change would occur, however, it is unlikely to have substantive policy implications.
- This revision improves the clarity and consistency of the revised statutes.

## **RCC § 22E-202. CONDUCT REQUIREMENT.**

(1) *OAG, App. C at 005*, notes that the phrase “culpably unaware” utilized in the RCC definition of omission should have either a statutory definition or further explanation in the commentary.

- The RCC incorporates OAG’s recommendation by clarifying through commentary that: “[a] person is ‘culpably unaware’ of a legal duty when a reasonable person in the actor’s situation would have been aware of the legal duty.” This definition of “culpably unaware” is based on *Conley v. United States*,<sup>2</sup> where the DCCA interpreted the U.S. Supreme Court’s decision in *Lambert v. California*<sup>3</sup> to stand for the proposition that “it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if *he had no reason to believe* he had a legal duty to act, or even that his failure to act was blameworthy.”<sup>4</sup>
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 005-006*, notes that the RCC definition of possession does not appear recognize or address that a person may be culpable for possession even in less time than it would take to dispose of the object possessed, such as, for example, when a heroin purchaser is arrested a “split-second” after an undercover drug sale operation.

- The RCC addresses OAG’s comment by providing a new definition of “possession” in RCC § 22E-801 and separate defenses addressing momentary possession in RCC [Reserved]. The new definition does not raise a question about the duration of a person’s possession, but the commentary clarifies that momentary possession as described by OAG would meet the definition of possession. The commentary gives the following example: “For example, a person who knowingly purchases a brick of heroin for purposes of distribution and is immediately arrested by an undercover officer has ‘possessed’ the heroin, notwithstanding the fact that the buyer’s physical control lasted for a fraction of a second.”
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *USAO, App. C at 0001*, notes that the RCC definition of possession would transform the fleeting possession affirmative defense to possession liability under current law and make it an affirmative element of all possession offenses. *USAO* does not recommend any changes but says this change should be discussed by the Advisory Group.

- The RCC addresses USAO’s comment by providing a new definition of “possession” in RCC § 22E-801 and separate defenses addressing momentary possession in RCC [Reserved]. The RCC conduct requirement no longer imposes a temporal requirement regarding possession. USAO’s point also was discussed by the Advisory Group.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

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<sup>2</sup> 79 A.3d 270, 273 (D.C. 2013).

<sup>3</sup> 355 U.S. 225 (1957).

<sup>4</sup> *Conley*, 79 A.3d at 273.

(4) *The CCRC recommends that the RCC remove the legal principles concerning when “a legal duty to act exists” from the definition of omission, and place them in their own subsection (d), entitled “Existence of Legal Duty.”*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends that the RCC add an “other definitions” subsection, which highlights terms employed in one section of the RCC that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(6) *The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-202 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on the conduct requirement.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

## **RCC § 22E-203. VOLUNTARINESS REQUIREMENT.**

(1) *OAG, App. C at 006, recommends that the RCC commentary on voluntariness address when an act that is not “the product of conscious effort or determination” can nevertheless be treated as having been “subject to the person’s control.” Specifically, OAG requests clarity as to whether there must be some threshold level of risk awareness at one point in time concerning the likelihood that involuntary conduct would occur at a second/future point in time in order for the conduct at the second/future point in time to be considered “subject to the person’s control.”*<sup>5</sup>

- The RCC incorporates OAG’s recommendation by stating in the commentary that there is no threshold level of risk awareness at the first point in time (as hypothesized by OAG) for purposes of RCC § 22E-203 but that—in situations of both act and omission liability—the person’s level of awareness at that first point in time must at the very least be sufficient to meet the culpability requirement governing the charged offense. The RCC commentary offers detailed examples in support of this clarification.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends reorganizing subsection (b), Scope of Voluntariness Requirement, to better reflect legislative drafting employed throughout the RCC.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends adding a “definitions” subsection, which highlights terms employed in one section of the general part that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends reorganizing the commentary on subsection (b), Scope of Voluntariness Requirement, to better reflect legislative drafting employed throughout the RCC.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-203 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on the voluntariness requirement.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

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<sup>5</sup> As OAG illustrates: “Suppose,” for example, that “a person knows that there is a .05% (or .005%) chance that he or she will experience an epileptic seizure if they don’t take their medication, but drives that way anyway. If a crash occurs, will driving the vehicle have been enough to trigger the ‘otherwise subject to the person’s control’ prong of voluntariness or is it too remote?”

## RCC § 22E-204. CAUSATION REQUIREMENT.

(1) USAO, App. C at 001-002, states that the “Advisory Group should consider the ‘factual cause’ definition in light of gun-battle liability, which is predicated upon ‘substantial factor’ causation.” USAO says that replacing the “substantial factor” test with the standard but-for inquiry “would . . . appear to eliminate the basis for urban gun-battle causation as a theory of factual causation” given that, under DCCA case law, “factual cause includes situations where the defendant’s actions were a ‘substantial factor’ in bringing about the harm.”<sup>6</sup> USAO does not recommend any changes, and notes that the DCCA is now reviewing its case law concerning the use of a substantial factor test for homicide liability.

- The RCC addresses USAO’s comment by providing additional clarity on the relationship between factual causation and gun battle liability through Commentary. First, the Explanatory Note accompanying RCC § 22E-204(b)(1) states that “if D initiates a gun battle with X, and X thereafter returns fire but mistakenly hits a nearby bystander, V, D will still be deemed 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.” Second, the Explanatory Note accompanying RCC § 22E-204(b)(2) states that “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).” As these examples illustrate, abandoning a substantial factor test would not “eliminate the basis for urban gun-battle causation as a theory of factual causation.” While it’s true that in urban gun battle cases—like all other prosecutions involving issues of causation—the DCCA recites the “substantial factor” test in its formulation of the governing principles, standard principles of factual causation will often suffice for liability.<sup>7</sup>

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<sup>6</sup> Specifically, USAO says:

The D.C. Court of Appeals has stated that “[i]n this jurisdiction[,] we have held findings of homicide liability permissible where: (1) a defendant’s actions contribute substantially to or are a substantial factor in a fatal injury . . . and (2) the death is a reasonably foreseeable consequence of the defendant’s actions.” *Fleming v. United States*, 148 A.3d 1175, 1180 (D.C. 2016) (quoting *Roy v. United States*, 871 A.2d 498 (D.C. 2005) (petition for rehearing en banc pending))

App. C at 002.

<sup>7</sup> See, e.g., *Phillips v. Com*, 17 S.W.3d 870, 874 (Ky. 2000) (upholding homicide conviction of a defendant who participated in an urban 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.”).



- This revision does not further change current District law,<sup>8</sup> and it improves the clarity of the revised statutes.

(2) OAG, App. C at 007, notes that factual causation in omission cases “may be more difficult for people to understand” than where liability rests on an act.<sup>9</sup> OAG recommends the CCRC accordingly “review whether there needs to be a third definition of ‘factual cause’ that addresses acts of omission or whether merely an explanation and example in the Commentary about how to apply factual causation in cases of omission is sufficient.”

- The RCC addresses OAG’s recommendation by incorporating an analysis of factual causation in omission cases accompanied by illustrative examples in the Commentary’s Explanatory Note to RCC § 22E-204(b). A third definition of factual cause to address factual causation in omission cases, which are relatively rare, may be unnecessarily confusing.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) USAO, App. C at 002, recommends deleting the phrase “or otherwise dependent upon an intervening force or act” from the definition of legal cause while making conforming revisions to other aspects of the Commentary. USAO says that: “An intervening force or act does not negate legal causation if that intervening force or act is reasonably foreseeable.”

- The RCC does not incorporate USAO’s recommendation because it is unclear under current District law whether an intervening force or act can negate legal causation even if that intervening force or act is reasonably foreseeable,<sup>10</sup> and, as USAO has noted, the DCCA is currently reviewing its

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<sup>8</sup> That is, separate and apart from the RCC’s general potential expansion of legal causation, which is addressed in the Relation to Current District Law entry on RCC § 22E-204(b). See pg. 4, n.23 (“In contrast [to the District’s current approach to factual causation in urban gun battle liability cases], 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 an 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.”).

<sup>9</sup> OAG offers the following illustrative hypothetical:

A father takes his toddler to the pool. He sees the child crawl to the deep end of the pool and fall in. The father sits there, doesn’t move, and watches the child drown. In this situation it is awkward to think about the father’s lack of movement as “performing” conduct, as opposed to doing nothing.

*Id.*

<sup>10</sup> 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.”); see RCC § 204(c): Relation to District Law, pg. 8 (noting that the DCCA has held that where the intervening cause “is the victim’s own response to the circumstances that the defendant created, the victim’s reaction must be an abnormal one in order to supersede the defendant’s act,” even though an abnormal response is not necessarily unforeseeable.)

test regarding legal causation.<sup>11</sup> However, the RCC definition of legal causation has been revised to more clearly address the kinds of reasonably foreseeable intervening forces or acts that can negate legal causation. Specifically, the relevant inquiry under the revised version of RCC § 22E-204(c) now emphasizes whether a result is “too dependent upon another’s volitional act to have a just bearing on the person’s liability.” Thereafter, the Commentary’s accompanying 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 the free, deliberate, and informed actions of a third party or the victim,” while providing illustrative examples of how such considerations operate in practice.

- This revision does not further change current District law,<sup>12</sup> and it improves the clarity of the revised statutes.

(4) *The CCRC recommends that the RCC definitions of factual and legal causation be rephrased in terms of the conditions in which a person’s conduct is the factual or legal cause of a result (in contrast to what factual or legal cause “means”).*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends that the two components of the RCC definition of legal causation—foreseeability and the volitional conduct of another—be described as considerations that should be evaluated together (i.e., “and”) rather than in the alternative (i.e., “or”). This revision reflects the fact that both components may be relevant to evaluation of legal causation in a single case.*

- This revision does not change current District law,<sup>13</sup> and it improves the clarity and consistency of the revised statutes.

(6) *The CCRC recommends that the second component of the RCC definition of legal causation be described as the “volitional conduct of another” rather than the “volitional act of another.” This revision reflects the fact that another person’s volitional act or omission<sup>14</sup> may be relevant to evaluation of legal causation in a given case.*

- This revision does not change current District law,<sup>15</sup> and it improves the clarity and consistency of the revised statutes.

(7) *The CCRC recommends adding examples to the Explanatory Notes accompanying the RCC definitions of factual and legal cause to better illustrate the underlying legal principles set forth in RCC §§ 22E-204(b) and (c).*

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<sup>11</sup> *Fleming v. United States*, 164 A.3d 72 (D.C. 2017) (granting *en banc* rehearing of *Fleming v. United States*, 148 A.3d 1175, 1177 (D.C. 2016))

<sup>12</sup> That is, separate and apart from the RCC’s general potential expansion of causation analysis, which is addressed in the Commentary. See RCC § 22E-204(c): Relation to Current District Law, pg. 6 (“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.”).

<sup>13</sup> That is, separate and apart from the RCC’s general potential expansion of legal causation, which is addressed in the Commentary. See generally RCC § 22E-204(c): Relation to Current District Law.

<sup>14</sup> For example, where D inflicts a minor injury on V, a child, and thereafter V’s parent, P, fails to get V medical treatment, which leads V to incur a fatal infection, P’s omission to provide care to V would be relevant to assessing legal causation.

<sup>15</sup> That is, separate and apart from the RCC’s general potential expansion of legal causation, which is addressed in the Relation to Current District Law entry on RCC § 22E-204(c).

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

*(8) The CCRC recommends deleting the legal causation factors from the Commentary’s Explanatory Note accompanying RCC § 22E-204(c). The factors may complicate the legal causation analysis under RCC § 22E-204(c) and be too complex for juries to apply. Furthermore, given the revisions to the statutory text of, and Explanatory Note accompanying, RCC § 22E-204(c), noted above, the legal causation factors are no longer necessary.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

*(9) The CCRC recommends adding an “other definitions” subsection, which highlights terms employed in one section of the general part that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

*(10) The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-203 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on the causation requirement.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

## **RCC § 22E-205. CULPABLE MENTAL STATE REQUIREMENT.**

(1) *USAO, App. C at 003, offers a general observation on the Commentary discussion of the mens rea of simple assault in the District provided in the Relation to District Law section. Specifically, USAO points out that the DCCA’s 2013 decision in Vines v. United States, 70 A.3d 1170, 1180 (D.C. 2013), as amended (Sept. 19, 2013), establishes that “reckless[ness] as to a result” will suffice to establish the mens rea of simple assault. USAO’s comment does not recommend any specific changes.*

- The RCC addresses USAO’s comment by clarifying in the Commentary that the *Vines* court went out of its way to *avoid* resolving the culpable mental state of simple assault in that decision.<sup>16</sup> In contrast, the definition of simple assault in the RCC (i.e., fifth degree assault<sup>17</sup>) incorporates the culpable mental state of recklessness as to a result.

(2) *The CCRC recommends revising RCC § 22E-205(a) to require proof that the person acts with a culpable mental state as to every “result element” and “circumstance element” required by that offense. This clarifies that the culpable mental state requirement applies to the objective elements of an offense, as defined in RCC § 22E-201.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends revising the definition of “culpable mental state” in RCC § 22E-205(b), as well as accompanying commentary, to clarify that “[t]he object of the phrases ‘with intent to’ and ‘with the purpose of’” constitutes part of a “culpable mental state.” This non-substantive statutory revision, along with relevant additions to the Commentary’s Explanatory Note, more clearly communicate what a culpable mental state is for purposes of drafting, reading, and interpreting criminal statutes. It should also help to avoid confusion surrounding the nature of the culpable mental state requirement applicable to inchoate crimes.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends revising the definition of “strictly liable” and “strict liability,” which currently reads “liability in the absence of purpose, knowledge, recklessness, or negligence, as defined in § 22A-206, or any comparable mental state specified in this Title,” with the following simpler and more accessible definition:*

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<sup>16</sup> The defendant in *Vines* argued that prior simple assault case law “require[s] the government to prove that he had either: (a) the specific intent to cause bodily harm; or (b) the specific intent to place his victim in reasonable apprehension of bodily harm in order to sustain a conviction.” *Vines v. United States*, 70 A.3d 1170, 1179-80 (D.C. 2013), *as amended* (Sept. 19, 2013). In response, the DCCA noted that it “need not address the correctness of *Vines*’ understanding of our case law to resolve this appeal,” and that “[e]ven assuming *Vines* is correct, a reasonable juror could have inferred the intent to cause bodily harm from his extremely reckless conduct, which was almost certain to cause bodily injury to another . . . .” *Id.* (italics added); *see id.* (“We need not decide whether it was necessary for the government to show that *Vines* possessed the intent to injure May and Garrett or only the intent to commit the acts constituting the assault. Even if the greater proof was necessary, the jury could permissibly infer such intent from *Vines*’ extremely reckless conduct, which posed a high risk of injury to those around him.”) (italics added).

<sup>17</sup> *See* RCC § 22E-202(f) (“A person commits the offense of fifth degree assault when that person *recklessly causes bodily injury to, or uses physical force that overpowers, another person.*”) (italics added).

*“liability as to a result element or circumstance element in the absence of a culpable mental state.”*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

*(5) The CCRC recommends adding an “other definitions” subsection, which highlights terms employed in one section of the general part that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

*(6) The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-205 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on element analysis.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

*(7) The CCRC recommends expanding the Commentary’s Relation to Current District Law section accompanying RCC § 22E-205 to incorporate additional authority—including the DCCA’s en banc decision in Carrell and state case law—on element analysis.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

## **RCC § 22E-206. DEFINITIONS AND HIERARCHY OF CULPABLE MENTAL STATES.**

(1) *OAG, App. C at 008, recommends revising the definitions of recklessness and negligence to accord with the following drafting principle: “A tenant of a well written definition for use in a Code provision is that, niceties of grammar aside, the definition should be able to be substituted for the defined term in the substantive offense and the sentence should retain its meaning.”*

- The RCC partially incorporates OAG’s recommendation by revising the definitions of recklessness and negligence to avoid substitution problems altogether. Specifically, whereas the prior version of these definitions employed the phrases “‘recklessly’ means” and “‘negligently’ means,” the revised versions of these definitions now utilize the phrases “[a] person acts recklessly . . . when” and “[a] person acts negligently . . . when.” The latter phrases do not indicate that the RCC definitions of recklessness and negligence are intended to be susceptible to substitution without grammatical alteration.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 009, recommends two related revisions to the gross deviation prong of the RCC definitions of recklessness and negligence.<sup>18</sup> First, OAG points out that the accompanying “Commentary elucidates a precise three-factor test to determine whether something is a ‘gross deviation’ but does not actually incorporate that test into the codified text.” Accordingly, “[t]he Commission should consider whether a legal standard of that nature should be codified.” Second, OAG notes that the Commentary describes this three-factor test as “discretionary,” which is confusing and potentially problematic under the circumstances. As a result, OAG recommends that “[i]f this definition is to remain, the comment should be expanded to explain which part of [the relevant statutory language] the Commission believes is discretionary or otherwise explain this point.”*

- The RCC incorporates OAG’s recommendation by substantially revising the statutory text of the second prong of the recklessness and negligence definitions, as well as the accompanying commentary. The relevant revisions and their underlying rationales are as follows.
- The gross deviation standard incorporated into the prior draft RCC statutory text of the second prong of the recklessness and negligence definitions has been replaced by a clear blameworthiness standard, which is codified alongside a statutory specification of the factors that are central to resolving it. For example, the second prong of the new version of the RCC definition of recklessness now reads: “The risk is of such a nature and degree that, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the person’s conscious disregard of it is clearly blameworthy.” Likewise, the second prong of the new version of the RCC definition of negligence requires a nearly

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<sup>18</sup> OAG’s comment only explicitly references the RCC definition of recklessness; however, the broad manner in which the comment is phrased suggests that OAG is also referring to the RCC definition of negligence. In any event, given that the issues raised by OAG’s comment are equally applicable to the RCC definitions of both recklessness and negligence, the CCRC staff’s response addresses them in the context of both culpable mental states.

identical inquiry.<sup>19</sup> In Commentary, the Explanatory Notes accompanying the RCC definitions of recklessness and negligence have been expanded and revised to explain and illustrate, in significant detail, the intended meaning and operation of this clear blameworthiness standard.<sup>20</sup> These revisions both accord with, and improve upon, the second prong of the widely adopted Model Penal Code definitions of recklessness and negligence,<sup>21</sup> which are comprised of a very similar multi-factor test.<sup>22</sup> The primary difference between the new second prong of the RCC definitions, on the one hand, and Model Penal Code approach (as well as the prior version of the RCC definitions), on the other hand, is that the animating principle is now one of clear blameworthiness instead of a gross deviation from a reasonable standard of care. This new standard is simpler, more accessible, and better articulates the operative principle of culpability that the drafters of the Model Penal Code themselves—and CCRC staff, in recommending codification of the gross deviation standard in prior drafts—intended to codify.<sup>23</sup>

- These revisions do not further change District law, and they improve the clarity and consistency of the revised statute.

*(3) OAG, App. C at 009 and 091, recommends three related revisions to the treatment of enhanced recklessness in the RCC. First, OAG recommends separately defining and codifying the culpable mental state of enhanced recklessness—whereas it is currently defined and codified in the context of the RCC definition of recklessness, RCC § 22E-*

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<sup>19</sup> See RCC § 22E-206(e)(1)(B): (“The risk is of such a nature and degree that, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the person’s failure to perceive it is clearly blameworthy.”)

<sup>20</sup> These revised Explanatory Notes also omit the prior confusing reference to the “discretionary” nature of the second prong of these definitions, highlighted in OAG’s comment, as superfluous.

<sup>21</sup> See, e.g., *United States v. Dominguez-Ochoa*, 386 F.3d 639, 646 (5th Cir. 2004) (“At least 24 state statutes follow the Model Penal Code’s definitions of recklessness and negligence.”).

<sup>22</sup> For example, the second prong of Model Penal Code definition of recklessness requires that: “The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” Model Penal Code § 2.02(c). The second prong of the Model Penal Code definition of negligence requires a nearly identical inquiry. See Model Penal Code § 2.02(d) (“The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of the person’s conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”).

<sup>23</sup> See, e.g., Model Penal Code § 2.02 cmt. at 237 (“Some standard is needed for determining how substantial and how unjustifiable the risk must be in order to warrant a finding of culpability. There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor’s conduct and determine whether it should be condemned. The Code proposes, therefore, that this difficulty be accepted frankly . . . .”); *id.* at n.14 (“The original draft of the standard, as published in Tentative Draft No.4, asked whether disregard of the risk ‘involved culpability of a high degree.’ [However, an] alternative was selected because of the difficulty inherent in defining culpability in terms of culpability, though in some respects the accomplishment is hardly more than verbal; it does not beg the crucial question any less.”); *id.* at 238 (“Second, the jury is to make the culpability judgment in terms of whether the defendant’s conscious disregard of the risk justifies condemnation.”); *id.* at 241 (for negligence, “[t]he tribunal must evaluate the actor’s failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned . . . . [As with recklessness, the jury] must make the culpability judgment, this time in terms of whether the failure of the defendant to perceive the risk justifies condemnation.”).

206(d). *Second, OAG recommends clarifying the role of enhanced recklessness in RCC § 22E-206(f), which addresses the hierarchical relationship of culpable mental states. And third, OAG recommends clarifying the distinction between recklessness and extreme recklessness through additional explanation and/or examples in the Commentary.*

- The RCC partially incorporates OAG’s recommendations. Because enhanced recklessness only applies to the RCC murder and assault statutes, it would unnecessarily complicate the RCC hierarchy to add a sixth tier/new culpable mental state applicable to all offenses. Moreover, given that enhanced recklessness is simply an aggravated form of recklessness, it could also be misleading to separately codify enhanced recklessness as a sixth tier/new culpable mental state under RCC § 22E-206. Nevertheless, the CCRC recognizes that the current reference to enhanced recklessness in the context of the RCC definition of recklessness may be unnecessarily confusing, and further illustration of the difference between recklessness and extreme recklessness in the Commentary would be beneficial. Consequently, all references to enhanced recklessness have been omitted from the revised version of RCC § 22E-206. The only statutory references to enhanced recklessness are now in the offense definitions for murder and assault. In light of this change, discussion of enhanced recklessness in the RCC Commentary has been moved to the sections on murder and assault, with illustrative examples of the difference between recklessness and extreme recklessness.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *OAG, App. C at 009-010, recommends clarifying whether an actor must be aware of a risk’s substantiality (as opposed to the mere existence of the risk, without regard to its substantiality) in order to satisfy the first prong of the RCC definition of recklessness.*<sup>24</sup>

- The RCC addresses OAG’s comment by revising the RCC definition of recklessness to read “consciously disregards a substantial risk” (instead of being “aware of a substantial risk”). The Commentary’s Explanatory Note also incorporates two new footnotes, which explicitly establish that recklessness entails proof of awareness as to a risk’s substantiality.<sup>25</sup>

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<sup>24</sup> OAG points out that while the Commentary suggests that awareness as to substantiality is required, the statutory language “is not altogether clear in that respect.” Specifically:

Being aware of a substantial risk doesn’t necessarily mean being aware that the risk is substantial – the very same kind of ambiguity that inspired element analysis to begin with. Take the following hypothetical. Suppose a person drives down a little used street at 150 miles an hour at 3:00 am. In order to be considered reckless, does the person have to be aware that there is a substantial risk that he will hit and kill someone or that if he hits someone they will be killed.

<sup>25</sup> Specifically, the Explanatory Note on RCC § 22E-206(d)(1)(A) incorporate a footnote that reads:

For example, if X speeds through a red light *aware that it is substantially possible* that X will fatally hit V, a pedestrian stepping into the crosswalk, X acts “recklessly” with respect to causing the death of V (provided that X’s conscious disregard of the risk is also clearly blameworthy, see *infra* notes\_\_ and accompanying text). As the italicized language in this example illustrates, the RCC definition of recklessness as to a result requires proof that that defendant subjectively perceived *both the risk and its substantiality*.



- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) OAG, App. C at 027, recommends replacing the phrase “one’s conduct” with the phrase “his or her conduct” in the RCC definitions of *purposely*, *knowingly*, and *intentionally* so that there is “no question that it is the same person whose mental state and conduct is being considered.”

- The RCC partially incorporates OAG’s recommendation by removing reference to “one’s conduct” in the relevant RCC culpable mental state definitions. The RCC does not use the phrase “his or her conduct” because doing so would be inconsistent with other RCC statutes. In some situations (e.g., accomplice liability), the defendant’s mental state does, in fact, need to relate to another person’s conduct (e.g., the principal actor) in contrast to his or her own conduct. Therefore, to avoid any confusion, the relevant RCC culpable mental state definitions have been revised to simply reference “conduct.”<sup>26</sup>

(6) OAG, App. C at 027-028, recommends revising the Commentary’s Explanatory Notes to more clearly illustrate the difference in proof for the culpable mental states of *knowledge* and *intent*.

- The RCC incorporates OAG’s recommendation by substantially revising and expanding the treatment of the relationship between knowledge and intent in the Commentary’s Explanatory Notes to more clearly illustrate the difference in proof for these culpable mental states. The relevant changes clarify that: (1) insofar as an actor’s subjective state of mind is concerned, there’s no difference in the proof necessary to establish either knowledge or intent; and (2) it is likely to be the case that criminal statutes employing intent (but not knowledge) will be inchoate, and, therefore, will *not* require proof that the intended element actually occurred.<sup>27</sup>
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

Likewise, the Explanatory Note on RCC § 22E-206(d)(2)(A) incorporates a footnote that reads:

For example, if X purchases a stolen luxury car from Y for a fraction of its market value, *aware that it is substantially possible* that the car is stolen, X acts “recklessly” with respect to whether the property being purchased is stolen (provided that X’s conscious disregard of the risk is also clearly blameworthy, see *infra* notes \_\_\_ and accompanying text). As the italicized language in this example illustrates, the RCC definition of recklessness as to a circumstance requires proof that that defendant subjectively perceived *both the risk and its substantiality*.

<sup>26</sup> See, e.g., RCC § 22E-206(b)(1) (“A person acts knowingly . . . As to a result element, when that person is aware that conduct is practically certain to cause the result[.]”). This point is also addressed in the revised Explanatory Note accompanying RCC § 22E-206(b), which states in a footnote that:

The reference both here and throughout RCC § 22E-206 is to whether “conduct” (in general) will cause a result, and not to whether “*that person’s* conduct” (in particular) will cause a result. This is because, in some situations (e.g., accomplice liability), the defendant’s culpable mental state will relate to the relationship between *another person’s* conduct (e.g., the principal actor) and causing a prohibited result.

<sup>27</sup> See Explanatory Notes accompanying RCC § 22E-206(b)-(c).

(7) *The CCRC recommends retitling RCC § 22E-206 “Definitions and Hierarchy of Culpable Mental States.” This new title more clearly captures the content of this general provision.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(8) *The CCRC recommends revising RCC § 22E-206 to reference culpability as to a “result element” and/or “circumstance element” required by an offense definition. This clarifies that the specified culpable mental states apply to the objective elements of an offense, as defined in RCC § 22E-201.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(9) *The CCRC recommends two revisions to RCC § 22E-206(f). First, this subsection should be retitled “Hierarchical Relationship of Culpable Mental States,” instead of “Proof of Greater Culpable Mental State Satisfies Requirement for Lower.” This new title more clearly characterizes the nature of the relevant culpability principle, in contrast to describing its operative effect. Second, the culpable mental states of knowledge and intent should be treated alongside one another, as hierarchically parallel, rather than treated separately from one another, with knowledge standing in a hierarchically superior position to intent. This revision more clearly reflects the nature of the relationship between knowledge and intent: these mental states are substantively identical as a matter of mental culpability, yet often communicatively distinct in terms of the government’s burden of proof regarding an offense’s objective elements.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(10) *The CCRC recommends adding a new subsection (g), which establishes that “[t]he words defined in this section have the same meaning when used in other parts of speech.” This avoids confusion resulting from the fact that culpable mental states are used in many different parts of speech (e.g., “intent” and “intending”) but only defined in terms of one part of speech (e.g., “intentionally”).*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(11) *The CCRC recommends adding an “other definitions” subsection, which highlights terms that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(12) *The CCRC recommends reorganizing the Commentary so that all of the Explanatory Notes and Relation to Current District Law entries are grouped alongside one another.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(13) *The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-206 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on culpable mental states.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(14) *The CCRC recommends incorporating an expanded introduction to the Commentary's Relation to Current District Law section, which summarizes the need for RCC § 22E-206 in light of current District law.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(15) *The CCRC recommends adding citations to and discussion of recent District case law to Commentary's Relation to Current District Law section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

**RCC § 22E-207. RULES OF INTERPRETATION APPLICABLE TO CULPABLE MENTAL STATES.**

(1) *OAG, App. C at 010, states that the second prong of RCC § 22E-207(b)—which notes that strict liability applies to “any result or circumstance in an offense . . . [t]o which legislative intent explicitly indicates strict liability applies”—could be interpreted in a few different ways and is ambiguous. OAG proposes as an alternative the phrase: “when another statutory provision can fairly be read to indicate that strict liability should apply.”*

- The RCC partially incorporates OAG’s recommendation by rephrasing the relevant provision in RCC § 22E-207(b) to read: “When another statutory provision explicitly indicates strict liability applies to that result or circumstance.”
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 010, recommends incorporating into the Explanatory Note accompanying RCC § 22E-207(b) “two additional examples,” which “are needed to fully explain how it works in situations of strict liability.” The first would clarify that a culpable mental state “skips” over an objective element modified by “in fact” but continues to “travel” and apply to subsequent objective elements. The second example would clarify that two objective elements may be subject to strict liability by repeating the phrase “in fact.”*

- The RCC incorporates OAG’s recommendation by incorporating the following examples into the Commentary’s relevant Explanatory Note. The first reads: “Note that two objective elements in an offense definition may be subject to strict liability by repeating the phrase ‘in fact.’ Consider, for example, an offense definition that reads: ‘Knowingly causing bodily injury to a person, who is, in fact, a child, with what is, in fact, a knife.’ Here, both circumstances—that the victim be a child and that the bodily injury be inflicted with a knife—are subject to strict liability.” And the second reads: “While an enumerated culpable mental state ‘skips’ over an objective element modified by ‘in fact,’ it nevertheless continues to ‘travel’ and apply to subsequent objective elements. Consider, for example, an offense definition that reads: “Knowingly causing bodily injury to a person, who is, in fact, a child, with a knife. Under the rules of interpretation the mental state of “knowingly” would apply to both the result of “causing bodily injury,” and the circumstance of “with a knife.”
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends revising RCC § 22E-207 to replace all references to “result” and “circumstance” with “result element” and “circumstance element.” This clarifies that the mental state rules of construction apply to the objective elements of an offense, as defined in RCC § 22E-201.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends adding an “other definitions” subsection, which highlights terms employed in one section of the general part that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends expanding the Commentary's Explanatory Notes accompanying RCC § 22E-207 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on mental state rules of interpretation.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

**RCC § 22E-208. PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND IGNORANCE.**

(1) *PDS, App. C at 017-018, recommends revising RCC § 22E-208 to explicitly clarify that “[a]ccident, mistake and ignorance are not defenses,” but “[r]ather, accident, mistake, and ignorance are conditions that may preclude the government from establishing liability.” PDS says this revision is “particularly important because, in the view of PDS, judges and practitioners too often incorrectly (whether mistakenly or accidentally) view ‘accident’ or ‘mistake’ as ‘defenses,’ creating a serious risk of burden shifting . . . .”*

- The RCC partially incorporates PDS’ recommendation by clarifying, through commentary, that “accident, mistake and ignorance do not—generally speaking—constitute defenses, but rather, merely describe conditions that may preclude the government from establishing liability.” The RCC does not statutorily codify PDS’ precise language, however, for two reasons. First, accident, mistake, and ignorance are sometimes referred to as “absent element defenses” in legal scholarship.<sup>28</sup> Second, mistake and ignorance may at least occasionally provide the basis for a general excuse defense.<sup>29</sup>
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 012-013, recommends that the RCC “clarify the types of mistakes or ignorance of law, if any, to which [RCC § 22E-208(a)] applies.” Specifically, OAG requests clarity regarding the relationship between mistake, ignorance, and the illegality of one’s conduct. OAG said that its understanding of RCC § 22E-208(a) is that it “does not mean that the government would have to prove that the defendant was aware that the act itself was illegal or the exact parameters of the prohibition.”*

- The RCC addresses OAG’s recommendation by codifying a new general provision, RCC § 22E-208(c), which comprehensively addresses the relationship between mistake, ignorance, and the illegality of one’s conduct. That provision states that: A person may be held liable for an offense although he or she is mistaken or ignorant as to the illegality of his or her conduct unless: (1)(A) The offense or some other provision in the Code expressly requires proof of a culpable mental state as to: (i) Whether conduct constitutes that offense; or (ii) The existence, meaning, or application of the law defining an offense; and (B) The person’s mistake or ignorance negates that culpable mental state; or (2) The person’s mistake or ignorance satisfies the requirements for a general excuse

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<sup>28</sup> An “absent element defense” is a defense that is contingent upon conditions or circumstances directly related to the elements of the charged offense. When an absent element defense—for existence, a non-culpable mistake of fact or an alibi defense—is successfully raised it exonerates the accused *because the government cannot, by virtue of the defense’s existence, prove all of the elements of an offense beyond a reasonable doubt*. PAUL H. ROBINSON, 1 CRIM. L. DEF. § 65(c) (Westlaw 2018). This is to be contrasted with an “affirmative defense,” which is a defense that is contingent upon conditions or circumstances unrelated to the elements contained in the charged offense. When an affirmative defense—typically either a justification or excuse—is successfully raised it exonerates the accused *notwithstanding the fact that the government proved all of the elements of an offense beyond a reasonable doubt*. *Id.*

<sup>29</sup> See RCC § 22E-208(c)(2) (noting the possibility that a person’s “mistake or ignorance” can “satisf[y] the requirements for a general excuse defense”).

defense.” The accompanying commentary provides additional clarity on the operation of this provision, both in general and as it relates to current District law in particular.<sup>30</sup>

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) OAG, App. C at 013, recommends clarifying the “nonparallel structure” reflected in RCC § 22E-208(b)’s approach to communicating the relationship between mistake, recklessness, and negligence as to a circumstance element. Specifically, whereas RCC § 22E-208(b)(3) states that “[a]n unreasonable mistake as to a circumstance only negates the existence of the recklessness applicable to that element if the person did not recklessly

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<sup>30</sup> It should also be noted that the accompanying Commentary does *not* incorporate either of the two examples proposed by OAG in its comment:

First, a person would be guilty of distribution of a controlled substance even if what the government proved was that the defendant thought that she was selling heroin, but she was really selling cocaine. Second, the government would not need to prove that a person knew that he was a mandatory reporter and that mandatory reporters must report child abuse in order to secure a conviction for failing to report child abuse.

App. C at 012-013.

The first OAG proposed example does not illustrate the general relevance of mistakes or ignorance of penal law, but rather, a distinctive aspect of the *mens rea* of drug offenses in particular, which was recently summarized by the U.S. Supreme Court as follows:

[The] knowledge requirement [for drug offenses] may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was. Take, for example, a defendant whose role in a larger drug organization is to distribute a white powder to customers. The defendant may know that the white powder is listed on the schedules even if he does not know precisely what substance it is. And if so, he would be guilty of knowingly distributing “a controlled substance.”

*McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015). A more germane example would instead illustrate that, as the U.S. Supreme Court phrased it in the same case:

The knowledge requirement [for drug offenses] may be met by showing that the defendant knew the identity of the substance he possessed. Take, for example, a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules . . . . *Because ignorance of the law is typically no defense to criminal prosecution* . . . this defendant would also be guilty of knowingly distributing “a controlled substance.”

*Id.* (italics added). This latter example has been incorporated into the Commentary accompanying RCC § 22E-208(c).

By incorporating the latter example into the relevant explanatory note, the RCC effectively addresses OAG’s second recommended hypothetical about mandatory reporters, without the added complication created by the fact that: (1) failure to report child abuse is a crime of omission; and (2) RCC § 22E-202(b) incorporates a general culpability requirement akin to negligence with respect to the existence of a duty for purposes of omission liability. See *Conley v. United States*, 79 A.3d 270, 278-79 (D.C. 2013) (“It is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy.”); Commentary on RCC § 22E-208(c) (discussion the *Conley* decision); RCC § 22E-202(b) (same).

make that mistake,” RCC § 22E-208(b)(4) states that “[a]n unreasonable mistake as to a circumstance only negates the existence of the negligence applicable to that element if the person did not recklessly or negligently make that mistake.” OAG states that if the RCC is going to keep this nonparallel structure then the Commentary should explain the reason why a reference to “recklessness” is included in the statement on “negligence.”

- The RCC addresses OAG’s recommendation by avoiding the “nonparallel structure” in RCC § 22E-208(b) altogether. Specifically, the term “recklessly” has been removed from RCC § 22E-208(b)(4), such that the relevant clause now reads: “An unreasonable mistake as to a circumstance element negates the existence of the negligence applicable to that element if the person did not negligently make that mistake.” A new footnote has also been added to the accompanying Explanatory Note, which clarifies that “reckless mistakes, which are necessarily negligent mistakes, cannot negate the culpable mental state of negligence.”
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) PDS, App. C at 019-020, recommends incorporating a “primary purpose” test into the second prong of the general provision on deliberate ignorance, RCC § 22E-208(d)(2). Specifically, “PDS proposes that to hold the person liable, the person must have avoided confirming the circumstance or failed to investigate whether the circumstance existed with the primary purpose of avoiding criminal liability.” PDS states that a primary purpose test more fairly captures those reckless actors who are as blameworthy as knowing actors.<sup>31</sup>

- The RCC partially incorporates PDS’ recommendation by clarifying through commentary that the requisite “purpose of avoiding criminal liability” must at least be a “substantial motivating factor.” This substantial motivating factor standard, which is drawn from case law “confront[ing] the issue of mixed criminal motives” in general,<sup>32</sup> better reflects a form of culpable mental state

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<sup>31</sup> As PDS explains:

[I]f to satisfy the knowledge requirement, the government need only prove the reckless-level of awareness of the circumstance, then the purpose the person had for avoiding confirming the existence of the circumstance has to be a stringent enough test that it significantly distinguishes the deliberate avoider from the merely reckless person. Therefore, PDS proposes that to hold the person liable, the person must have avoided confirming the circumstance or failed to investigate whether the circumstance existed with the primary purpose of avoiding criminal liability. A primary purpose test embeds a *mens rea* element in that in order to have a primary purpose of avoiding criminal liability, a person must have had something approaching knowledge that the circumstance existed. Adding the requirement that avoiding liability was the person’s primary purpose sufficiently separates the more culpable from those who were merely negligent or reckless.

App. C at 020.

<sup>32</sup> See Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 147 (2006) (“Many courts that have confronted the issue of mixed criminal motives have adopted the substantial motivating factor test.”); *People v. Cahill*, 809 N.E.2d 561, 583 (2003) (adopting a rule that would permit a first degree murder conviction when a defendant possessed “mixed motives” so long as the defendant’s motivation to eliminate the victim as a witness “was a substantial factor in murdering her.”); see also, e.g.,



comparable to knowledge. This is because it is not necessary for an actor's desire to avoid criminal liability to be primary for his or her purposeful avoidance to be as blameworthy as knowledge.<sup>33</sup>

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) USAO, App. C at 022, recommends clarifying that the phrase “purpose of avoiding criminal liability” utilized in the general provision on deliberate ignorance does not “require proof that a defendant knew that his/her actions would be against the law.” USAO states that this would be problematic because “what is relevant is a defendant’s awareness of the circumstances, not the legality of his/her actions in that circumstance.”

- The RCC does not incorporate USAO’s recommendation. USAO is correct that RCC § 22E-208(d) does not require proof of knowledge as to the illegality of the deliberately ignorant actor’s conduct. However, as a matter practice, all deliberately ignorant actors will possess that knowledge to the extent that awareness as to illegality is a necessary prerequisite to acting with the purpose of avoiding criminal liability. It is this particularly culpable purpose—drawn from federal appellate case law<sup>34</sup>—that justifies the imputation of knowledge upon an actor who is merely reckless under the circumstances.<sup>35</sup>

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WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.2(d) (3d ed. Westlaw) (“It may be said that, so long as the defendant has the intention required by the definition of the crime, it is immaterial that he may also have had some other intention.”) (citing, e.g., *O’Neal v. United States*, 240 F.2d 700 (10th Cir. 1957); *United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016); *United States v. Snow*, 507 F.2d 22 (7th Cir. 1974)).

<sup>33</sup> Consider, for example, a bartender who fails to check a young-looking female’s ID: (1) for the primary purpose of making it easier to sexually assault her after the bar closes; and (2) for the lesser, but still substantially motivating purpose of avoiding liability for serving a minor in the event the bar is raided. Under these circumstances, the bartender’s non-primary purpose of avoiding liability for serving a minor in the event the bar is raided seems sufficient to deem him deliberately ignorant given its substantially motivating nature.

<sup>34</sup> See, e.g., *United States v. Alston-Graves*, 435 F.3d 331, 341 (D.C. Cir. 2006) (willful blindness instruction should not be given unless there is evidence that the defendant “purposely contrived to avoid learning all the facts in order to have a defense in the event of a subsequent prosecution.”) (quoting *United States v. Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001) (quoting *United States v. Hanzlicek*, 187 F.3d 1228, 1233 (10th Cir. 1999)) (internal quotation mark omitted); accord *United States v. Heredia*, 429 F.3d 820, 824 (9th Cir. 2005); *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002).

<sup>35</sup> Absent this particularly culpable purpose, imputation for deliberate ignorance might be expanded to capture some of the least blameworthy actors. Consider, for example, the situation of a parent driving carpool who declines to check his child’s backpack after smelling what might be a controlled substance for any (or all) of the following reasons: (1) he wants to respect his child’s privacy; (2) he doesn’t want to lose the child’s hard-earned trust; and/or (2) he simply doesn’t want to know whether his child is, in fact, using controlled substances. Under these circumstances, where the parent’s deliberate avoidance is not motivated by a desire to avoid criminal liability, it cannot be said that he is as blameworthy as one who knowingly transports controlled substances. See *United States v. Heredia*, 483 F.3d 913, 924, 928 (9th Cir. 2007) (Absent proof of a “motivation to avoid criminal responsibility,” deliberate ignorance doctrine would effectively create “[a] criminal duty to investigate the wrongdoing of others to avoid wrongdoing of one’s own,” which is a “novelty in the criminal law.” For example, “[s]hall someone who thinks his mother is carrying a stash of marijuana in her suitcase be obligated, when he helps her with it, to rummage through her things?” Or [s]hall all of us who give a ride to child’s friend search her purse or his backpack?”). Nevertheless, this parent could be deemed deliberately ignorant under USAO’s recommended clarification since he acts “with the purpose of avoiding knowledge of whether the circumstance existed.”

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (6) *The CCRC recommends revising RCC § 22E-208(a), (b), and (d) to reference the “result element” and/or “circumstance element” required by that offense. This clarifies that the specified general liability principles apply to the objective elements of an offense, as defined in RCC § 22E-201.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (7) *The CCRC recommends revising RCC § 22E-208(b)(2) to incorporate a reference to intent alongside the relationship between mistake and knowledge as to a circumstance element. This clarifies that the same mistake principles governing negation of knowledge similarly apply to the negation of intent. It also accords with the fact that knowledge and intent are substantively identical culpable mental states under the RCC.<sup>36</sup>*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (8) *The CCRC recommends revising RCC § 22E-208(d) to state the principle of knowledge imputation governing situations of deliberate ignorance in the present tense.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (9) *The CCRC recommends adding a “definitions” subsection, which highlights terms employed in one section of the general part that are defined in another section.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (10) *The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-208 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on accident, mistake, and ignorance.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (11) *The CCRC recommends incorporating an expanded introduction to the Commentary’s Relation to Current District Law section, which summarizes the impact of RCC § 22E-208 on current District law.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (12) *The CCRC recommends reorganizing the Commentary so that all of the Explanatory Notes and Relation to Current District Law entries are grouped alongside one another.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

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<sup>36</sup> See Commentary on RCC § 22E-206(b)-(c) (discussing the relationship between knowledge and intent under the RCC).

## RCC § 22E-209. PRINCIPLES OF LIABILITY GOVERNING INTOXICATION.

(1) OAG, App. C at 013, recommends a statutory revision to RCC § 22E-209(b), which “explicitly states that a person’s intoxication does not negate the culpable mental state of negligence.” OAG observes that subsection (b) already addresses the relationship between intoxication and purpose, knowledge, and recklessness, and that such a provision would “avoid needless arguments in litigation over the relationship between intoxication and the culpable mental state of negligently.”

- The RCC partially incorporates OAG’s recommendation by codifying the relationship between intoxication and the culpable mental state of negligence in RCC § 22E-209(b)(4). However, this new general provision clarifies that a person’s intoxication can negate the culpable mental state of negligence. That a person’s intoxication can negate the culpable mental state of negligence is most obvious in the context of involuntary intoxication. Consider the situation of X, who is given a non-alcoholic beverage that has been secretly spiked by Y with a sleep-inducing narcotic. If X later kills V on the road when she falls asleep at the wheel, X’s involuntarily intoxicated state would obviously be relevant to determining whether X’s conduct was “clearly blameworthy” under the circumstances.<sup>37</sup>
- However, in some instances, even self-induced intoxication may negate the culpable mental state of negligence. This is perhaps clearest in rare situations involving pathological intoxication—i.e., intoxication that is “grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.”<sup>38</sup> Consider the situation of X, who consumes a single alcoholic beverage at an office holiday party, and immediately thereafter departs to the metro. While waiting for the train, X begins to experience an extraordinary level of intoxication—unbeknownst to her, the single drink X has consumed has interacted with an allergy medication she is taking, thereby producing a level of intoxication ten times greater than what X normally experiences from that amount of alcohol. X begins to stumble uncontrollably, and ends up fatally knocking another train-goer, V, onto the tracks just as the train is approaching. On these facts, X’s self-induced intoxication would be relevant to determining whether X’s conduct was “clearly blameworthy” under the circumstances.<sup>39</sup>
- Furthermore, in rare situations, a person’s self-induced intoxication also has the potential to negate his or her blameworthiness even where it is not pathological. This is reflected in the situation of X, who consumes a large amount of alcohol alone in her two-story home, only to receive a surprise visit from friend, V. If X

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<sup>37</sup> RCC § 22E-206(e)(1)(B). This clear blameworthiness standard replaces the gross deviation standard incorporated into earlier drafts of the RCC definition of negligence. See generally BFR Materials on RCC § 22E-206. However, the intoxication analysis is the same under either formulation of culpability.

<sup>38</sup> Model Penal Code § 2.08(5)(c).

<sup>39</sup> It may be true that X, but for her intoxicated state, would have been more careful/aware of V’s proximity. Nevertheless, X is only liable for negligently killing V if X’s conduct manifested a culpable disregard for V’s personal safety. And given that X’s minimally-culpable decision to consume a single alcoholic beverage while on her allergy medication is the sole reason X fatally stumbled into V, it simply cannot be said that blameworthiness of this nature (i.e., that necessary to support a finding of culpable negligence) exists under the facts presented.

- later fatally stumbles into V at the top of the stairs, unaware that V was standing right her, X’s self-induced intoxication would be relevant to determining whether X’s conduct was “clearly blameworthy” under the circumstances.<sup>40</sup>
- This revision may change current District law, as described in the commentary,<sup>41</sup> and it improves the proportionality, clarity and consistency of the revised statutes.
- (2) *OAG, App. C at 014, recommends revising the Relation to Current District Law section to clarify whether the RCC affirmatively “preclude[s] exculpation of negligence” for self-induced intoxication in light of the fact that the recklessness imputation principle ultimately requires proof of negligence.*
- The RCC addresses OAG’s comment by revising the Relation to Current District Law section to more clearly communicate the relationship between self-induced intoxication, recklessness, and negligence. Specifically, this aspect of the Commentary now states that “the RCC approach leaves open the possibility that a person’s self-induced intoxication could, under narrow circumstances, be relevant to defending against a recklessness or negligence charge,” while providing a detailed explanation of and rationale for this change to current District law.
- (3) *OAG, App. C at 014, states that the Commentary should clarify that the general intoxication provision “was clearly drafted to explain the relationship between intoxication and culpable mental states in general and not when the offense itself includes the requirement that the government prove—as an element of the offense—that the person was intoxicated at the time that the offense was committed.”*
- The RCC addresses OAG’s comment by revising the Commentary to clarify this point. Specifically, the Explanatory Notes accompanying RCC § 22E-209 incorporate a footnote, which states that this general provision is not “intended to have any impact on the meaning, interpretation, or application of intoxication as an objective element. For example, some criminal offenses prohibit engaging in certain forms of conduct while in an intoxicated state. [] The general culpability

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<sup>40</sup> It may be true that X, but for her intoxicated state, would have been more careful/aware of V’s proximity. Nevertheless, X is only liable for negligently killing V if X’s conduct manifested a culpable disregard for V’s personal safety. And given that X’s minimally-culpable decision to consume a large amount of alcohol in the safety of her own home is the sole reason X fatally stumbled into V, it simply cannot be said that blameworthiness of this nature (i.e., that necessary to support a finding of culpable negligence) exists under the facts presented. Compare Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 573 (2012) (“[I]f the defendant’s act of becoming intoxicated is *unjustified*—if the value of the act to the agent is outweighed by a substantial amount by the potential harm to others—and the defendant is *aware of the relevant risked harms when he chooses to become intoxicated*, then his act of becoming intoxicated is itself reckless.”) (italics added).

<sup>41</sup> As the analysis in the Relation to District Law section observes:

In addition, the RCC approach leaves open the possibility that a person’s self-induced intoxication could, under narrow circumstances, be relevant to defending against a recklessness or negligence charge. The rationale is that when, due to a person’s self-induced state of intoxication, that person’s disregard of a risk is not clearly blameworthy, then it would be disproportionate to impose a criminal conviction for a recklessness or negligence crime. The fact that current District law appears to impose a categorical bar on the presentation of evidence of self-induced intoxication to disprove the existence of comparable mental states, in contrast, creates a risk of imposing liability for serious crimes on minimally culpable (or even non-culpable) actors. RCC § 22E-209 effectively removes this categorical bar in the interests of proportionality.

principles stated in RCC § 22E-209 should not be construed as altering the government’s burden of proof for the intoxication-related objective element(s) that comprise these offense definitions.”

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *PDS, App. C at 020*, “*recommends stating the correspondence between intoxication and negligence*” in RCC § 22E-209(b). *PDS explains that this revision would be particularly welcome since RCC § 22E-209(b) already states “the correspondence between three of the culpable mental state requirements and [intoxication].” PDS proposes specific language.*<sup>42</sup>

- The RCC partially incorporates PDS’ recommendation by revising subsection (b) to explicitly address the nature of the correspondence between negligence and intoxication. Specifically, RCC § 22E-209(b)(4) states that: “Intoxication negates the existence of negligence [as to a result element or circumstance element] when, due to a person’s intoxicated state, that person’s failure to perceive a substantial risk the result will occur or that the circumstance exists is not clearly blameworthy under RCC §§ 206(e)(1)(B) or (2)(B).” This language in RCC § 22E-209(b)(4) differs in two main ways from that proposed by PDS. First, the focus in the RCC approach is placed on both prongs of negligence—i.e., the failure to perceive a substantial risk and the actor’s clear blameworthiness for disregarding it. Second, the RCC approach does not categorically bar consideration of self-induced intoxication given the possibility that such evidence might, in rare circumstances, have the tendency to negate negligence.
- This revision may change current District law,<sup>43</sup> and it improves the proportionality, clarity and consistency of the revised statutes.

(5) *PDS, App. C at 020-021*, “*strongly recommends defining the term ‘self-induced intoxication.’*” *PDS observes that “[t]he imputation of recklessness for self-induced intoxication turns on whether the intoxication is self-induced,” such that “[t]he outcome of some cases, perhaps of many cases, will depend entirely on whether the defendant’s intoxication was ‘self-induced.’*” *PDS also notes that “[t]he purpose of modernizing the*

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<sup>42</sup> In accordance with this recommendation, PDS proposes the following draft language:

(4) *Negligence*. A person’s intoxication negates the existence of the culpable mental state of negligence applicable to a result or circumstance when, due to the person’s intoxicated state, that person failed to perceive a substantial risk that the person’s conduct will cause that result or that the circumstance exists, and the person’s intoxication was not self-induced.

<sup>43</sup> As the analysis in the Relation to District Law section observes:

In addition, the RCC approach leaves open the possibility that a person’s self-induced intoxication could, under narrow circumstances, be relevant to defending against a recklessness or negligence charge. The rationale is that when, due to a person’s self-induced state of intoxication, that person’s disregard of a risk is not clearly blameworthy, then it would be disproportionate to impose a criminal conviction for a recklessness or negligence crime. The fact that current District law appears to impose a categorical bar on the presentation of evidence of self-induced intoxication to disprove the existence of comparable mental states, in contrast, creates a risk of imposing liability for serious crimes on minimally culpable (or even non-culpable) actors. RCC § 22E-209 effectively removes this categorical bar in the interests of proportionality.

*District's Code is to reduce significantly the need for courts to create law by interpretation." PDS proposes specific language.*<sup>44</sup>

- The RCC incorporates PDS' recommendation by incorporating a new general provision, which defines "self-induced intoxication." Specifically, RCC § 22E-209(d)(2) reads: "'Self-induced intoxication' means intoxication caused by substances: (A) A person knowingly introduces into his or her body; (B) The tendency of which to cause intoxication the person is aware of or should be aware of; and (C) That have not been introduced pursuant to medical advice or under circumstances that would afford a general defense to a charge of crime. The definition incorporated into RCC § 22E-209(d)(2) is substantively the same as that proposed by PDS, but organized/articulated in a manner that may be clearer and more intuitive.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

*(6) OAG, App. C at 188, raises a concern that—for sexual assault and various other related RCC sex offenses—the interaction between the RCC's general intoxication principles and the culpable mental state of knowingly would inappropriately create a self-induced intoxication-based loophole for those who, in effect, culpably create the conditions for an absent element defense. Specifically, OAG states that "a person should not be able to decide to rape, or otherwise sexually abuse, someone; consume massive amounts of alcohol to get up the nerve to do it; consummate the rape; and then be able to argue, whether true or not, that at the time of the rape he lacked the mental state necessary to be convicted of the offense." Accordingly, OAG observes that "[i]f the Commission is going to use this mental state, then the Commission should create an exception that accounts for this situation."*<sup>45</sup>

- The RCC addresses OAG's comment by incorporating a footnote into the Explanatory Notes accompanying RCC § 22E-209, which addresses the disposition of situations involving self-induced intoxication intended to create the conditions for one's own absent-element defense across revised offenses.<sup>46</sup> This footnote explains that: "If, under these circumstances, the actor possesses the statutorily-required purpose, knowledge, or intent at the point in which he or she begins consuming intoxicating substances, then the fact that the person

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<sup>44</sup> In accordance with this recommendation, PDS proposes the following draft definition:

"Self-induced intoxication" means intoxication caused by substances the person knowingly introduces into the body, the tendency of which to cause intoxication the person knows or ought to know, unless the person introduces the substances under such circumstances as would afford a defense to a charge of crime. Intoxication is not "self-induced" if it occurs as an unforeseen result of medication taken pursuant to medical advice.

<sup>45</sup> OAG points out that "[t]his exception would be similar to what the Commission is already proposing in § 22A-208 (c) concerning willful blindness."

<sup>46</sup> See generally Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 31 (1985) ("Where the actor is not only culpable as to causing the defense conditions, but also has a culpable state of mind as to causing himself to engage in the conduct constituting the offense, the state should be punish him for causing the ultimate justified or excused conduct.").

subsequently lacks the requisite desire or state of awareness at the precise moment the conduct constituting the offense is completed should not preclude a finding that the person satisfied the offense’s culpable mental state requirement.”<sup>47</sup> The footnote also offers a detailed illustration of this generally applicable intoxication principle using a hypothetical similar to that discussed by OAG in its comment.<sup>48</sup>

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(7) *The CCRC recommends revising RCC § 22E-209 to reference culpability as to a “result element” and/or “circumstance element” required by an offense definition. This clarifies that the specified culpable mental states apply to the objective elements of an offense, as defined in RCC § 22E-201.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(8) *The CCRC recommends revising RCC § 22E-209(b)(2) to incorporate reference to “intent” alongside “knowledge.” This clarifies that the correspondence between intoxication and intent is identical to the correspondence between intoxication and knowledge.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

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<sup>47</sup> *Id.* at 35 (Observing that, in this situation, “[t]he actor’s liability for the offense may be based on his conduct at the time he becomes voluntary intoxicated and his accompanying state of mind as to the elements of the subsequent offense.”).

<sup>48</sup> Specifically, the relevant hypothetical reads:

X desires to have sex with V, who is happily married and has previously expressed V’s firm lack of romantic interest in X on multiple occasions. Soon after the last rejection, X realizes that the only way he’ll ever have sex with Y is by force; however, X also realizes that he lacks the temperament necessary to follow through on this criminal intent. To address the perceived deficiency (and strengthen his resolve), X purchases a large amount of Phencyclidine (PCP) and cocaine, which X subsequently consumes a few hours before a party that he knows V will be attending by herself. Later on that evening, while at the party, X asks Y to step into an empty bedroom for a brief discussion, at which point X proceeds to pin Y’s hands behind her back and engage in non-consensual, forceful intercourse. However, due to his extreme state of intoxication, at the time of intercourse X honestly perceives the sexual interaction with Y to be a consensual, passionate expression of long-suppressed mutual affection. X is subsequently prosecuted for first-degree sexual assault on a theory of liability requiring knowledge. See RCC § 22E-1303(a) (“An actor commits the offense of first degree sexual assault when that actor . . . Knowingly causes the complainant to engage in or submit to a sexual act . . . By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant.”).

On these facts, X’s lack of awareness concerning the non-consensual, forceful nature of the intercourse at the moment it occurred should *not* preclude a finding of guilt, provided the prosecution can establish that X was practically certain that—at the moment he became intoxicated—the forceful sexual act he intended to facilitate would be non-consensual. See Robinson, *supra* note [], at 51 (“If an actor’s intoxication negates a required culpability element at the time of the offense, such element is nonetheless established if the actor satisfied such element immediately preceding or during the time that he was becoming intoxicated or at any time thereafter until commission of the offense, and the harm or evil he intended, contemplated, or risked is brought about by the actor’s subsequent conduct during intoxication.”).

(9) *The CCRC recommends revising RCC § 22E-209(b)(3) to incorporate reference to both the awareness and culpability prongs of recklessness. This clarifies the nature of the correspondence between intoxication and recklessness in light of the recklessness imputation principle specified in RCC § 22E-209(c).*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(10) *The CCRC recommends rephrasing and reorganizing various aspects of the recklessness imputation principle specified in RCC § 22E-209(c). These revisions more clearly communicate the different elements that must be proven to impute recklessness in situations of self-induced intoxication.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(11) *The CCRC recommends adding an “other definitions” subsection, which highlights terms employed in one section of the general part that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(12) *The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-209 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on the law of intoxication.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(13) *The CCRC recommends incorporating an expanded introduction to the Commentary’s Relation to Current District Law section, which summarizes the need for RCC § 22E-209 in light of current District law.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(14) *The CCRC recommends revising the Commentary’s Relation to Current District Law section to more comprehensively address the problems reflected in the current District law of intoxication.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.



## **RCC § 22E-210. ACCOMPLICE LIABILITY.**

(1) *PDS, App. C at 142, proposes amending the definition of “culpability requirement” to include premeditation and deliberation and any lack of mitigation. PDS says that, in the absence of such a revision, the requirements for accomplice liability could be lowered for offenses requiring any of these broader aspects of culpability.*<sup>49</sup>

- The RCC incorporates PDS’ recommendation by revising the definition of “culpability requirement” in section 201. Specifically, RCC § 22E-201(d)(3) now incorporates the phrase: “Any other aspect of culpability specifically required by an offense.” Further, the accompanying Commentary’s Explanatory Notes have been revised to clarify that this language refers to, among other possibilities, premeditation, deliberation, and the absence of mitigation. Finally, the Explanatory Note accompanying RCC § 22E-210(a) has been revised to reference this statutory change insofar as it relates the culpability requirement governing accomplice liability.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *PDS, App. C at 143-144, proposes adding a substantiality requirement to the encouragement prong of accomplice liability, such that it would be necessary to prove that “the encouragement is a substantial factor in the commission of the offense.” PDS says that this revision would solve the problem that, under the RCC, the “act of encouraging a criminal offense, even with the intent required for the commission of the offense, extends criminal liability to those who merely utter words in support of an offense but who have no meaningful impact on whether the offense is carried out.”*

- The RCC does not incorporate PDS’ recommendation because, to the extent it raises the level of influence required for accomplice liability, that increase would be inconsistent with other offenses’ requirements. “Encouragement” already requires that an accomplice’s conduct exert some minimum level of influence on the principal actor, while the demanding purpose requirement governing accomplice liability ensures that only sufficiently culpable actors will be held

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<sup>49</sup> The basis for this recommendation is that:

RCC § 22A-210 provides that a person is an accomplice in the commission of an offense by another when that person is “acting with the culpability required by that offense.” Report #22 at footnote 5, states that any broader aspect of culpability, such as “proof of premeditation, deliberation, or the absence of mitigating circumstances” is encompassed within culpability when required by the specific offense.

PDS wholeheartedly agrees with footnote 5 and believes it is consistent with and required by *Wilson-Bey v. United States*. PDS is concerned, however, that this view of what culpability encompasses will not be applied if it remains only in a footnote to the commentary . . . . Without a statutory definition [of culpability requirement] broad enough to encompass premeditation, deliberation, and absence of mitigating circumstances, there is a substantial risk that culpability for accomplice liability would be watered down. Even if practitioners and judges found footnote 5 to argue from, the narrow culpability requirement definition could be read to supersede a footnote from the commentary. PDS proposes amending the definition of “culpability requirement” to include premeditation and deliberation and any lack of mitigation.

criminally responsible under the RCC. Raising that level of influence would therefore be inconsistent with other areas of the RCC (e.g., general inchoate crimes), where highly culpable actors are subject to liability although their conduct may not in anyway be harmful (e.g., failed attempts, conspiracies, and solicitations). Expert opinion also supports excluding a substantiality requirement, as it would arguably “constitute poor policy, whether one applies utilitarian or just-deserts philosophy,” to completely exculpate actors who meet these conditions solely because of the insubstantiality of their influence.<sup>50</sup>

(3) *OAG, App. C at 149-150, recommends changing the statutory text to “make it clear that an accomplice can be convicted for assisting or encouraging a person to commit an offense even if the principal does not complete all of the elements of the offense and would only be guilty of attempt.”*

- The RCC partially addresses OAG’s recommendation by revising and expanding the Commentary. Specifically, the main text of the Explanatory Notes now clarifies that “an accomplice may only be held criminally responsible under RCC § 22E-210 upon proof that the principal actor in fact committed ‘an offense,’” and that “[t]his reference to ‘an offense’ includes general inchoate crimes, such as a criminal attempt, solicitation, or conspiracy, all of which may serve as the basis for accomplice liability.” Thereafter, a footnote adds further clarity, explaining that, “[i]n practice, this means that accomplice liability can be based on purposely assisting or encouraging an unsuccessful principal who makes enough progress towards his or her criminal objective to satisfy the requirements of an attempt, solicitation, or conspiracy.” That same footnote also provides an illustrative example.<sup>51</sup>
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *OAG, App. C at 151, recommends that the Commentary distinguish accomplice liability based on an omission “from the related, but distinct accomplice liability of a person encouraging another person to commit an offense by omission.” To illustrate, OAG gives the following hypothetical: “[I]f AA, a corrupt police officer, talks his partner A, another corrupt police officer, to intentionally fail to stop a bank robbery committed*

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<sup>50</sup> See Joshua Dressler, *Reforming Complicity Law: Trivial Assistance As A Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 448 (2008) (“In regard to insubstantial participants in a crime, it would constitute poor policy, whether one applies utilitarian or just-deserts philosophy, to allow such a person to escape criminal liability.”); *but see id.* (noting that “[m]inor assistance should constitute a separate and lesser degree of offense than the crime committed by the principal party.”).

<sup>51</sup> The example reads:

A purposely assists P with the planning of a bank robbery that P is to commit by himself, while also volunteering to serve as P’s get away driver. However, as P enters the bank (with A waiting in the parking lot), the police—who have been alerted to the plan by a third party—intervene, arresting P just as he begins to remove a weapon from his coat. On these facts, P satisfies the requirements of liability for the general inchoate crime of attempted robbery. See RCC § 22E-301(a) (attempt liability based on intent to commit target offense and dangerous proximity to completion). For this reason, A is—given his purposeful assistance—also liable for attempted robbery on a complicity theory of liability.

by P, based upon P's promise to provide AA with a portion of the proceeds, AA may be deemed an accomplice to the robbery. In this example, AA purposely encouraged A to engage in specific conduct constituting an offense of omission."

- The RCC does not incorporate OAG's recommendation because it is unnecessary to ensure that accomplice liability exists in the fact pattern cited by OAG. The CCRC agrees with OAG that AA would be liable as an accomplice. However, the CCRC doesn't believe that AA's conduct is complicity *by omission*, but rather, constitutes complicity *by assistance*. That is, AA has purposely assisted P with the planning or commission of conduct constituting an offense by encouraging A to engage in an omission.<sup>52</sup>

(5) OAG, App. C at 151-152, recommends that RCC § 22A-210(c) "be split into two subparagraphs: one where the accomplice and principal commit an offense that is divided into degrees based upon distinctions in culpability and another where distinctions in culpability is but one distinction between greater and lesser included offenses." This recommendation stems from a concern that "the principle of culpable mental state equivalences applicable to results" under the current RCC approach to accomplice liability may not also apply to "greater and lesser included offenses that are contained in different code provisions." For example, OAG points out that "manslaughter is not a "degree" of murder, nor is murder described as "aggravated" manslaughter," so it is unclear whether "an accomplice could be convicted of manslaughter when the principal is convicted of murder" under the current RCC approach to accomplice liability.

- The RCC partially incorporates OAG's recommendation through the following revisions. First, the statutory text of RCC § 22E- 210(c) omits reference to "an offense that is *divided into degrees* based upon distinctions in culpability." The revised version of RCC § 22E- 210(c) instead references "an offense that is *graded by* distinctions in culpability." Second, the relevant Explanatory Note in the Commentary has been revised to incorporate the following analysis: "The requirement in subsection (c) that the target "offense" be "graded by distinctions in culpability as to result elements" should be broadly construed to support convictions for greater and lesser-included versions of the same substantive offense. This should be done, moreover, even where the relevant criminal statutes are neither (1) formally described in the RCC as distinct degrees of the same offense, nor (2) codified in the same statutory provision. Third, the relevant Explanatory Note in the Commentary has been revised to incorporate an example specifically addressing forms of homicide.<sup>53</sup>

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<sup>52</sup> Which is to say, the question isn't whether—as OAG phrases it—"AA purposely encouraged A to engage in specific conduct constituting an offense of omission." Rather, the central question is whether AA—*by encouraging A to engage in an omission*—purposely assisted P with the planning or commission of conduct constituting an offense.

<sup>53</sup> "To illustrate, consider the overlapping, hierarchically related offenses of first-degree murder, second-degree manslaughter, and negligent homicide. These three offenses are *not* formally described as distinct degrees of the same offense (e.g., homicide) under the RCC, and each is codified in a different section of the code . . . However, because all three of these homicide statutes are graded by distinctions in culpability as to the same result element (death), RCC § 22E-210(c) would authorize the imposition of liability for (among other possibilities) the following in a three person criminal scheme: (1) first-degree murder upon P; (2) second-degree manslaughter on A1; and (3) negligent homicide on A2."

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (6) *The CCRC recommends revising RCC § 22E-210 to reference culpability as to a “result element” and/or “circumstance element” required by an offense definition. This clarifies that the specified culpable mental states apply to the objective elements of an offense, as defined in RCC § 22E-201.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (7) *The CCRC recommends adding a “Definitions” subsection, which highlights terms employed in one section of the general part that are defined in another section.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (8) *The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-210 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on accomplice liability.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

**RCC § 22E-211. LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON.**

(1) *OAG, App. C at 152, comments that the “text of RCC § 22A-211 does not define the term ‘legally accountable,’ nor does it explicitly state that a person who is legally accountable for the actions of another is guilty of the offense.” OAG explains that this is a problem because it leaves unclear the relationship between the innocent instrumentality doctrine and criminal liability under the RCC.*

- The RCC addresses OAG’s comment by incorporating a new statutory provision into RCC § 22E-211, which explicitly states that a person who is legally accountable for the actions of another is guilty of an offense. That provision, styled as subsection (c), reads: “*Liability Based on Legal Accountability.* A person is guilty of an offense if it is committed by the conduct of another person for which he or she is legally accountable under subsection (a).”
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 152, comments that “[t]he title [of subsection (a)] misleading” because, “[a]s drafted, it implies that the person acted with some intentionality in causing another person to act,” whereas recklessly causing another person to commit a crime may suffice in particular circumstances under RCC § 22E-211(a).*

- The RCC addresses OAG’s comment by renaming RCC § 22E-211(a). Whereas this subsection was previously titled, “Using Another Person to Commit an Offense,” the revised version of RCC § 22E-211(a) is now titled “Causing Crime by an Innocent or Irresponsible Person.” The new title no longer implies that the defendant intentionally caused another person to act.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends adding an “Other Definitions” subsection, which highlights terms employed in one section of the general part that are defined in another section.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-211 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on causing crime by an innocent or irresponsible person.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

## **RCC § 22E-212. EXCEPTIONS TO LEGAL ACCOUNTABILITY**

(1) *The CCRC recommends expanding the Commentary's Explanatory Notes accompanying RCC § 22E-212 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on exceptions to legal accountability.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

### **RCC § 22E-213. WITHDRAWAL DEFENSE TO LEGAL ACCOUNTABILITY.**

(1) *OAG, App. C at 200, states that the “RCC should give more guidance on the applicability of [the withdrawal] defense” to legal accountability. OAG states that “[t]he RCC does not define the phrase ‘proper efforts,’” and that “[n]either the RCC nor the Commentary [] explain the parameters of this defense.” One relevant ambiguity, for example, is that “it is unclear if the phrase ‘proper efforts’ is meant to be broader, narrower, or the same as ‘reasonable efforts.’”*

- The RCC incorporates OAG’s recommendation by replacing the phrase “proper efforts” with “reasonable efforts” in the statutory text of RCC § 22E-213, and throughout the accompanying Commentary. This revision, in addition to the pre-existing analysis in the Explanatory Note on RCC § 22E-213(a)(3), offers sufficiently detailed guidance concerning the scope and availability of the withdrawal defense.<sup>54</sup>

(2) *The CCRC recommends expanding the Commentary’s Explanatory Notes accompanying RCC § 22E-213 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on the withdrawal defense.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

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<sup>54</sup> For example, the text of the accompanying Explanatory Note explains that:

Paragraph (a)(3) establishes that a withdrawal defense is available where the defendant “[o]therwise makes reasonable efforts to prevent the commission of the offense.” This catchall “reasonable efforts” alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (a)(1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably calculated towards disrupting it. This standard should be evaluated in light of the totality of the circumstances.

And an illustrative footnote in the explanatory note states that:

For example, alerting the victim of a criminal scheme of its existence could constitute a “reasonable efforts” at preventing the commission of an offense, where: (1) the disclosure to the victim is *timely*; and (2) the disclosure provides the victim with a *reasonably feasible* means of avoiding the target harm. Where, in contrast, the disclosure is made too late, or does not enable to victim to easily and safely escape harm, then the defendant’s conduct would not meet the “reasonable efforts” standard.

## **APPENDIX B:**

### **COMPILATION OF PRIOR RELATION TO NATIONAL LEGAL TRENDS ENTRIES**

This appendix contains the relation to national legal trends entries (hereinafter, “entries”), which the CCRC staff previously produced in conjunction with prior drafts of the legislation addressed in Report #35. These entries have been excerpted from the staff commentary accompanying those prior drafts and are presented in this appendix, alongside the draft legislation to which they originally corresponded, in the same form as when they were originally released. These entries are included in this Report for reference purposes only, and should be viewed with a few important caveats in mind. *First*, these entries reflect the analysis of national legal trends that informed the CCRC staff’s work at the time of their initial release. Since that time, however, the relevant national legal trends and/or staff’s understanding of them may have subsequently changed or shifted. *Second*, these entries track older versions of proposed CCRC legislation, which may significantly depart from the corresponding CCRC legislation recommended in this Report. *Third*, the internal references and citations (e.g., *supra* and *infras*) utilized in these entries have not been updated, and, therefore, are no longer accurate.



## **§ 22A-201 PROOF OF OFFENSE ELEMENTS BEYOND A REASONABLE DOUBT**

- (a) **PROOF OF OFFENSE ELEMENTS BEYOND A REASONABLE DOUBT.** No person may be convicted of an offense unless each offense element is proven beyond a reasonable doubt.
- (b) **OFFENSE ELEMENT DEFINED.** “Offense element” includes the objective elements and culpability requirement necessary to establish liability for an offense.
- (c) **OBJECTIVE ELEMENT DEFINED.** “Objective element” means any conduct element, result element, or circumstance element. For purposes of this Title:
  - (1) “Conduct element” means any act or omission, as defined in § 22A-202, that is required to establish liability for an offense.
  - (2) “Result element” means any consequence that must have been caused by a person’s conduct in order to establish liability for an offense.
  - (3) “Circumstance element” means any characteristic or condition relating to either a conduct element or result element the existence of which is required to establish liability for an offense.
- (d) **CULPABILITY REQUIREMENT DEFINED.** “Culpability requirement” includes each of the following:
  - (1) The voluntariness requirement, as provided in § 22A-203;
  - (2) The causation requirement, as provided in § 22A-204; and
  - (3) The culpable mental state requirement, as provided in § 22A-205.

### **1. § 22A-201(a)—Proof of Offense Elements Beyond a Reasonable Doubt**

***Relation to National Legal Trends.*** Subsection (a) codifies an American constitutional principle in a manner that is consistent with legislative practice in reform jurisdictions.

“[T]he 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.”<sup>1</sup> In practical effect, this means that the defendant in a criminal case may not be required to “prove the critical fact in dispute,”<sup>2</sup> which is to say any fact that serves to negate an element of the offense.<sup>3</sup>

As the U.S. Supreme Court has explained, this constitutional prohibition is a central component of the American criminal justice system:

[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by

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<sup>1</sup> *In re Winship*, 397 U.S. at 364.

<sup>2</sup> *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).

<sup>3</sup> *See Patterson v. New York*, 432 U.S. 197, 207 (1977).

a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.<sup>4</sup>

Codification of this constitutional principle is a standard part of modern code reform efforts. The vast majority of reform jurisdictions—in addition to the Model Penal Code, the Proposed Federal Criminal Code, and the most recent code reform projects—codify a general provision on the burden of proof comparable to § 22A-201(a).<sup>5</sup> There is, however, one important variance between § 22A-201(a) and the comparable provisions in reform codes. Whereas many reform codes address various procedural and evidentiary issues—including the effect of presumptions and the status of defenses—alongside their general provision establishing the burden of proof, § 22A-201 does not address such issues.<sup>6</sup> (Due to time constraints, the CCRC has no plans to develop recommendations on these matters before its statutory deadline of September 30, 2017).

## 2. § 22A-201(b)—Offense Element Defined

*Relation to National Legal Trends.* Subsection (b) reflects American legal principles in a manner that is consistent with legislative practice in reform jurisdictions.

It is a well-established part of the American criminal justice system that both the objective elements and culpability requirement of an offense are among the facts subject to the reasonable doubt standard. As the U.S. Supreme Court has explained, “In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.”<sup>7</sup> Both of these requirements, in turn, are among the “fact[s] necessary to constitute the crime with which [the accused] is charged.”<sup>8</sup>

The foregoing principles are reflected in all reform codes, which either explicitly or implicitly subject the objective elements and the culpability requirement of an offense to the proof beyond a reasonable doubt standard.<sup>9</sup> However, codification of a definition of “offense element” or its substantive equivalent is a minority trend. Only about a third of reform jurisdictions—though all of the model codes and recent code reform projects—

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<sup>4</sup> *In re Winship*, 397 U.S. at 364.

<sup>5</sup> For reform jurisdictions, see Ariz. Rev. Stat. Ann. § 13-115; Colo. Rev. Stat. Ann. § 18-1-402; Conn. Gen., Stat. Ann. § 53a-12; Del. Code Ann. tit. 11, § 301; Haw. Rev. Stat. Ann. § 701-115; 720 Ill. Comp. Stat. Ann. 5/3-1; 720 Ill. Comp. Stat. Ann. 5/3-2; Ind. Code Ann. § 35-41-4-1; Kan. Stat. Ann. § 21-5108; Me. Rev. Stat. tit. 17-A, § 101; Mo. Ann. Stat. § 556.056; N.H. Rev. Stat. Ann. § 625:10; N.J. Stat. Ann. § 2C:1-13; N.Y. Penal Law § 25.00; Ohio Rev. Code Ann. § 2901.05; Or. Rev. Stat. Ann. § 161.055; S.D. Codified Laws § 22-1-2; Tenn. Code Ann. § 39-11-204; Tex. Penal Code Ann. § 2.01; Utah Code Ann. § 76-1-501; Wash. Rev. Code Ann. § 9A.04.100. For model codes, see Model Penal Code § 1.12 and Proposed Federal Criminal Code § 103. For recent code reform projects, see Kentucky Revision Project 500.106 and Illinois Reform Project § 107.

<sup>6</sup> See, e.g., Model Penal Code § 1.12; N.J. Stat. Ann. § 2C:1-13.

<sup>7</sup> *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980).

<sup>8</sup> *In re Winship*, 397 U.S. at 364.

<sup>9</sup> See sources cited *supra* note 7.

codify a definition of a comparable phrase.<sup>10</sup> The definition of “offense element” provided in § 22A-201(b) is based on this minority practice. Its adoption will enhance the clarity and consistency of the Revised Criminal Code.

One substantive variance between § 22A-201(b) and the comparable provisions in reform codes is that whereas many reform codes address the status of other issues as elements (e.g., defenses, the statute of limitations, venue, and jurisdiction), § 22A-201(b) does not address such issues.<sup>11</sup> (Due to time constraints the CCRC has no plans to develop general recommendations on these matters before its statutory deadline of September 30, 2017.)

### 3. § 22A-201(c)—Objective Element Defined

**Relation to National Legal Trends.** Subsection (c) is broadly consistent with common law principles and legislative trends in reform jurisdictions. However, the precise statutory definitions of conduct element, result element, and circumstance element contained in § 22A-201(c) depart from the prevailing legislative practice of providing conflicting descriptions of conduct and no definition of result element or circumstance element at all. This departure enhances the clarity and consistency of the Revised Criminal Code.

Historically, the objective part of a criminal offense—the *actus reus*—has been viewed as a single whole by the common law. More recently, though, American legal authorities have begun to recognize that the *actus reus* of an offense is actually comprised of different kinds of “objective elements,”<sup>12</sup> which are “often distilled into three categories: the defendant’s conduct, the attendant circumstances, and the results or consequences.”<sup>13</sup> This change in perspective was driven by the insights of the Model Penal Code, whose drafters famously recognized that “clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.”<sup>14</sup>

Consistent with this practice of examining the culpable mental state requirement governing each element in an offense’s *actus reus*—a practice called “element analysis”—nearly all reform codes make reference to and rely on the distinctions between conduct, results, and circumstances in the context of various general culpability provisions.<sup>15</sup> What no modern criminal code provides, however, is a clear legislative scheme for differentiating between these three kinds of elements in practice.

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<sup>10</sup> For reform codes, *see* Ark. Code Ann. § 5-1-102; Del. Code Ann. tit. 11, § 232; Me. Rev. Stat. tit. 17-A, § 32; N.H. Rev. Stat. Ann. § 625:11; N.J. Stat. Ann. § 2C:1-14; 18 Pa. Stat. and Cons. Stat. Ann. § 103; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-1-501. For model codes, *see* Model Penal Code § 1.13(9) and Proposed Federal Criminal Code § 103(1). For recent code reform projects, *see* Kentucky Revision Project 501.202 and Illinois Reform Project § 202(1).

<sup>11</sup> *See, e.g.*, Model Penal Code § 1.13(9); Del. Code Ann. tit. 11, § 232; N.H. Rev. Stat. Ann. § 625:11; 18 Pa. Stat. and Cons. Stat. Ann. § 103.

<sup>12</sup> *E.g.*, *State v. Moser*, 111 P.3d 54, 65 (Haw. Ct. App. 2005); *Matter of Welfare of A.A.E.*, 579 N.W.2d 149 (Minn. Ct. App. 1998); *Com. v. Roebuck*, 32 A.3d 613, 618 (Pa. 2011).

<sup>13</sup> *United States v. Burwell*, 690 F.3d 500, 530 n.3 (D.C. Cir. 2012) (citing Model Penal Code § 1.13(9)); WAYNE R. LAFAYE, 1 SUBST. CRIM. L. § 5.4 (Westlaw 2016)).

<sup>14</sup> Model Penal Code § 2.02 cmt. at 123.

<sup>15</sup> For example, when an attempt to commit an offense is charged, the result element of the target offense, if not already subject to a culpable mental state of at least knowledge, must be appropriately elevated under

This “major defect,”<sup>16</sup> decried by both courts and commentators alike, is most clearly reflected in the total absence of a definition for either “result element” or “circumstance element” in other jurisdictions’ codes. The absence of any definition makes it difficult to “determine how to categorize a specific material element of a crime.”<sup>17</sup> Less clear, but ultimately no less problematic, is the ambiguous and conflicting treatment of “conduct” typically reflected in reform codes. On the one hand, reform codes often define conduct narrowly in a general definitions provision “as an action or omission.”<sup>18</sup> On the other hand, these same codes then make reference to the “nature of the [actor’s] conduct” in other general provisions governing culpable mental state definitions.<sup>19</sup> Although this phrase is never defined, its usage strongly suggests that conduct entails more than just a bodily movement, but rather “a bodily movement and *all of its relevant characteristics*.”<sup>20</sup> If true, however, then this creates a “troublesome overlap between culpability as to conduct and culpability as to a circumstance and a result,”<sup>21</sup> a problem that has plagued courts attempting to consistently and objectively apply this kind of legislative scheme.<sup>22</sup>

The definitions provided in § 22A-201(c) are intended to remedy these defects in the following manner. First, § 22A-201(c)(1) adopts a narrow definition of conduct element, as an “act” or “omission,” which terms are in turn respectively defined in §§ 22A-202(b) and (c) as a “bodily movement” or “failure to act” under specified circumstances. This definition of conduct element is consistent with that contained in most reform codes<sup>23</sup> and finds support in legal commentary.<sup>24</sup> The Revised Criminal Code does not use the phrase “nature of the actor’s conduct.”

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reform codes—a “rule of elevation” that generally *does not* apply to circumstance elements. *See, e.g.*, Model Penal Code § 5.01. Additionally, it is common to provide disparate definitions of “purposely” and “knowingly” contingent upon whether the objective element to which it applies is a result or circumstance. *See, e.g.*, Model Penal Code § 2.02(2).

<sup>16</sup> Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 706-07 (1983).

<sup>17</sup> *State v. Crosby*, 154 P.3d 97, 102 (Or. 2007).

<sup>18</sup> *See, e.g.*, Model Penal Code § 1.13(5); Ark. Code Ann. § 5-2-201; Colo. Rev. Stat. Ann. § 18-1-501; Kan. Stat. Ann. § 21-5111; 18 Pa. Stat. and Cons. Stat. Ann. § 103.

<sup>19</sup> *See, e.g.*, Model Penal Code § 2.02(2); Ark. Code Ann. § 5-2-202; Kan. Stat. Ann. § 21-5202; 18 Pa. Stat. and Cons. Stat. Ann. § 302.

<sup>20</sup> Robinson & Grall, *supra* note 20, at 707.

<sup>21</sup> PAUL H. ROBINSON, 1 CRIM. L. DEF. § 61 (Westlaw 2016). For example, in an offense definition that prohibits the “unlawful killing of another human being,” the “nature of the conduct” is surely the bodily movement that causes death. But what are the *relevant* characteristics accompanying this bodily movement? Its “unlawful” nature? Its propensity to “kill”? Its propensity to “kill another *human being*”? Or perhaps it is some combination of the three? There is, in the final analysis, simply no concrete way of answering this question, as the determination of *relevance* necessarily calls for the exercise of judicial discretion—discretion that runs contrary to the goals of *ex ante* predictability and certainty animating codification in the first instance. *Id.*

<sup>22</sup> *See, e.g.*, *Cook v. State*, 884 S.W.2d 485, 493 (Tex. Crim. App. 1994) (*en banc*) (Maloney, J., concurring).

<sup>23</sup> *See* sources cited *supra* note 22.

<sup>24</sup> For older authorities that offer a similar definition, see 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 290 (R. Campbell ed. 1874); O. W. HOLMES, THE COMMON LAW 54 (1881). For more recent authorities that provide a similar definition, see Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 554 n.250 (1992); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1035 n.24 (1998); ROBINSON, *supra* note 25, at 1 CRIM. L. DEF. § 61; Robinson & Grall, *supra* note 20, at 707.

Second, §§ 22A-201(c)(1) and (2) respectively provide precise definitions for result elements and circumstance elements. A result element, as defined in § 22A-201(c)(2), addresses any consequence required to have been caused by the actor in order to entail liability, while a circumstance element, as defined in § 22A-201(c)(3), addresses any characteristic or condition relating to either a conduct element or result element the existence of which is necessary to establish liability. These definitions are loosely modeled on those provided by the two most recent comprehensive code reform projects<sup>25</sup> and also find general support in legal commentary.<sup>26</sup>

The foregoing framework, when viewed collectively, should make it easier to analytically separate what is usually inconsequential—the required bodily movement (or, where relevant, failure to make one)—from other aspects of a criminal offense that are more central to adjudging culpability, such as the required results of and circumstances surrounding that bodily movement.<sup>27</sup> One noteworthy implication of this framework, however, is that it treats all “issues raised by the nature of one’s conduct”—for example, whether one’s bodily movement amounts to use—“as circumstance elements.”<sup>28</sup> It will, therefore, no longer make sense to refer to “conduct crimes” under the Revised Criminal Code; every offense, under the prescribed framework, will be comprised of, at minimum, a conduct element and either a circumstance element or result element.<sup>29</sup>

#### 4. § 22A-201(d)—Culpability Requirement Defined

*Relation to National Legal Trends.* See commentary on the voluntariness requirement, § 22A-203, causation requirement, § 22A-204, and the culpable mental state requirement, § 22A-205.

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<sup>25</sup> For example, § 501.202 of the Kentucky Revision Project reads in relevant part: “A ‘result element’ is any change of circumstances required to have been caused by the person’s conduct . . . A ‘circumstance element’ is any objective element that is not a conduct or result element.” Likewise, § 202(1) of the Illinois Reform Project contains identical language.

<sup>26</sup> See, e.g., Robinson & Grall, *supra* note 20, at 712; Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 183 (2003).

<sup>27</sup> For a fuller discussion of this point, see commentary on the voluntariness requirement, § 22A-203, and the culpable mental state requirement, § 22A-205.

<sup>28</sup> Robinson & Grall, *supra* note 20, at 712.

<sup>29</sup> In this way, the Revised Criminal Code recognizes that one’s “willed bodily movement may be qualified by circumstances and results so that [one’s] conduct can be redescribed in any number of ways; and some redescriptions render your conduct criminal.” Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 380 (2008).

## § 22A-202 CONDUCT REQUIREMENT

(a) CONDUCT REQUIREMENT. No person may be convicted of an offense unless the person's liability is based on an act, omission, or possession.

(b) ACT DEFINED. "Act" means a bodily movement.

(c) OMISSION DEFINED. "Omission" means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. For purposes of this Title, a legal duty to act exists when:

(1) The failure to act is expressly made sufficient by the law defining the offense; or

(2) A duty to perform the omitted act is otherwise imposed by law.

(d) POSSESSION DEFINED. "Possession" means knowingly exercising control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property.

### 1. § 22A-202(a)—Conduct Requirement

***Relation to National Legal Trends.*** Subsection (a) codifies a well-established common law principle that is routinely addressed by reform codes.

The conduct requirement has deep historical roots: "The maxim that civilized societies should not criminally punish individuals for their 'thoughts alone' has existed for three centuries."<sup>30</sup> And it is no less established today: American courts all seem to accept the basic "principle that no one is punishable for his thoughts."<sup>31</sup> This requirement also has a constitutional dimension; a series of cases decided by the U.S. Supreme Court establish that "[s]ome conduct by the defendant is constitutionally required in order to punish a person."<sup>32</sup>

Codification of the conduct requirement is a regular part of modern code reform efforts. Typically, however, reform jurisdictions codify the conduct requirement alongside the voluntariness requirement in a general provision that more broadly addresses the so-called "voluntary act doctrine."<sup>33</sup> This approach is based on Model

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<sup>30</sup> Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 282 (2002).

<sup>31</sup> *United States v. Muzii*, 676 F.2d 919, 920 (2d Cir. 1982); see, e.g., *Proctor v. State*, 176 P. 771, 773 (Okla. Crim. App. 1918); *Ex Parte Smith*, 36 S.W. 628, 632 (Mo. 1896)).

<sup>32</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.04(c) (6th ed. 2012) (discussing *Robinson v. California*, 392 U.S. 514 (1968) and *Powell v. Texas*, 392 U.S. 514 (1968)). As Wayne R. LaFave similarly observes: "A statute purporting to make it criminal simply to think bad thoughts would, in the United States, be held unconstitutional." WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.1 (Westlaw 2016).

<sup>33</sup> E.g., DRESSLER, *supra* note 4, at § 9.02(a); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 206 (8th ed. 2012). For reform jurisdictions, see Ala. Code § 13A-2-3; Alaska Stat. Ann. §

Penal Code § 2.01(1), which establishes that “[a] person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”<sup>34</sup>

The Revised Criminal Code, in contrast, codifies these two requirements separately: § 22A-202(a) of this provision codifies the conduct requirement while § 22A-301(a) codifies the voluntariness requirement. This departure improves the clarity and precision of each requirement. The conduct requirement and the voluntariness requirement are conceptually distinct from one another,<sup>35</sup> and each serves different policy goals.<sup>36</sup> Therefore, individual consideration of whether each requirement is met, rather than considering both requirements together in the context of the voluntary act doctrine, is likely to lead to clearer and more consistent legal analysis.<sup>37</sup>

## 2. § 22A-202(b)—Act Defined

*Relation to National Legal Trends.* Subsection (b) is broadly consistent with common law principles and legislative trends reflected in reform jurisdictions.

The common law principles supporting this definition are addressed in the commentary to § 22-201(c)—Objective Elements Defined.

Codification of a definition of “act” is a frequent part of modern code reform efforts. Most reform jurisdictions—in addition to the Model Penal Code, the Proposed Federal Criminal Code, and recent code reform projects—codify a definition of the term consistent with that provided in § 22A-202(b).<sup>38</sup>

## 3. § 22A-202(c)—Omission Defined

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11.81.600; Ariz. Rev. Stat. Ann. § 13-201; Ark. Code Ann. § 5-2-204; Colo. Rev. Stat. Ann. § 18-1-502; Del. Code Ann. tit. 11, § 242; Haw. Rev. Stat. Ann. § 702-200; 720 Ill. Comp. Stat. Ann. 5/4-1; Ind. Code Ann. § 35-41-2-1; Kan. Stat. Ann. § 21-5201; Ky. Rev. Stat. Ann. § 501.030; Me. Rev. Stat. tit. 17-A, § 34; Mo. Ann. Stat. § 562.011; N.H. Rev. Stat. Ann. § 626:1; N.J. Stat. Ann. § 2C:2-1; N.Y. Penal Law § 15.10; N.D. Cent. Code Ann. § 12.1-02-01; Ohio Rev. Code Ann. § 2901.21; Or. Rev. Stat. Ann. § 161.095; 18 Pa. Stat. and Cons. Stat. Ann. § 301; Tex. Penal Code Ann. § 6.01. For model codes, *see* Proposed Federal Criminal Code § 301 and Proposed D.C. Basic Criminal Code § 22-102. For recent code reform projects, *see* Kentucky Code Revision Project § 501.204 and Illinois Reform Project § 204.

<sup>34</sup> Model Penal Code § 2.01(4) later clarifies that: “Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.”

<sup>35</sup> *See, e.g.*, DRESSLER, *supra* note 4, at § 9.02(a); Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1571-72 (2013).

<sup>36</sup> *See, e.g.*, Model Penal Code § 2.01 cmt. at 213-14; Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405-06 (1959); LAFAVE, *supra* note 4, at § 6.1.

<sup>37</sup> *See, e.g.*, DRESSLER, *supra* note 4, at § 9.02(a); Farrell & Marceau, *supra* note 7, at 1571-74.

<sup>38</sup> For reform jurisdictions, *see* Ala. Code § 13A-2-1; Ariz. Rev. Stat. Ann. § 13-105; Ark. Code Ann. § 5-2-201; Colo. Rev. Stat. Ann. § 18-1-501; Haw. Rev. Stat. Ann. § 701-118; Kan. Stat. Ann. § 21-5111; Me. Rev. Stat. tit. 17-A, § 2; Mo. Ann. Stat. § 562.011; Mont. Code Ann. § 45-2-101; N.J. Stat. Ann. § 2C:1-14; N.Y. Penal Law § 15.00; N.D. Cent. Code Ann. § 12.1-01-04; Or. Rev. Stat. Ann. § 161.085; 18 Pa. Stat. and Cons. Stat. Ann. § 103; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-1-601; 720 Ill. Comp. Stat. Ann. 5/2-2; Iowa Code Ann. § 702.2; Wash. Rev. Code Ann. § 9A.04.110. For model codes, *see* Model Penal Code § 1.13(4). For recent code reform projects, *see* Kentucky Revision Project § 501.204(4) and Illinois Reform Project § 204(4).

**Relation to National Legal Trends.** Subsection (c) codifies basic common law principles and is generally in accordance with legislative trends. However, it departs from the standard legislative approach by specifying that omission liability is limited to those situations where the actor was either aware—or if not aware, then culpably unaware—that the legal duty to act existed. This departure reflects the DCCA’s interpretation of U.S. Supreme Court precedent.<sup>39</sup>

The scope of omission liability, as developed by the common law, is relatively narrow. Generally speaking, “a person has no criminal law duty to act to prevent harm to another, even if she can do so at no risk to herself, and even if the person imperiled may lose her life in the absence of assistance.”<sup>40</sup> Rather, it is only where the person has a legal duty to act that omission liability is considered to be appropriate.

The common law recognizes that a legal duty to act can be established through two basic mechanisms. First, a duty to act may be created by the criminal statute for which the accused is being prosecuted, by expressly defining the offense in terms of an omission. Illustrative of such offenses are statutes criminalizing a motorist’s failure to stop after involvement in an accident, a taxpayer’s failure to file a tax return, a parent’s neglect of the health of his child, and a failure to report certain communicable diseases.<sup>41</sup> Second, a duty to act may be created by a law—whether criminal or civil—distinct from the offense for which the defendant is being prosecuted. Illustrative of such duties are those created by special relationships, landowners, contract, voluntary assumption of responsibility, and the creation of peril.<sup>42</sup>

Codification of the foregoing principles of omission liability is a standard part of modern code reform efforts. A majority of reform jurisdictions codify a general provision that provides a basic definition of omission.<sup>43</sup> Among these reform jurisdictions, most address the limits of omission liability through their definition of omission.<sup>44</sup> This is in contrast to the approach developed by the Model Penal Code, which defines “omission” as a “failure to act” in one general provision,<sup>45</sup> and thereafter

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<sup>39</sup> *Id.*

<sup>40</sup> DRESSLER, *supra* note 4, at § 9.06(a).

<sup>41</sup> PAUL H. ROBINSON, CRIMINAL LAW DEFENSES, 1 CRIM. L. DEF. § 86 (Westlaw 2016).

<sup>42</sup> *Id.* For example, state courts have held that an omission may give rise to criminal liability in the following situations: (1) a person *with a legal duty to act* who negligently fails to provide needed care to someone in great medical distress may be guilty of manslaughter if the person dies as a result of the omission, *Commonwealth v. Twitchell*, 617 N.E.2d 609 (Mass. 1993); *People v. Oliver*, 210 Cal. App. 3d 138 (Ct. App. 1989); (2) a person who *has a legal duty to report a fire* may be convicted of some form of criminal homicide if her failure to report the fire recklessly or negligently results in death; *Commonwealth v. Levesque*, 766 N.E.2d 50 (Mass. 2002); and (3) a parent who *has a duty to act* may be convicted of child or sexual abuse if she fails to prevent such harm from being committed by another person, *Degren v. State*, 722 A.2d 887 (Md. 1999); *State v. Williquette*, 385 N.W.2d 145 (Wis. 1986); *Pope v. State*, 396 A.2d 1054 (Md. 1975).

<sup>43</sup> See Ala. Code § 13A-2-1; Alaska Stat. Ann. § 11.81.900; Ariz. Rev. Stat. Ann. § 13-105; Ark. Code Ann. § 5-2-201; Colo. Rev. Stat. Ann. § 18-1-501; Haw. Rev. Stat. Ann. § 701-118; Mo. Ann. Stat. § 562.011; N.J. Stat. Ann. § 2C:1-14; N.Y. Penal Law § 15.00; N.D. Cent. Code Ann. § 12.1-01-04; Or. Rev. Stat. Ann. § 161.085; 18 Pa. Stat. and Cons. Stat. Ann. § 103; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-1-601; Wash. Rev. Code Ann. § 9A.04.110.

<sup>44</sup> Ala. Code § 13A-2-1; Alaska Stat. Ann. § 11.81.900; Ariz. Rev. Stat. Ann. § 13-105; Ark. Code Ann. § 5-2-201; Colo. Rev. Stat. Ann. § 18-1-501; N.Y. Penal Law § 15.00; Or. Rev. Stat. Ann. § 161.085; Utah Code Ann. § 76-1-601.

<sup>45</sup> Model Penal Code § 1.13(4).



specifies in another general provision that “[l]iability for the commission of an offense may not be based on an omission unaccompanied by action unless” either “the omission is expressly made sufficient by the law defining the offense,” or, alternatively, “a duty to perform the omitted act is otherwise imposed by law.”<sup>46</sup>

The Revised Criminal Code, like most reform codes that statutorily address omission liability, incorporates the limitations on omission liability into the definition of omission under § 22A-202(b). This variance from the Model Penal Code is intended to enhance the accessibility and clarity of the Revised Criminal Code. It should, for example, preclude courts and advocates from having to read two separate code provisions to understand the kinds of “omissions” that are relevant to criminal liability. And it also clarifies that, for purposes of the Revised Criminal Code, there is only one kind of “omission,” namely, those sufficient to form the basis of criminal liability in the absence of an affirmative act.

Subsection (b) departs, however, from other states’ general provisions on omission liability in one important respect: it establishes that in order to be subject to omission liability the person must have been aware—or if not aware, then culpably unaware—of the relevant legal duty. This departure accords with compelling policy considerations and is consistent with District law.

Generally speaking, there is little benefit in prosecuting those who lack “knowledge of [a] law’s provisions, and no reasonable probability that knowledge might be obtained.”<sup>47</sup> As the U.S. Court of Appeals for the Second Circuit has observed:

Since [such offenders] could not know better, we can hardly expect that they should have been deterred. Similarly, it is difficult to justify application of criminal punishment on other traditional grounds such as retribution, rehabilitation or disablement. Without knowledge [or a reasonable probability of knowledge], the moral force of retribution is entirely spent; we do not rehabilitate conduct that is by hypothesis not faulty; and there is little to recommend incarcerating those who would obey the law if only they knew of its existence.<sup>48</sup>

These concerns are even more pronounced in the realm of omission liability, however, “where the mind of the offender has no relationship to the prescribed conduct if he has no knowledge of the relevant regulation.”<sup>49</sup> In this context, it is argued, “the strictest liability that makes any sense is a liability for culpable ignorance.”<sup>50</sup>

Policy considerations aside, this position appears to have been adopted as a constitutional requirement by the DCCA in *Conley v. United States*.<sup>51</sup> In that case, the DCCA interpreted the U.S. Supreme Court’s decision in *Lambert v. California*<sup>52</sup> to stand for the proposition that “it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no

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<sup>46</sup> Model Penal Code § 2.01(3).

<sup>47</sup> *United States v. Mancuso*, 420 F.2d 556, 559 (2d Cir. 1970).

<sup>48</sup> *Id.* (citing H.L.A. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB., at 422-25).

<sup>49</sup> Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 602-03 (1958).

<sup>50</sup> *Id.*

<sup>51</sup> 79 A.3d at 273.

<sup>52</sup> 355 U.S. 225 (1957).

reason to believe he had a legal duty to act, or even that his failure to act was blameworthy.”<sup>53</sup>

#### 4. § 22A-202(d)—Possession Defined

**Relation to National Legal Trends.** Subsection (d) is generally in accordance with well-established common law principles and nationwide legislative practice.

Prohibitions on the possession of contraband or other criminal instrumentalities pervade American criminal law.<sup>54</sup> Prohibitions of this nature, like criminal statutes that prohibit attempts or solicitation, are typically understood to constitute a form of “inchoate” liability in that their primary “purpose is to provide the police with a basis for arresting those whom they suspect will later commit a socially injurious act (e.g., sell narcotics, or use the tools to commit a crime).”<sup>55</sup> Unlike other forms of inchoate liability, however, possession offenses do not necessarily require the defendant to engage in a physical movement at all. It is generally accepted, for example, that proof that an actor “failed to dispossess herself of [a prohibited] object after she became aware of its presence” will suffice for possession liability.<sup>56</sup> “In the latter case, ‘possession’ is equivalent to an omission, in which the defendant has a statutory duty to dispossess herself of the property.”<sup>57</sup> And it is also well established at common law that proof of actual possession is not necessary for criminal liability; rather proof that the person constructively possessed prohibited contraband not otherwise on his or her person will suffice.<sup>58</sup>

Codification of the foregoing principles governing possession liability is a standard part of modern code reform efforts. The basis for nearly all such general provisions is Model Penal Code § 2.01(4), which establishes that “[p]ossession is an act, within the meaning of [the voluntary act doctrine], if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.” Many reform jurisdictions have a definition of possession substantively identical to § 2.01(4).<sup>59</sup> Another sizable group of reform jurisdictions, in contrast, define possession solely by reference to whether the

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<sup>53</sup> *Conley*, 79 A.3d at 273. Whether the DCCA’s interpretation of *Lambert* is consistent with the interpretation applied by other federal courts of appeal is unclear. Compare *Mancuso*, 420 F.2d at 559 and *United States v. Anderson*, 853 F.3d 313 (5th Cir. 1988) with *United States v. Shelton*, 325 F.3d 553, 564 (5th Cir. 2003) and *United States v. Hancock*, 231 F.3d 557, 563-64 (9th Cir. 2000); see also *Conley*, 79 A.3d at 293 (Thompson, J., dissenting).

<sup>54</sup> WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 19.1 (Westlaw 2016).

<sup>55</sup> DRESSLER, *supra* note 4, at § 9.03(c).

<sup>56</sup> DRESSLER, *supra* note 4, at § 9.03(c).

<sup>57</sup> *Id.* That being said, such a defendant “is not guilty if the contraband was ‘planted’ on her, and she did not have sufficient time to terminate her possession after she learned of its presence.” *Id.*

<sup>58</sup> See, e.g., *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *Wallace v. State*, 932 S.W.2d 519 (Tex. App. 1995); *State v. Al-Khayyal*, 744 S.E.2d 885 (Ga. App. 2013); *People v. Josephitis*, 914 N.E.2d 607 (Ill. App. 2009); *State v. Miller*, 678 S.E.2d 592 (N.C. 2009); *State v. Demarais*, 770 N.W.2d 246 (N.D. 2009).

<sup>59</sup> See Del. Code Ann. tit. 11, § 243; Haw. Rev. Stat. Ann. § 702-202; 720 Ill. Comp. Stat. Ann. 5/4-2; Me. Rev. Stat. tit. 17-A, § 103-B; Mo. Ann. Stat. § 562.011; Mont. Code Ann. § 45-2-202; N.H. Rev. Stat. Ann. § 626:1; N.J. Stat. Ann. § 2C:2-1; Ohio Rev. Code Ann. § 2901.21; 18 Pa. Stat. and Cons. Stat. Ann. § 301; Tex. Penal Code Ann. § 6.01.

actor “was aware of his control thereof for a sufficient period to have been able to terminate his possession.”<sup>60</sup>

Subsection (d) defines possession in a manner that is broadly consistent with the foregoing general provisions as well as those contained in other code reform projects.<sup>61</sup> However, it has been modified to more clearly allow for constructive possession as a sufficient basis for liability—as reflected in the phrase “whether or not the property is on one’s person.” And it also strives to make clear that, regardless of whether actual or constructive possession is at issue, “the issue of passing control [should be viewed as] intrinsically related to the definition of possession rather than as a matter of affirmative defense.”<sup>62</sup>

The latter aspect of § 22A-202(d) reflects the most intuitive understanding of possession—as various federal courts have observed: “To ‘possess’ means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature.”<sup>63</sup> Perhaps more importantly, this understanding of possession is best situated to limit the risk that “superficial possession”<sup>64</sup>—such as when one picks up a prohibited object to merely examine it—will lead to “convictions under guiltless circumstances.”<sup>65</sup> By providing a “grace period [] designed to separate illegal possession from temporary control incidental to the lawful purpose of terminating possession,”<sup>66</sup> § 22A-202(d) is intended to avoid causing “manifest injustice to admittedly innocent individuals.”<sup>67</sup>

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<sup>60</sup> See Ala. Code § 13A-2-1; Colo. Rev. Stat. Ann. § 18-1-501; Ind. Code Ann. § 35-41-2-1; Ky. Rev. Stat. Ann. § 501.010; N.Y. Penal Law § 15.00.

<sup>61</sup> See Kentucky Revision Project § 501.204; Illinois Reform Project § 204.

<sup>62</sup> *Jordan v. State*, 819 P.2d 39, 41 (Alaska Ct. App. 1991).

<sup>63</sup> *United States v. Landry*, 257 F.2d 425, 431 (7th Cir. 1958) (quoting *United States v. Wainer*, 170 F.2d 603, 606 (7th Cir. 1948)).

<sup>64</sup> *Tingley v. Brown*, 380 So.2d 1289, 1291 (Fla.1980).

<sup>65</sup> *People v. Mijares*, 491 P.2d 1115, 1119–20 (1971).

<sup>66</sup> *State v. Flaherty*, 400 A.2d 363, 367 (Me. 1979).

<sup>67</sup> *Mijares*, 491 P.2d at 1120 (1971).

## § 22A-203 VOLUNTARINESS REQUIREMENT

(a) VOLUNTARINESS REQUIREMENT. No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense.

(b) SCOPE OF VOLUNTARINESS REQUIREMENT.

(1) *Voluntariness of Act.* Where a person’s act provides the basis for liability, a person voluntarily commits the conduct element of an offense when that act was the product of conscious effort or determination, or was otherwise subject to the person’s control.

(2) *Voluntariness of Omission.* Where a person’s omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when the person had the physical capacity to perform the required legal duty, or the failure to act was otherwise subject to the person’s control.

### 1. § 22A-203(a)—Voluntariness Requirement

***Relation to National Legal Trends.*** Subsection (a) codifies a well-established common law principle that is routinely addressed by reform codes. However, the precise manner in which § 22A-203(a) codifies the voluntariness requirement departs from the standard legislative approach to improve the clarity and consistency of the Revised Criminal Code.

The requirement of voluntariness is a central feature of the common law.<sup>68</sup> “At all events it is clear,” as LaFave observes, “that criminal liability requires that the activity in question be voluntary.”<sup>69</sup> Indeed, it has been argued that “a voluntary act is the most fundamental requirement of criminal liability.”<sup>70</sup> The reason? “The concept of volition is tied to the notion that criminal law responsibility should only attach to those who are accountable for their actions in a very personal way.”<sup>71</sup> As LaFave observes:

The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no reason to impose punishment on this basis as to those whose actions were not voluntary.<sup>72</sup>

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<sup>68</sup> See, e.g., OLIVER WENDELL HOLMES, THE COMMON LAW 54 (1881); 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 426 (3d ed. 1869).

<sup>69</sup> WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 6.1 (Westlaw 2016). See, e.g., *State v. Deer*, 244 P.3d 965 (Wash. Ct. App. 2010); *Martin v. State*, 17 So.2d 427 (Ala. Ct. App. 1944).

<sup>70</sup> Paul H. Robinson et. al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 92 (2015).

<sup>71</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.02(c)(2) (6th ed. 2012). As one court has phrased it, “It is [the] volitional aspect of a person’s actions that renders her morally responsible.” *State v. Deer*, 244 P.3d 965, 968 (Wash. Ct. App. 2010).

<sup>72</sup> LAFAVE, *supra* note 5, at § 6.1; see MPC § 2.01 cmt. at 214-15.

Given the centrality of the voluntariness requirement to American criminal law, “[a]t least forty-two jurisdictions” recognize it in some way.<sup>73</sup> Among reform jurisdictions, however, the standard approach is to codify the voluntariness requirement alongside the conduct requirement in a general provision that more broadly addresses the so-called “voluntary act doctrine.”<sup>74</sup> Often, these general provisions are based on Model Penal Code § 2.01(1), which establishes that “[a] person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”<sup>75</sup> Among reform jurisdictions, the requirement of a voluntary act is “almost universally treated as a required element of every offense.”<sup>76</sup>

The Revised Criminal Code similarly treats a voluntary act as a required element of every offense. In contrast to the standard legislative approach, however, it codifies the two underlying requirements separately: § 22A-203(a) of this provision codifies the voluntariness requirement, while § 22A-202(a) codifies the conduct requirement. This departure improves the clarity and precision of each requirement. The conduct requirement and the voluntariness requirement are conceptually distinct from one another,<sup>77</sup> and each serves different policy goals.<sup>78</sup> Therefore, individual consideration of whether each requirement is met, rather than considering both requirements together in the context of the voluntary act doctrine, is likely to lead to clearer and more consistent legal analysis.<sup>79</sup>

## 2. § 22A-203(b)—Scope of Voluntariness Requirement

***Relation to National Legal Trends.*** Subsection (b) codifies fundamental common law principles, which are reflected in many reform codes. However, the precise manner in which § 22A-203(b) codifies these principles departs from the standard legislative approach. This departure improves the clarity of the law.

The requirement of voluntariness is a well-established part of Anglo-American criminal law.<sup>80</sup> Less clear, however, is what this requirement entails as a matter of course. Traditionally, the voluntariness requirement has been understood to require proof

<sup>73</sup> Robinson et. al., *supra* note 6, at 92.

<sup>74</sup> E.g., DRESSLER, *supra* note 7, at § 9.02(a); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 206 (8th ed. 2012). For reform jurisdictions, *see* Ala. Code § 13A-2-3; Alaska Stat. Ann. § 11.81.600; Ariz. Rev. Stat. Ann. § 13-201; Ark. Code Ann. § 5-2-204; Colo. Rev. Stat. Ann. § 18-1-502; Del. Code Ann. tit. 11, § 242; Haw. Rev. Stat. Ann. § 702-200; 720 Ill. Comp. Stat. Ann. 5/4-1; Ind. Code Ann. § 35-41-2-1; Kan. Stat. Ann. § 21-5201; Ky. Rev. Stat. Ann. § 501.030; Me. Rev. Stat. tit. 17-A, § 34; Mo. Ann. Stat. § 562.011; N.H. Rev. Stat. Ann. § 626:1; N.J. Stat. Ann. § 2C:2-1; N.Y. Penal Law § 15.10; N.D. Cent. Code Ann. § 12.1-02-01; Ohio Rev. Code Ann. § 2901.21; Or. Rev. Stat. Ann. § 161.095; 18 Pa. Stat. and Cons. Stat. Ann. § 301; Tex. Penal Code Ann. § 6.01. For model codes, *see* Proposed Federal Criminal Code § 301 and Proposed D.C. Basic Criminal Code § 22-102. For recent reform projects, *see* Kentucky Code Revision Project § 501.204 and Illinois Reform Project § 204.

<sup>75</sup> Model Penal Code § 2.01(2) later clarifies the conditions that render an act involuntary.

<sup>76</sup> PAUL H. ROBINSON, 2 CRIM. L. DEF. § 171 (Westlaw 2016).

<sup>77</sup> *See, e.g.*, DRESSLER, *supra* note 7, at § 9.02(a); Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1571-72 (2013).

<sup>78</sup> *See, e.g.*, Model Penal Code § 2.01 cmt. at 213-14; Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405-06 (1959); LAFAYE, *supra* note 5, at § 6.1.

<sup>79</sup> *See, e.g.*, DRESSLER, *supra* note 7, at § 9.02(a); Farrell & Marceau, *supra* note 13, at 1571-74.

<sup>80</sup> *See supra* notes 4-9 and accompanying text.

that a person's conduct is an external manifestation of will. For example, nineteenth century scholar John Austin defined a "voluntary act" as a "movement of the body which follows our volition,"<sup>81</sup> while Justice Oliver Wendell Holmes described it as a "willed" contraction of a muscle.<sup>82</sup> Other common law authorities have more nebulously defined the voluntariness requirement to require proof of "behavior that would have been otherwise if the individual had willed or chosen it to be otherwise."<sup>83</sup>

The drafters of the Model Penal Code, seeking to develop a general provision that would codify the voluntary act requirement for the first time, took a substantially different approach to the issue. First, Model Penal Code § 2.01(1) establishes that a person is not guilty of an offense in the absence of a "voluntary act or the omission to perform an act of which he is physically capable." Rather than define a "voluntary act" in the affirmative, however, the subsequent provision, § 2.01(2), lists the conditions that render an act *involuntary*.<sup>84</sup>

Generally speaking, the Model Penal Code drafters' decision to address the issues underlying the voluntary act requirement was warmly received, "spurr[ing] countrywide implementation of a voluntary act requirement" in reform jurisdictions.<sup>85</sup> However, the specifics of the Model Penal Code approach have been widely criticized for failing to "specifically define the term 'voluntary.'"<sup>86</sup> Consistent with this criticism, reform jurisdictions have typically rejected the Model Penal Code's negative approach to defining voluntariness.<sup>87</sup> Instead, the standard approach employed by reform jurisdictions is to affirmatively define a voluntary act as an act "performed consciously as a result of effort or determination."<sup>88</sup> Nevertheless, most reform jurisdictions do codify—consistent with the Model Penal Code—that an omission which the person was "physically capable of performing" will alternatively satisfy the requirement of a

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<sup>81</sup> 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 426 (3d ed. 1869).

<sup>82</sup> OLIVER WENDELL HOLMES, THE COMMON LAW 54 (1881).

<sup>83</sup> LAFAVE, *supra* note 5, at § 6.1.

<sup>84</sup> The relevant provision reads as follows:

The following are not voluntary acts within the meaning of this section:

- (a) a reflex or convulsion;
- (b) a bodily movement during unconsciousness or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion;
- (d) a bodily movement that otherwise is not the product of the effort or determination of the actor, either conscious or habitual.

Model Penal Code § 2.01(2).

<sup>85</sup> Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 277 (2002).

<sup>86</sup> *Id.*

<sup>87</sup> See Mont. Code Ann. § 45-2-101; Ohio Rev. Code Ann. § 2901.21.

<sup>88</sup> Colo. Rev. Stat. Ann. § 18-1-501. See Ala. Code § 13A-2-1; Alaska Stat. § 11.81.900; Ariz. Rev. Stat. Ann. § 13-105; Ark. Code Ann. § 5-2-201; Del. Code Ann. tit. 11, § 243; Haw. Rev. Stat. § 701-118; Ky. Rev. Stat. Ann. § 501.010; Me. Rev. Stat. Ann. tit. 17-A, § 2; Mo. Ann. Stat. § 562.011; Neb. Rev. Stat. § 28-109; N.J. Stat. Ann. § 2C:2-1; N.Y. Penal Law § 15.00; Or. Rev. Stat. § 161.085; S.D. Cod. Laws § 22-3-1.

voluntary act.<sup>89</sup>

Separate and apart from the Revised Criminal Code's decision to separately codify the voluntariness requirement and conduct requirement, § 22A-203(b) broadly follows the majority approach to codifying voluntariness reflected in reform codes. For example, § 22A-203(b)(1) establishes that, where a person's act provides the basis for liability, proof that the act was the product of conscious effort or determination will satisfy the voluntariness requirement. Likewise, § 22A-203(b)(2) establishes that, where a person's omission provides the basis for liability, proof that the person was physically capable of performing the requisite legal duty will satisfy the voluntariness requirement. Subsection (b) also departs, however, from the majority approach to codifying voluntariness reflected in both model codes and reform codes in two main ways.

The first departure is terminological: § 22A-203(b)(1) explicitly relates a person's physical ability to perform a legal duty to the voluntariness requirement, and, in so doing, more clearly applies a voluntariness analysis to omissions. This is in contrast to the standard approach of treating the physical capacity to perform an omission as an alternative to the voluntariness requirement. This departure clarifies the law and finds support in an array of legal authorities.

The fact that a "voluntary omission" is an omission that the "defendant is physically capable" of performing is made explicit in at least one reform code,<sup>90</sup> while the general point is communicated through the Model Penal Code commentary, which observes that "the demand that an act or omission be voluntary [should] be viewed as a preliminary requirement of culpability."<sup>91</sup> Likewise, the idea that "omissions can be thought of as either voluntary or involuntary" is widely recognized in legal commentary; various commentators have underscored the extent to which "[a]n omission to perform an act of which the person is not physically capable [is] . . . an involuntary omission."<sup>92</sup>

The second, and perhaps more significant, departure reflected in § 22A-203(b) is the use of the parallel catch-all control prongs that serve as an alternative means of deeming a given act or omission voluntary. This open textured language is intended to address those exceptional situations where, although the conduct most directly linked to the social harm may not appear to be the product of conscious effort or determination or within the physical capacity of the actor, there nevertheless exists an acceptable basis for determining that the defendant, due to some earlier culpable conduct, nevertheless had a reasonable opportunity to avoid committing the offense—the animating principle underlying all voluntariness evaluations.

One commentator summarizes the current state of the law governing these types of exceptional situations as follows:

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<sup>89</sup> See Ala. Code § 13A-2-3; Alaska Stat. Ann. § 11.81.600 ; Ariz. Rev. Stat. Ann. § 13-201; Ark. Code Ann. § 5-2-204; Colo. Rev. Stat. Ann. § 18-1-502; Del. Code Ann. tit. 11, § 242; Haw. Rev. Stat. Ann. § 702-200; 720 Ill. Comp. Stat. Ann. 5/4-1; Kan. Stat. Ann. § 21-5201; Ky. Rev. Stat. Ann. § 501.030; Mo. Ann. Stat. § 562.011; N.H. Rev. Stat. Ann. § 626:1; N.J. Stat. Ann. § 2C:2-1; N.Y. Penal Law § 15.10; Ohio Rev. Code Ann. § 2901.21; Or. Rev. Stat. Ann. § 161.095; 18 Pa. Stat. and Cons. Stat. Ann. § 301.

<sup>90</sup> Haw. Rev. Stat. Ann. § 702-200.

<sup>91</sup> Model Penal Code § 2.01 cmt. at 216.

<sup>92</sup> Farrell & Marceau, *supra* note 13, at 1578; see, e.g., A.P. Simester, *On the So-Called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403, 404-05 (1998).

[P]ersons who, although not otherwise responsible for their involuntary actions, are, nonetheless, responsible for allowing their involuntariness to jeopardize others. Thus, persons who are not otherwise responsible for physical conditions that cause them to lose consciousness (e.g., epilepsy, diabetes, concussion) are, nonetheless, responsible if, knowing or having reason to know that they are susceptible to unconsciousness, they place themselves in settings in which their conditions present an unjustified risk to others (e.g., driving). By the same token, standards of responsibility are also different for persons who, while knowing or having reason to know that intoxication on their part presents an unjustified risk to others, nonetheless, voluntarily intoxicate themselves. Thus, nearly every jurisdiction takes the view that, although involuntariness ordinarily exculpates persons of responsibility for what they do, it does not exculpate persons whose involuntariness is the product of prior voluntary intoxication.<sup>93</sup>

The language of “otherwise subject to the person’s control” is intended to provide an adequate basis for capturing the foregoing legal trends in a coherent manner.

This control-based standard brings with it a variety of benefits. First, it is intuitive: all legal authorities seem to agree that control is at the heart of voluntariness determinations. Insofar as code reform work is concerned, for example, the Model Penal Code commentary notes that the term voluntary “focuses upon conduct that is within the control of the actor,”<sup>94</sup> while Professor Lloyd Weinreb, writing for *Working Papers of the National Commission on Reform of Federal Criminal Laws*, argues for the following statutory definition of voluntariness: “A person does not engage in conduct voluntarily if the conduct is not subject to [that person’s] control.”<sup>95</sup> This focus on control is also at the heart of much scholarly work on voluntariness. For example, Professors Ian P. Farrell & Justin F. Marceau argue that “th[e] ability to do otherwise [is] the *sine qua non* of voluntariness,”<sup>96</sup> while Professor H.L.A. Hart has also emphasized the same “fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it.”<sup>97</sup>

Second, a control-based standard provides a more transparent means of addressing the “time-framing” problem inherent in particularly challenging voluntariness assessments. The most famous example of this problem is the New York Court of

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<sup>93</sup> Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, (1999). For relevant case law, see *State v. Welsh*, 508 P.2d 1041, 1044 (Wash. Ct. App. 1973); *Lewis v. Georgia*, 27 S.E.2d 659, 661 (Ga. 1943); *Fulcher v. State*, 633 P.2d 142, 147 (Wyo. 1981). For relevant commentary, see Eunice A. Eichelberger, *Annotation, Automatism or Unconsciousness as Defense to Criminal Charge*, 27 A.L.R.4th 1067 (1984); Monrad G. Paulson, *Intoxication as a Defense to Crime*, 1961 U. ILL. L.F. 1, 7; Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

<sup>94</sup> Model Penal Code § 2.01 cmt. at 215.

<sup>95</sup> Lloyd L. Weinreb, *Comment on Basis of Criminal Liability; Culpability; Causation: Chapter 3; Section 610*, in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 105, 112 (1970)); see Denno, *supra* note 21, at 358.

<sup>96</sup> Marceau & Farrell, *supra* note 13, at 1579.

<sup>97</sup> H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 168, 174 (1968).



Appeals case of *People v. Decina*, which involved a defendant with a prior history of seizures who made a conscious decision to not take his medication and then got behind the wheel of a car, only to suffer from an epileptic seizure on the road during which he caused the death of four children.<sup>98</sup> For his actions—and in light of Decina’s knowledge that he was subject to epileptic seizures—Decina was prosecuted for negligent homicide.<sup>99</sup>

On appeal, the New York Court of Appeals was presented with a difficult question of “time-framing.”<sup>100</sup> On the one hand, if the court “construct[ed] an extremely narrow time-frame—specifically, the conduct at the instant the car struck the victims—[the defendant’s] conduct did not include a voluntary act.”<sup>101</sup> But if, on the other hand, the court applied “[a] broader time-frame” it “would include the voluntary acts of entering the car, turning the ignition key, and driving.”<sup>102</sup> The New York Court of Appeals ultimately chose the latter view, relying on the voluntary conduct of the defendant prior to the seizure as the basis for potential liability.<sup>103</sup>

The modern legislative approach to the voluntary act doctrine clearly endorses the outcome and approach taken in *Decina*; however, it does so by providing courts with hidden discretion to broaden the time frame as widely as it deems necessary. The relevant language contained in the Model Penal Code and incorporated into many reform codes reads: “A person is not guilty of an offense unless his liability is *based on conduct that includes* a voluntary act or the omission to perform an act of which he is physically capable.”<sup>104</sup> What precisely the italicized language means is less than clear. For example, “the Code does not say that liability must be based on a voluntary act, or based on conduct that is a voluntary act. Liability need only be based on conduct that ‘includes’ a voluntary act.”<sup>105</sup> At the very least, though, what is clear is that the term “includes” was intended to provide courts with sufficient leeway to capture cases such as *Decina*<sup>106</sup> (though it may also capture other situations where liability would be inappropriate.<sup>107</sup>)

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<sup>98</sup> *People v. Decina*, 138 N.E.2d 799, 803, 807 (N.Y. 1956).

<sup>99</sup> *Id.*

<sup>100</sup> DRESSLER, *supra* note 7, at § 9.02.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Decina*, 138 N.E.2d at 803, 807; *see also State v. Burrell*, 609 A.2d 751 (N.H. 1992); *Rogers v. State*, 105 S.W.3d 630 (Tex. Crim. App. 2003).

<sup>104</sup> Model Penal Code § 2.01(1).

<sup>105</sup> Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2441(2007).

<sup>106</sup> Analyzing the *Decina* decision, the commentary to the Model Penal Code explains that “[t]he entire course of the defendant’s conduct . . . included a voluntary act, and me[ets] the principle under discussion here.” Model Penal Code § 2.01 cmt. at 218.

<sup>107</sup> If interpreted literally, the “includes” standard could result in some unintuitive outcomes. Consider, for example, *Martin v. State*, in which the Alabama Court of Appeals overturned a public intoxication conviction where “[o]fficers of the law arrested [the defendant] at his home [where he was already drunk] and took him onto the highway, where he allegedly committed the proscribed conduct, viz. manifested a drunken condition by using loud and profane language.” 17 So. 2d 427, 428 (Ala. Ct. App. 1944). The defendant in *Martin* engaged in conduct that “includes” a voluntary act and had satisfied the objective elements of a public intoxication offense. Still, the Alabama Court of Appeals was unwilling to hold the actor responsible for his actions. *Id.* Also relevant is a line of cases involving actors with contraband on their person who are arrested and then brought to a jail without an opportunity to dispose of the contraband. Generally speaking, courts have found liability inappropriate in these situations on grounds of

Rather than utilize the “notoriously cryptic”<sup>108</sup> term “includes” to address difficult cases implicating voluntariness determinations, the Revised Criminal Code relies on the more transparent phrasing of “otherwise subject to the person’s control.” This provides an explicit standard to guide judicial time framing assessments, capacious enough to account for the “enormous diversity in the ways that people can become unconscious as well as the situations and acts they may experience.”<sup>109</sup> Admittedly, this standard is itself quite vague. However, such vagueness is unavoidable given the nature of the moral principle underlying voluntariness assessments. Moreover, vagueness of this nature also has its own advantages, namely, it can “accommodate new research on voluntariness” while nonetheless “keep[ing] the main statement of criminal liability accurate.”<sup>110</sup> In accordance with the foregoing analysis, § 22A-203(b) employs a distinctive yet accessible approach to addressing issues of voluntariness.

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involuntariness. *See, e.g., State v. Cole*, 164 P.3d 1024 (N.M. Ct. App. 2007); *State v. Eaton*, 177 P.3d 157 (Wash. Ct. App. 2008); *Fontaine v. State*, 762 A.2d 1027 (Md. Ct. Spec. App. 2000). Here again, however, these actors have engaged in conduct that “includes” a voluntary act.

<sup>108</sup> Husak, *supra* note 41, at 2441.

<sup>109</sup> Denno, *supra* note 21, at 358.

<sup>110</sup> *Id.* Professor Denno argues that the language of consciousness, effort, and determination reflected in the first prong of § 22A-203(b) and utilized in state codes fails to adequately capture our contemporary understanding of the mind, and explains why future scientific developments concerning the human mind may place further strain on this mind/body language. *Id.* at 358-59. The open-textured nature of the control prong is well-situated to deal with this, however: it provides courts and juries with a clearly articulated and easily accessible alternative “normative anchor” from which to view developments in the mind sciences to the extent they’re relevant to the issue of voluntariness. *Id.* However, it does so without unnecessarily complicating the easy cases.

## § 22A-204 CAUSATION REQUIREMENT

(a) CAUSATION REQUIREMENT. No person may be convicted of an offense that contains a result element unless the person’s conduct was the factual cause and legal cause of the result.

(b) FACTUAL CAUSE DEFINED. “Factual cause” means:

- (1) The result would not have occurred but for the person’s conduct; or
- (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

(c) LEGAL CAUSE DEFINED. “Legal cause” means the result was a reasonably foreseeable consequence of the person’s conduct. A consequence is reasonably foreseeable if its occurrence is not too remote, accidental, or otherwise dependent upon an intervening force or act to have a just bearing on the person’s liability.

### 1. § 22A-204(a)—Causation Requirement

**Relation to National Legal Trends.** Subsection (a) is in accordance with well-established common law principles as well as legislative practice among reform jurisdictions.

It is an axiomatic common law principle that for offenses with result elements there be a causal connection between the defendant’s conduct and the resulting harm.<sup>111</sup> Courts have developed this requirement of a causal connection to determine whether responsibility for a resulting harm can fairly be assigned to the defendant’s conduct, or alternatively, whether responsibility is instead attributable to other people or forces in the world. In making this kind of assessment, judges divide their analysis into two distinct components: factual causation and legal causation.<sup>112</sup> Both components are typically treated as offense elements, the existence of which must be proven beyond a reasonable doubt.<sup>113</sup>

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<sup>111</sup> See, e.g., WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 6.4 (Westlaw 2016); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14 (6th ed. 2012); PAUL H. ROBINSON & MICHAEL CAHILL, CRIMINAL LAW § 3.2 (2d ed. 2012).

<sup>112</sup> As the U.S. Supreme Court in *Burrage v. United States* recently observed:

The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause. H. Hart & A. Honore, Causation in the Law 104 (1959). When a crime requires “not merely conduct but also a specified result of conduct,” a defendant generally may not be convicted unless his conduct is “both (1) the actual cause, and (2) the ‘legal’ cause (often called the ‘proximate cause’) of the result.” 1 W. LaFave, Substantive Criminal Law § 6.4(a), pp. 464–466 (2d ed. 2003) . . .

134 S. Ct. 881, 887 (2014).

<sup>113</sup> See, e.g., *Henderson v. Kibbe*, 431 U.S. 145 (1977); *State v. Crocker*, 431 A.2d 1323 (Me. 1981); *Commonwealth v. Green*, 383 A.2d 877 (Pa. 1978).

Codification of a causation requirement is frequently, but not invariably, a part of modern code reform efforts. Nearly half of reform jurisdictions—as well as all of the major model codes and recent comprehensive code reform projects—incorporate general causation provisions.<sup>114</sup> All such provisions state various principles related to causation; none, however, simply establish up front the two basic components that comprise causation: factual causation and legal causation. That is the approach reflected in § 22A-204(a), which is both clearer and better fits existing case law than the approach to codification applied in reform jurisdictions.

## 2. § 22A-204(b)—Definition of Factual Cause

**Relation to National Legal Trends.** Subsection (b) reflects the common law approach to causation and is in accordance with legislative practice among some reform jurisdictions.

The traditional common law articulation of the factual causation requirement is that there can be no criminal liability for resulting social harm “unless it can be shown that the defendant’s conduct was a cause-in-fact of the prohibited result.”<sup>115</sup> In order to make this determination, courts have typically posed the following question: “But for the defendant’s conduct, would the social harm have occurred?” If the answer is “no,” then courts are likely to deem a defendant the factual cause of the result. Any defendant whose conduct does not satisfy this test, in contrast, is unlikely to be deemed a factual cause with one rare exception: “where two causes, each alone sufficient to bring about the harmful result, operate together to cause it.”<sup>116</sup> As the U.S. Supreme Court has observed:

[I]f A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head . . . also inflicting [a fatal] wound; and B dies from the combined effects of the two wounds, A will generally be liable for homicide even though his conduct was not a but-for cause of B’s death (since B would have died from X’s actions in any event).<sup>117</sup>

To address this “unusual” situation, courts have devised one or more forms of a “special rule” to ensure that the accused does not escape liability, including the substantial factor

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<sup>114</sup> For reform codes, see Ala. Code § 13A-2-5; Ariz. Rev. Stat. Ann. § 13-203; Ark. Code Ann. § 5-2-205; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Me. Rev. Stat. tit. 17-A, § 33; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; N.D. Cent. Code Ann. § 12.1-02-05; 18 Pa. Stat. and Cons. Stat. Ann. § 303; Tex. Penal Code Ann. § 6.04. For model codes, see Model Penal Code § 2.03 and Proposed Federal Criminal Code § 305. For recent code reform projects, see Kentucky Revision Project § 501.203 and Illinois Reform Project § 203.

<sup>115</sup> *Velazquez v. State*, 561 So. 2d 347, 350 (Fla. Dist. Ct. App. 1990).

<sup>116</sup> LAFAVE, *supra* note 2, at § 6.4. As the U.S. Supreme Court recently observed, “[t]he concept of 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.’” *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (quoting 4 F. HARPER, F. JAMES, & O. GRAY, TORTS § 20.2, p. 100 (3d ed. 2007)).

<sup>117</sup> *Burrage*, 134 S. Ct. at 892.

test, discussed *supra*, in addition to specific bright line rules, such as that proposed in § 22A-204(b)(ii).<sup>118</sup>

Codification of a definition of factual cause is a key feature of general causation provisions that have been adopted in the context of modern code reform efforts. All twelve of the reform jurisdictions that incorporate a general provision on causation—along with the Model Penal Code, the Proposed Federal Criminal Code, and the most recent code reform projects—codify a definition of factual causation comprised of the concept of “but for” causation reflected in § 22A-204(b)(i).<sup>119</sup> That being said, only five state criminal codes specifically address the situation of multiple causes—i.e., where the conduct of multiple actors contributes to a result—that is addressed in § 22A-204(b)(ii).<sup>120</sup>

Unfortunately, the relevant state code provisions—modeled on the causation provision contained in the Proposed Federal Criminal Code—are not a model of clarity; they combine both the standard but for test and the multiple causes test into one confusing formulation.<sup>121</sup> A clearer approach is that applied in two recent code reform projects, which contain general causation provisions that individually codify these tests in separate provisions.<sup>122</sup>

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<sup>118</sup> LAFAVE, *supra* note 2, at § 6.4. “To further complicate matters, some cases apply what they call a ‘substantial factor’ test only when multiple independently sufficient causes ‘operat[e] together to cause the result.’” *Burrage*, 134 S. Ct. at 892 (quoting *Eversley v. Florida*, 748 So.2d 963, 967 (Fla.1999) and *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852, 862–863 (Mo. 1993)).

<sup>119</sup> For reform jurisdictions, *see* Ala. Code § 13A-2-5; Ariz. Rev. Stat. Ann. § 13-203; Ark. Code Ann. § 5-2-205; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Me. Rev. Stat. tit. 17-A, § 33; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; N.D. Cent. Code Ann. § 12.1-02-05; 18 Pa. Stat. and Cons. Stat. Ann. § 303; Tex. Penal Code Ann. § 6.04. For model codes, *see* Model Penal Code § 2.03 and Proposed Federal Criminal Code § 305. For recent code reform projects, *see* Kentucky Revision Project § 501.203 and Illinois Reform Project § 203.

<sup>120</sup> *See* Ala. Code § 13A-2-5; Ark. Code Ann. § 5-2-205; Me. Rev. Stat. tit. 17-A, § 33; N.D. Cent. Code Ann. § 12.1-02-05; Tex. Penal Code Ann. § 6.04.

<sup>121</sup> For example, the factual causation test applied in the Maine Penal Code reads:

Unless otherwise provided, when causing a result is an element of a crime, causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient.

Me. Rev. Stat. tit. 17-A, § 33.

<sup>122</sup> For example, § 203(2) of the Illinois Reform Project reads:

(1) Conduct is the cause of a result if:

(a) the conduct is an antecedent but for which the result in question would not have occurred; and

(b) the result is not too remote or accidental in its occurrence, and not too dependent upon another’s volitional act, to have a just bearing on the actor’s liability or on the gravity of his offense; and

(c) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

Consistent with these reform codes—and in furtherance of the interests of clarity and consistency—this is also the approach applied in § 22A-204(b). Subsection (b)(1) provides for factual causation where the defendant was the logical, but-for cause of a result, while § 22A-204(b)(2) provides for factual causation where, in the rare situation where the conduct of two or more persons contributes to a result, each person’s conduct was sufficient to produce the prohibited result.

### 3. § 22A-204(c)—Definition of Legal Cause

***Relation to National Legal Trends.*** Subsection (c) reflects well-established common law principles and legislative practice in various reform jurisdictions. However, the precise manner in which § 22A-204(c) codifies the definition of legal cause both simplifies and renders more transparent the approach to legal causation reflected in reform codes.

The concept of legal causation is well-established at common law.<sup>123</sup> It generally “refers to the basic requirement that there must be some direct relation between the injury asserted and the injurious conduct alleged.”<sup>124</sup> Traditionally, courts evaluate whether this requirement is met is by focusing on “reasonable foreseeability,” which, according to many judges, is the “linchpin” of the legal causation analysis.<sup>125</sup> What, precisely, “reasonably foreseeability” means, however, is less than clear and often muddled by the fact that courts have developed labyrinthine rules incorporating additional concepts, such as “superseding intervening cause,” “responsive intervening causes,” “direct causes,” and “remote causes,” to resolve the relevant issues.<sup>126</sup> In the final analysis, all such rules ultimately require the fact finder to consider whether, due to intervening forces or acts, “it no longer seems fair to say that the [social harm] was ‘caused’ by the defendant’s conduct.”<sup>127</sup>

There is, then, an inherent level of subjectivity at the heart of legal causation—as the U.S. Supreme Court has remarked, “the principle of legal caus[ation] is hardly a rigorous analytical tool.”<sup>128</sup> This is perhaps one reason why legal causation has not played a prominent role in comprehensive reform efforts. For example, among the twelve jurisdictions that incorporate a general provision on causation, only seven address

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(2) Concurrent Causes. Where the conduct of two or more persons each causally contributes to a result and each alone would have been sufficient to cause the result, the requirement of Subsection (1)(a) of this Section is satisfied as to both persons.

Subsection 501.203(2) of the Kentucky Revision Project is substantially similar.

<sup>123</sup> See, e.g., LAFAVE, *supra* note 2, at § 6.4.

<sup>124</sup> *Paroline*, 134 S. Ct. at 1719.

<sup>125</sup> *State v. Dunn*, 850 P.2d 1201, 1215 (Utah 1993); see *Johnson v. State*, 224 P.3d 105, 111 (Alaska 2010); *State v. Wieckowski*, 2011-Ohio-5567, ¶¶ 22-24, 2011 WL 5143183 (Ohio Ct. App. 2011); *State v. Pelham*, 824 A.2d 1082, 1093 (N.J. 2003).

<sup>126</sup> See DRESSLER, *supra* note 2, at § 14.03.

<sup>127</sup> *State v. Malone*, 819 P.2d 34, 37 (Alaska Ct. App. 1991).

<sup>128</sup> *Blue Shield of Va. v. McCready*, 457 U.S. 465, 478 n.13 (1982).

legal causation.<sup>129</sup> And while the Model Penal Code’s general provision on causation does address legal causation, the Proposed Federal Criminal Code’s general provision on causation does not.<sup>130</sup> In explaining their decision not to codify legal causation, the drafters of the Proposed Federal Criminal Code note the difficulty of reducing the requirement of legal causation to “readily understood rules.”<sup>131</sup>

Another reason for the relative lack of popularity of this issue in modern code reform efforts is that the central model for such reform, the Model Penal Code, applies a “fresh approach”<sup>132</sup> to the issue that is complex, blends *mens rea* issues with causation issues, and appears to constitute an unjustified departure from the common law view of legal causation.<sup>133</sup> Without a strong model to rely on, therefore, many reform jurisdictions may have opted to ignore the topic altogether. The silence on legal

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<sup>129</sup> See Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat. and Cons. Stat. Ann. § 303.

<sup>130</sup> Compare Model Penal Code § 2.03 with Proposed Federal Criminal Code § 305.

<sup>131</sup> 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).

<sup>132</sup> Model Penal Code § 2.03 cmt. at 254.

<sup>133</sup> The full text of the Model Penal Code approach to legal causation contained in § 2.03 reads:

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor’s conduct.

For a clear and accessible explanation of the problems reflected in the Model Penal Code approach, see Paul H. Robinson, *The Model Penal Code’s Conceptual Error on the Nature of Proximate Cause, and How to Fix it*, 51 No. 6 CRIM. LAW BULLETIN Art. 3 (Winter 2015).

causation in many reform codes is unfortunate, however, given that the detailed rules developed by the courts to address such problems in specific cases are themselves quite confusing. Furthermore, buried within the Model Penal Code's confusing legal causation provisions is a general standard—"not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense"—that would have significantly simplified and improved upon the common law approach to legal causation had it been employed independent of the other problematic aspects of the Model Penal Code.<sup>134</sup>

The handful of reform codes that did adopt the Model Penal Code approach to legal causation benefit from this general standard; however, in these jurisdictions it comes at the costs associated with incorporating *mens rea* considerations into the legal causation analysis.<sup>135</sup> It is therefore noteworthy that the courts in at least a few reform jurisdictions that never adopted a general provision on legal causation appear to have retained the common law requirement of reasonable foreseeability, and, at the same time, rely on the Model Penal Code's general standard through case law to give voice to it.<sup>136</sup> A similar approach is likewise reflected in the legal causation provision incorporated into one of the most recent code reform projects, which utilizes a general standard similar to that employed in the Model Penal Code to address legal causation independent of *mens rea* considerations (though there is no reference to reasonable foreseeability).<sup>137</sup>

The approach to legal causation applied in § 22A-204(c) is consistent with the foregoing authorities. The first sentence establishes that legal causation exists where it can be proven that the result was a reasonably foreseeable consequence of the person's conduct, while the second sentence clarifies that whether a consequence is reasonably foreseeable depends on whether the causal connection between the defendant's conduct and the occurrence of the resulting harm was "too remote, accidental, or dependent upon an intervening force or act to have a just bearing on the person's liability."<sup>138</sup> The explanatory note accompanying § 22A-204(c) provides various factors that the factfinder might bring to bear on this evaluation.

Admittedly, the foregoing language—like that employed in a handful of reform codes—remains "question-begging."<sup>139</sup> However, the same problem similarly plagues the confusing common law rules on legal causation, which only mask—but do not

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<sup>134</sup> Robinson, *supra* note 44, at 1.

<sup>135</sup> See, e.g., Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; Haw. Rev. Stat. Ann. § 702-214; Del. Code Ann. tit. 11, § 261.

<sup>136</sup> See, e.g., *Johnson*, 224 P.3d at 111; *State v. Wieckowski*, 2011-Ohio-5567, ¶¶ 22-24, 2011 WL 5143183 (Ohio Ct. App. 2011). In contrast, at least one court in a reform jurisdiction that did legislatively adopt the Model Penal Code approach to legal causation seems to have incorporated the requirement of reasonable foreseeability back into the analysis. See *State v. Pelham*, 824 A.2d 1082, 1093 (N.J. 2003).

<sup>137</sup> The relevant language in § 203(2) of the Illinois Reform Project reads: "Conduct is the cause of a result if . . . the result is not too remote or accidental in its occurrence, and not too dependent upon another's volitional act, to have a just bearing on the actor's liability or on the gravity of his offense . . ."

<sup>138</sup> This language is based on N.J. Stat. Ann. § 2C:2-3, which employs the phrase "not [] too remote, accidental in its occurrence, or dependent on another's volitional act to have a just bearing on the actor's liability or on the gravity of his offense."

<sup>139</sup> WEINREB, *supra* note 42, at 145; see Larry Alexander, *Crime and Culpability*, 1994 J. CONTEMP. LEGAL ISSUES 1, 14 (1994).



ameliorate—the subjective nature of the inquiry at hand.<sup>140</sup> There are simply limits on how precise any formulation of a normative judgment, such as that entailed by legal causation, can be made.<sup>141</sup> Still, providing courts and juries with an intuitive and transparent standard—guided by an explanation of the relevant factors to be considered—is more likely to lead to consistent, fair outcomes than providing no guidance at all.<sup>142</sup> Accordingly, that is the approach to legal causation taken in § 22A-204(c).

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<sup>140</sup> 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.” Model Penal Code § 2.03 cmt. at 260.

<sup>141</sup> Robinson, *supra* note 26, at 441-43. For this reason, a due process challenge of the Model Penal Code language on vagueness grounds has been rejected—as the New Jersey Supreme Court observed, no greater clarity is possible and thus the “only practical standard is the jury’s sense of justice.” *State v. Maldonado*, 137 N.J. 536, 566 (1994).

<sup>142</sup> Robinson, *supra* note 26, at 441-43. This is particularly true given that it “is not sufficient merely to tell the jury that they must find the defendant was . . . the proximate cause of the results.” LAFAVE, *supra* note 2, at § 6.4 (collecting cases).

## **§ 22A-205 CULPABLE MENTAL STATE REQUIREMENT**

(a) CULPABLE MENTAL STATE REQUIREMENT. No person may be convicted of an offense unless the person acts with a culpable mental state with respect to every result and circumstance required by the offense, with the exception of any result or circumstance for which that person is strictly liable under § 22A-207(b).

(b) CULPABLE MENTAL STATE DEFINED. “Culpable mental state” means purpose, knowledge, recklessness, negligence, as defined in § 22A-206, or any comparable mental state specified in this Title.

(c) STRICTLY LIABILITY DEFINED. “Strictly liable” or “strict liability” means liability in the absence of purpose, knowledge, recklessness, or negligence, as defined in § 22A-206, or any comparable mental state specified in this Title.

***Relation to National Legal Trends.*** Section 22A-205 is generally in accordance with common law principles concerning the role of *mens rea* as a necessary offense element, but rejects the common law approach to analyzing the offense as a whole with respect to culpable mental states (i.e., offense analysis). Section 22A-205 instead follows legislative practice among reform jurisdictions in requiring element analysis, analyzing the culpable mental state, if any, applicable to a given objective element. However, there are a few key ways the form of element analysis envisioned by § 22A-205 both simplifies and clarifies the standard approach.

For centuries, it has been widely accepted that “*mens rea* in some form [is] a defining and irreducible characteristic of the criminal law.”<sup>143</sup> Yet both the precise form of *mens rea* and the institution appropriately charged with determining it have undergone significant shifts and changes. Prior to the mid-twentieth century, for example, the judiciary was the institution first and foremost in charge of setting *mens rea* policy—a product of the fact that many offenses were entirely judge-made, and even those that were statutorily based rarely, if ever, clearly specified the contours of the governing culpability requirement.

In carrying out this role, courts did not view criminal offenses as comprised of various objective elements to which some culpable mental state might independently apply. Instead, they viewed the *actus reus* of an offense as a singular concept, subject to an “umbrella culpability requirement that applie[s] in a general way to the offense as a whole.”<sup>144</sup> And this umbrella culpability requirement was often quite simplistic, indicating “little more than immorality of motive,”<sup>145</sup> a “vicious will,”<sup>146</sup> or an “evil mind.”<sup>147</sup> To the extent courts recognized distinctions in culpable mental states at common law, they were often pitched at the offense level, revolving around whether an

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<sup>143</sup> *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 492 (E.D.N.Y. 1993)

<sup>144</sup> PAUL H. ROBINSON & MICHAEL T. CAHILL, *CRIMINAL LAW* 155 (2d ed. 2012).

<sup>145</sup> Francis B. Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in *HARVARD LEGAL ESSAYS* 399, 411-12 (1934).

<sup>146</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* at 21.

<sup>147</sup> 1 JOEL P. BISHOP, *CRIMINAL LAW* § 287 (9th ed. 1923).

offense was one of “specific intent,” “general intent,” or, in the rare case, one of “strict liability.”<sup>148</sup>

In later years, legislatures began to move beyond the judge-made, common law notions of general and specific intent by specifically enumerating a wide variety of culpable mental state terms in criminal statutes. However, because these terms were rarely or never defined—and since they failed to clarify the objective elements to which they were intended to apply—statutes of this nature did little to alter the offense analysis approach to culpable mental states.

The results of the foregoing state of affairs were decades of confusion, uncertainty, and litigation. By the 1950s, the situation was, as Justice Jackson famously described it, one of “variety, disparity and confusion” in “definitions of the requisite but elusive mental element.”<sup>149</sup> Recognition of these abysmal conditions set the stage for the re-envisioning of *mens rea* during the latter half of the mid-twentieth century, which was driven, in large part, by the work of the Model Penal Code.

The drafters of the Model Penal Code understood that offense analysis-based culpability evaluations were primarily responsible for the “inconsistent and confusing” law of *mens rea* that had developed.<sup>150</sup> The primary problem, as the Model Penal Code drafters viewed it, was that the common law approach ignored the fact that “[c]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.”<sup>151</sup> At the same time, the more recent proliferation of culpable mental state terminology in criminal statutes failed to recognize that “for purposes of liability (as distinguished from sentence) only four concepts”—namely, purpose, knowledge, recklessness, and negligence—“are needed to prescribe the minimal requirements and lay the basis for distinctions that may usefully be drawn.”<sup>152</sup> Both of these analytical insights pervade the Model Penal Code’s general part; however, they are most explicitly articulated in the Code’s culpable mental state requirement, § 2.02(1), which establishes that “each material element of the offense” must be evaluated in light of the culpable mental states of “purposely, knowingly, recklessly or negligently.”<sup>153</sup>

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<sup>148</sup> At common law it was generally well-established that some *mens rea* was necessary for most criminal convictions, but that there existed important exceptions to this rule, including the category of so-called “public welfare crimes” as well as individual offenses such as statutory rape. See generally Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933); Arthur Leavens, *Beyond Blame-Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1 (2007); Gerald Leonard, *Towards A Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691 (2003).

<sup>149</sup> *Morissette v. United States*, 342 U.S. 246, 252 (1952). Or as another esteemed commentator observed: Anglo-American *mens rea* law was an “amorphous quagmire,” reflected by “a thin surface of general terminology denoting wrongfulness.” Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 577 (1988).

<sup>150</sup> PETER W. LOW ET AL., CRIMINAL LAW: CASES AND MATERIALS 198-99 (2d ed. 1986).

<sup>151</sup> E.g., *United States v. Bailey*, 444 U.S. 394, 406 (1980) (quoting Model Penal Code § 2.02 cmt. at 123).

<sup>152</sup> Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425, 1426 (1968).

<sup>153</sup> *Id.*

Codification of comparable provisions is a well-established part of modern code reform efforts.<sup>154</sup> Through such provisions, reform codes recognize that “[t]he mental ingredients of a particular crime may differ with regard to the different elements of the crime,”<sup>155</sup> while, at the same time, communicate that “the four degrees of culpability” contained in the Model Penal Code hierarchy “express the significant distinctions found by the courts, and are adequate for all the distinctions which can and should be made to accomplish the purposes of a [] criminal code.”<sup>156</sup>

The Model Penal Code’s two central analytical insights regarding *mens rea* have thus been transformed into the “representative modern American culpability scheme.”<sup>157</sup> What has not become part of this scheme, however, is the controversial policy decision at the heart of § 2.02(1) and many other Model Penal Code general provisions that is sometimes referred to as the “principle of correspondence.”<sup>158</sup>

The principle of correspondence dictates that proof of some culpable mental state must be required with respect to every objective element of an offense.<sup>159</sup> It is clearly reflected in Model Penal Code § 2.02(1), which establishes that with the exception of “violations” punishable by a fine only, “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense.” The foregoing approach was intended by the Model Penal Code drafters to represent a “frontal attack on absolute or strict liability . . . whenever the offense carries a possibility of sentence of imprisonment.”<sup>160</sup>

The abolition of strict liability envisioned by the Model Penal Code drafters does not appear to have been realized in practice. For example, reform jurisdictions frequently depart—whether explicitly, through statutory modifications to key general provisions limiting strict liability, or implicitly, through judicial interpretations that authorize strict liability—from the Model Penal Code’s commitment to ensuring that a culpable mental state apply to each and every objective element of an offense.<sup>161</sup> Nor, for that matter, has

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<sup>154</sup> For reform codes, *see* Ala. Code § 13A-2-3; Alaska Stat. Ann. § 11.81.600; Ariz. Rev. Stat. Ann. § 13-201; Ark. Code Ann. § 5-2-204; Colo. Rev. Stat. Ann. § 18-1-502; Conn. Gen. Stat. Ann. § 53a-5; Del. Code Ann. tit. 11, § 251; Haw. Rev. Stat. Ann. § 702-204; 720 Ill. Comp. Stat. Ann. 5/4-3; Kan. Stat. Ann. § 21-5202; Ky. Rev. Stat. Ann. § 501.030; Me. Rev. Stat. tit. 17-A, § 34; Mo. Ann. Stat. § 562.016; Mont. Code Ann. § 45-2-103; N.H. Rev. Stat. Ann. § 626:2; N.J. Stat. Ann. § 2C:2-2; N.Y. Penal Law § 15.10; N.D. Cent. Code Ann. § 12.1-02-01; Ohio Rev. Code Ann. § 2901.21; Or. Rev. Stat. Ann. § 161.095; 18 Pa. Stat. and Cons. Stat. Ann. § 302; Tenn. Code Ann. § 39-11-301; Tex. Penal Code Ann. § 6.02; Utah Code Ann. § 76-2-101. For model and proposed codes, *see* Proposed Federal Criminal Code § 301. For recent reform projects, *see* Kentucky Penal Code Revision Project, § 501.201; Proposed Illinois Criminal Code, § 205.

<sup>155</sup> WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.1 (Westlaw 2016).

<sup>156</sup> NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (hereinafter “NCR”), 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 119 (1970) (collecting more than seventy culpability terms). These first two insights render the labels “general intent” and “specific intent” superfluous. *See, e.g., Liparota v. United States*, 471 U.S. 419, 423 n.5, 433 n.16 (1985).

<sup>157</sup> Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 692 (1983).

<sup>158</sup> *E.g.*, ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 76 (6th ed. 2007); VICTOR TADROS, CRIMINAL RESPONSIBILITY 93-97 (2005).

<sup>159</sup> Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285 (2012).

<sup>160</sup> Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 595 (1963).

<sup>161</sup> For a comprehensive overview of the relevant legal trends, *see* Brown, *supra* note 46.

a rule that “would require the courts to assign some mental state to every objective element of every offense” been embraced by courts or legislatures outside of reform jurisdictions.<sup>162</sup> Instead, the most widely accepted principle governing strict liability, if one exists, is that the legislature should be careful to specify the situations in which it intends for it to apply.

Section 22A-205 is intended to codify all of the foregoing principles relevant to element analysis in a manner that is broadly consistent with prevailing legal trends. Like Model Penal Code § 2.02(1) and the many state general provisions based on it, § 22A-205 articulates the Revised Criminal Code’s commitment to viewing culpable mental state evaluations on an element-by-element basis. It also generally establishes that the culpable mental states of purpose, knowledge, recklessness, and negligence are the basis for making the relevant distinctions, while explicitly recognizing—consistent with legal practice, if not codification trends—the possibility of strict liability applying to a given objective element. Thus, § 22A-205 is in accordance with the common law approach insofar as it generally requires application of a culpable mental state to an offense, but more specifically follows the modern reform approach of requiring an element-by-element analysis of the objective elements to which it might apply.

While the Revised Criminal Code accords with the basic structure of the national trend towards element analysis, § 22A-205 does depart from the culpability schemes incorporated into most reform codes in two key ways.

First, and perhaps most importantly, conduct elements are excluded from the requisite culpable mental state analysis. This exclusion is intended to avoid unnecessary complexity and confusion. Consistent with prevailing legal trends, the Revised Criminal Code adopts a narrow definition of conduct, as an act or failure to act, in § 22A-201; and it requires in § 22A-203 that all conduct have been voluntarily committed. As a result, there is no need to consider the culpability requirement governing conduct elements any further.

To be sure, courts and legislatures sometimes refer to conduct being committed purposely, knowingly, recklessly, or negligently. However, insofar as the conduct to which they are referring are mere bodily movements, the intended meaning appears to be that the bodily movement at issue was voluntary—i.e., a product of conscious effort and determination (or was otherwise subject to the actor’s control). Importantly, though, requiring proof of voluntary conduct, and nothing more, is entirely consistent with strict liability.<sup>163</sup> This explains why the failure to clearly distinguish between voluntariness (which applies to acts, or, where relevant, the failure to act) and culpable mental states (which apply to results and circumstances) has at times led various courts to unwittingly

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<sup>162</sup> Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 772 (2012).

<sup>163</sup> For example, consider the situation of a person who quickly reaches for a soda on the counter, when, unbeknownst to the person, a small child darts in front of the soda prior to the person’s ability to reach it. If the child suffers a facial injury in the process one can say that the person’s voluntary act (factually) caused bodily injury to the child. That the relevant conduct was the product of effort or determination, however, is not to say that the person was in any way blameworthy or at fault for causing the child’s injury. On this view, then, a criminal offense that premised liability on the mere fact that the person’s conduct was voluntary—that is, regardless of whether the person acted purposely, knowingly, recklessly, or negligently as to the relevant results and circumstances—is appropriately understood as a strict liability offense.

impose strict liability (or negligence liability) in the context of serious felony offenses.<sup>164</sup> By speaking of conduct committed purposely, knowingly, recklessly, or negligently, these courts believed themselves to be imposing a culpable mental state requirement, when, in reality, they were merely restating the requirement of voluntariness.<sup>165</sup>

To avoid such problems from occurring under the Revised Criminal Code, § 22A-205 establishes a form of element analysis that focuses solely on the culpable mental states, if any, governing results and circumstances. (Note, however, that all “issues raised by the nature of one’s conduct”—for example, whether one’s bodily movement amounts to a taking or use—are treated “as circumstance elements.”<sup>166</sup>) This variance appears to have been followed in at least one reform jurisdiction, which defines culpable mental states with respect to result and circumstance elements, but not conduct elements.<sup>167</sup> And it also finds support in legal commentary, which highlights the extent to which requiring proof of *mens rea* as to conduct unnecessarily “duplicates the voluntariness requirement.”<sup>168</sup> That “[c]onduct culpability does nothing more than encompass the voluntariness requirement,”<sup>169</sup> however, means it is “unduly confusing, and not analytically helpful, to retain this category.”<sup>170</sup>

The second important difference between § 22A-205 and the standard approach to element analysis is that it takes a clear, policy-neutral approach to strict liability. General provisions incorporated into reform codes often fail to address issues related to strict liability with sufficient clarity, or, when they do clearly address them, approach them in a manner that future legislatures and courts are prone to ignore or disregard. To avoid these problems, § 22A-205 takes no position on which offenses the legislature may apply strict liability to; it merely requires that the legislature specify its intent to do so as required by § 22A-207(b).

Section 22A-205 also provides a clear definition of strict liability, which is by itself noteworthy. Reform codes typically do not define the phrase, while American legal authorities have generally been unable to agree on what “strict liability” actually

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<sup>164</sup> See, e.g., *State v. Sigler*, 688 P.2d 749 (Mont. 1984) overruled by *State v. Rothacher*, 901 P.2d 82 (Mont. 1995); *Van Dyken v. Day*, 165 F.3d 37 (9th Cir. 1998); *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985); *Markley v. State*, 421 N.E.2d 20 (Ind. Ct. App. 1981); *Jennings v. State*, 806 P.2d 1299 (Wyo. 1991); *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968).

<sup>165</sup> See, e.g., Eric A. Johnson, *The Crime That Wasn’t There: Wyoming’s Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1 (2007); Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 44 IND. L. REV. 1135 (2011); Larry Kupers, *Aliens Charged with Illegal Re-Entry Are Denied Due Process and, Thereby, Equal Treatment Under the Law*, 38 U.C. DAVIS L. REV. 861 (2005); J.W.C. Turner, *The Mental Element in Crime at Common Law*, 6 CAMBRIDGE L.J. 31, 34 (1936).

<sup>166</sup> Robinson & Grall, *supra* note 44, at 712.

<sup>167</sup> See Me. Rev. Stat. tit. 17-A, § 35.

<sup>168</sup> Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).

<sup>169</sup> Paul H. Robinson, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 722 (1983).

<sup>170</sup> Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003). Consider that under the element analysis required by most reform jurisdictions, the adjudicator must separately make two judgments in every case as to an actor’s culpability with respect to his or her conduct. First, was the conduct voluntary, as required by the voluntary act requirement contained in § 2.01? Second, did the defendant act with the requisite purpose, knowledge, recklessness, or negligence governing the conduct element in the offense? Under the narrow conception of conduct, the second question is largely incoherent; and, to the extent it has any intelligibility, it merely restates the second question.

means.<sup>171</sup> At the heart of the confusion is a failure to recognize the difference between “pure” strict liability crimes, which do not require proof of a culpable mental state as to any of an offense’s objective elements, and “impure” strict liability crimes, which do not require proof of a culpable mental state as to only some of the offense’s objective elements.<sup>172</sup> Given this potential for confusion, the clearer definition is that “[l]iability is strict if it requires no proof of fault as to an aspect of the offence: while *mens rea* must be proved as to some elements in the offence definition, it need not be proved as to every fact, consequence or circumstance necessary for the commission of the offence.”<sup>173</sup>

Such an approach is not only more consistent with element analysis, but it also provides the ability to distinguish between both kinds of strict liability, for elements or the offense as a whole. It is, therefore, the approach followed in § 22A-205, which clarifies that a strict liability offense is any offense for which a person can be held criminally liable without regard to the person’s blameworthiness or fault as to a single result or circumstance. (That no culpable mental state applies to any of the results and circumstances in an offense definition simply means the offense is one of “pure,” rather than “partial,” strict liability.)

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<sup>171</sup> See, e.g., Douglas N. Husak, *Varieties of Strict Liability*, 8 CAN. J.L. & JURIS. 189, 204 (1995); James B. Brady, *Strict Liability Offenses: A Justification*, 8 CRIM. L. BULL. 217, 217-18 (1972); Phillip E. Johnson, *Strict Liability: The Prevalent View*, in 4 ENCYCLOPEDIA OF CRIME & JUSTICE 1518, 1518 (Sanford H. Kadish ed., 1983); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 364 n.114 (1989); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 9.3.2, at 716 (1978); HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 343 (1979).

<sup>172</sup> Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081-82 (1997).

<sup>173</sup> R.A. Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence*, in APPRAISING STRICT LIABILITY 125, 125-26 (A.P. Simester ed., 2005) (citing Utah Code Ann. § 76-2-102 and *Ex parte Murry*, 455 So. 2d 72, 75-79 (Ala. 1984)). For similar views, see Joshua Dressler, *UNDERSTANDING CRIMINAL LAW* § 11.01 (6 ed. 2012); Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267 (1987); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571, 1575 (1978).

**§ 22A-206 HIERARCHY OF CULPABLE MENTAL STATES**

(a) PURPOSE DEFINED.

(1) A person acts purposely with respect to a result when that person consciously desires to cause the result.

(2) A person acts purposely with respect to a circumstance when that person consciously desires that the circumstance exists.

(b) KNOWLEDGE DEFINED.

(1) A person acts knowingly with respect to a result when that person is aware that conduct is practically certain to cause the result.

(2) A person acts knowingly with respect to a circumstance when that person is practically certain that the circumstance exists.

(c) INTENT DEFINED.

(1) A person acts intentionally with respect to a result when that person believes that conduct is practically certain to cause the result.

(2) A person acts intentionally with respect to a circumstance when that person believes it is practically certain that the circumstance exists.

(d) RECKLESSNESS DEFINED.

(1) A person acts recklessly with respect to a result when:

(A) That person is aware of a substantial risk that conduct will cause the result; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(2) A person acts recklessly with respect to a circumstance when:

(A) That person is aware of a substantial risk that the circumstance exists; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(3) A person's reckless conduct occurs "under circumstances manifesting extreme indifference" to the interests protected by an offense when the conduct



constitutes an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.

(e) NEGLIGENCE DEFINED.

(1) A person acts negligently with respect to a result when:

(A) That person should be aware of a substantial risk that conduct will cause the result; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(2) A person acts negligently with respect to a circumstance when:

(A) That person should be aware of a substantial risk that the circumstance exists; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(f) PROOF OF GREATER CULPABLE MENTAL STATE SATISFIES REQUIREMENT FOR LOWER.

(1) *Proof of Negligence.* When the law requires negligence as to a result or circumstance, the requirement is also satisfied by proof of recklessness, intent, knowledge, or purpose.

(2) *Proof of Recklessness.* When the law requires recklessness as to a result or circumstance, the requirement is also satisfied by proof of intent, knowledge, or purpose.

(3) *Proof of Intent.* When the law requires intent as to a result or circumstance, the requirement is also satisfied by proof of knowledge or purpose.

(4) *Proof of Knowledge.* When the law requires knowledge as to a result or circumstance, the requirement is also satisfied by proof of purpose.

**1. §§ 206(a), (b) & (c)—Purpose, Knowledge & Intent Defined**

***Relation to National Legal Trends.*** Subsections (a), (b), and (c) are generally in accordance with the common law and widespread legislative practice. In a departure from national legal trends, however, the definitions of purpose and knowledge contained in subsections (b) and (c) have been clarified, simplified, and rendered more consistent. In addition, subsection (c) incorporates a purely subjective definition of intent for use in

inchoate crimes, which is a novel, but non-substantive, revision to modern culpability schemes.

“The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness.”<sup>174</sup> In other words, the common law view was that “a person who acts (or omits to act) *intends* a result of his act (or omission) under two quite different circumstances: (1) when he *consciously desires* that result, whatever the likelihood of that result happening from his conduct; [or] (2) when he *knows* that that result is *practically certain* to follow from his conduct, whatever his desire may be as to that result.”<sup>175</sup>

In a departure from the common law, the drafters of the Model Penal Code opted to separate the *awareness* sense of intent from the *desire* sense of the term, labeling the former “knowledge” and applying the label of “purpose” to the latter.<sup>176</sup> The relevant definitions, Model Penal Code §§ 2.02(2)(a) and (b), read as follows:

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

“The essence of the narrow distinction” between purpose and knowledge under the Model Penal Code “is the presence or absence of a positive desire.”<sup>177</sup> With respect to results, for example, Model Penal Code § 2.02(a)(i) provides that acting “purposefully” means that the result is the actor’s “conscious object,” while Model Penal Code § 2.02(b)(ii) provides that acting “knowingly” with respect to a result means that

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<sup>174</sup> *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978).

<sup>175</sup> LAFAVE, *supra* note 14, 1 SUBST. CRIM. L. § 5.2; *see also* *Tison v. Arizona*, 481 U.S. 137, 150 (1987).

<sup>176</sup> Under the Model Penal Code, acting “purposefully,” “with purpose,” “intentionally,” or “with intent” with respect to a result element all mean that the result is the actor’s “conscious object.” Model Penal Code § 1.13.

<sup>177</sup> PAUL ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 43 (1997).

the actor “is aware that it is practically certain that his conduct will cause a particular result.” The same basic divide between “will[ing] that the act . . . occur [and] willing to let it occur” shows up in the context of elements involving the nature of one’s conduct.<sup>178</sup> Subsection (a)(i) provides that a person acts “purposefully” with respect to an “element [that] involves the nature of his conduct” if it “is his conscious object to engage in conduct of that nature,” while Model Penal Code § 2.02(b)(i) provides that acting “knowingly” with respect to an “element [that] involves the nature of his conduct” if “he is aware that his conduct is of that nature.”

The foregoing distinctions reflects a simple but widely shared moral intuition: all else being equal, desiring to cause a given harm is more blameworthy than being aware that it will almost surely result from one’s conduct.<sup>179</sup> The intuition is also one with a strong legal basis—as the U.S. Supreme Court in *United States v. Bailey* observed:

In certain narrow classes of crimes [the] heightened culpability [of purpose] has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the “degree” of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another’s life. Similarly, where a defendant is charged with treason, this Court has stated that the Government must demonstrate that the defendant acted with a purpose to aid the enemy . . . Another such example is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.<sup>180</sup>

Codification of the Model Penal Code definitions of purpose and knowledge is a standard part of modern code reform efforts. The overwhelming majority of reform jurisdictions codify definitions of purpose (or its substantive equivalent<sup>181</sup>) and knowledge modeled on those proposed by the Model Penal Code.<sup>182</sup> Likewise, in those

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<sup>178</sup> Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 Iowa L. Rev. 115, 122 (1998). Compare Model Penal Code § 2.02(a)(1) with RCC § 206(b)(1).

<sup>179</sup> See, e.g., Fiery Cushman, Liane Young & Marc Hauser, *The Role of Conscious Reasoning and Intuition in Moral Judgment*, 17 PSYCHOL. SCI. 1082 (2006); Francis X. Shen, et. al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1352 (2011).

<sup>180</sup> *United States v. Bailey*, 444 U.S. 394, 405 (1980). It should be noted, however, “that purpose is rarely the required mens rea for the commission of a crime.” Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1571 (2006). As the Model Penal Code drafters recognized, “th[e] distinction [between purpose and knowledge] is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient.” Model Penal Code § 2.02 cmt., at 234.

<sup>181</sup> Note, for example, that most reform codes apply the label “intent” to what the Model Penal Code otherwise refers to as “purpose.” LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2; see *infra* note 39 (collecting statutory citations).

<sup>182</sup> See Ala. Code § 13A-2-2; Alaska Stat. Ann. § 11.81.900; Ariz. Rev. Stat. Ann. § 13-105; Ark. Code Ann. § 5-2-202; Colo. Rev. Stat. Ann. § 18-1-501; Conn. Gen. Stat. Ann. § 53a-3; Del. Code Ann. tit. 11, § 231; Haw. Rev. Stat. Ann. § 702-206; 720 Ill. Comp. Stat. Ann. 5/4-5; Ind. Code Ann. § 35-41-2-2; Kan. Stat. Ann. § 21-5202; Me. Rev. Stat. tit. 17-A, § 35; Minn. Stat. Ann. § 609.02; Mo. Ann. Stat. § 562.016; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 626:2; N.Y. Penal Law § 15.05; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; Or. Rev. Stat. Ann. § 161.085; 18 Pa. Stat. and Cons.

jurisdictions that never modernized their codes, many courts have adopted similar definitions of purpose and knowledge through the common law.<sup>183</sup>

Subsections (a) and (b) are intended to generally reflect the definitions of, and distinctions between, purpose and knowledge reflected in reform codes. Under these provisions, the *awareness* sense of intent—labeled “knowingly”—is codified separately in subsection (b) from the *desire* sense of the term—labeled “purposely”—under subsection (a). Further, the definitions of each term correspond to the form of objective element to which it applies. At the same time, however, there are a variety of ways in which the definitions of purpose and knowledge contained in the Revised Criminal Code depart from standard legislative practice.

First, the definitions of purpose and knowledge contained in the Revised Criminal Code collectively differ from the Model Penal Code with respect to their treatment of conduct elements. The Model Penal Code definitions of purpose and knowledge separately address result, circumstance, and conduct elements.<sup>184</sup> In contrast, the definitions of purpose and knowledge contained in the Revised Criminal Code address only results and circumstances; they do not reference conduct elements at all. This reflects the Revised Criminal Code’s broader decision to exclude conduct elements from the culpable mental state analysis, which, as discussed in the Commentary on RCC §§ 201(b), 203(b), and 206(a), is intended to avoid unnecessary confusion surrounding the culpability requirement governing conduct elements, to substantially simplify the task of element analysis, and to enhance the clarity of District law.

Second, the element-sensitive definitions of purpose with respect to results and circumstances contained in the Revised Criminal Code revise the comparable Model Penal Code definitions in a few important ways. Both definitions of purpose in the Revised Criminal Code reference a “conscious desire,” and, therefore, are broadly symmetrical to one another. With respect to the Revised Criminal Code’s definition of purpose as to a result in subsection (a)(1), this constitutes a minor terminological revision to the comparable Model Penal Code definition, which references an actor’s “conscious object” to cause a particular consequence.<sup>185</sup> The language of “conscious desire” seems to more intuitively capture that which is at the heart of purpose than that of “conscious

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Stat. Ann. § 302; S.D. Codified Laws § 22-1-2; Tenn. Code Ann. § 39-11-302; Tex. Penal Code Ann. § 6.03; Utah Code Ann. § 76-2-103; Wash. Rev. Code Ann. § 9A.08.010.

<sup>183</sup> See, e.g., *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978); *Turner v. United States*, 396 U.S. 398, 416 n.29 (1970); *Bailey*, 444 U.S. at 404 (quoting *U.S. Gypsum Co.*, 438 U.S. at 444) (internal quotation marks and footnote call number omitted); *United States v. Restrepo-Granda*, 575 F.2d 524, 528 (5th Cir.), cert. denied, 439 U.S. 935 (1978); *United States v. M.W.*, 890 F.2d 239, 240-41 (10th Cir. 1989).

<sup>184</sup> See Model Penal Code § 2.02(2)(b)-(c).

<sup>185</sup> As specified in the explanatory note, the conscious desire necessary to constitute purpose must be accompanied by a belief that it is at least possible that the consciously desired result will occur or that the circumstance exists. This proposition is well-established, but of little practical significance given that in the typical situation, an actor who engages in conduct motivated by his or her desire will also believe that the result or circumstance to which that desire relates at least possibly will occur or exist. See, e.g., Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1, 13 n.17 (2012); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 942-43 (2000). Agency discussions have revealed the significant extent to which incorporating the belief requirement into the definition of purpose creates additional complexity that can lead to confusion regarding the meaning of the mental state. For this reason, the belief requirement has been omitted from the definition of purpose.

object.”<sup>186</sup> In contrast, use of the phrase “conscious desire” in the Revised Criminal Code’s definition of purpose as to a circumstance in subsection (a)(2) constitutes a more substantive revision to the comparable Model Penal Code definition.

Consider that under the Model Penal Code, a person acts “purposefully” with respect to circumstances if “the person is *aware* of the existence of such circumstances or the person *believes* or *hopes* that they exist.”<sup>187</sup> This definition is noteworthy not only because it looks so different than the Model Penal Code definition of purpose as to results, but also because it looks so similar to the Model Penal Code definition of knowledge as to a circumstance. For example, Model Penal Code § 2.02(b)(i) similarly provides that an individual acts “knowingly” with respect to circumstances if the person is “*aware* . . . that such circumstances exist.” Proof of mere awareness will thus satisfy both the Model Penal Code definitions of purpose and knowledge as to a circumstance, which, in practical effect, means that the distinction between the presence or absence of a positive desire—otherwise reflected in the Model Penal Code definitions of purpose and knowledge as to results—is effectively ignored. The reason? The Model Penal Code’s text and explanatory notes are unclear.<sup>188</sup> And “[n]owhere in the Comments to the Model Penal Code is this anomaly . . . explained.”<sup>189</sup>

This anomaly is problematic for two reasons. First, if the statutory basis of the narrow distinction between purpose and knowledge with respect to a result is the presence or absence of a positive desire, one would assume—for basic organizational reasons—that the same treatment would be afforded to circumstance elements. Second, the same moral arguments that support the desire/belief distinction in the context of results similarly apply to circumstances.<sup>190</sup> By failing to maintain this distinction, therefore, the drafters of the Model Penal Code produced a more complex general part, which fails to respect the basic principle “that purpose should be regarded as a more serious mental state than knowledge.”<sup>191</sup>

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<sup>186</sup> For cases and commentary utilizing the phrase “conscious desire,” see LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2; *United States Gypsum Co.*, 438 U.S. at 445; *Bailey*, 444 U.S. at 403. Note also that British code reformers recommended to Parliament that a person acts “purposely” if “he wants [the element] to exist or occur.” See LAW COMMISSION NO. 143, CODIFICATION OF THE CRIMINAL LAW: A REPORT TO THE LAW COMMISSION 183.

<sup>187</sup> Model Penal Code § 2.02(a)(ii).

<sup>188</sup> *But see infra* note 62 for a potential explanation that relates to the drafting of inchoate offenses.

<sup>189</sup> Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 174 (1981). The commentary to the Model Penal Code notes only that “knowledge that the requisite external circumstances exists is a common element in both [mental states].” Model Penal Code § 2.02 cmt. at 233.

<sup>190</sup> See, e.g., LARRY ALEXANDER & KIMBERLY FERZAN, *CRIME & CULPABILITY: A THEORY OF CRIMINAL LAW* 40 (2009). As one commentator observes:

Assuming that assaulting a police officer were a crime, [a legislature] might want to punish one who assaults a police officer for some reason arising out of his status as a police officer more severely than one who assaults his neighbor, whom he knows to be a police officer in a dispute over a noisy dog. Similarly, [a legislature] might regard the statutory rapist who purposely seeks out young girls as more reprehensible than one who seeks any willing sexual partner and is indifferent to his knowledge that she is below the age of consent.

Wesson, *supra* note 46, at 174.

<sup>191</sup> Wesson, *supra* note 46, at 174.

Consistent with the foregoing analysis, the Revised Criminal Code treats a “conscious desire” as the *sole* basis for finding purpose as to a circumstance under subsection (a)(2). When viewed in light of the definition of purpose as to a result subsection (a)(1), this produces a simpler culpable mental state hierarchy that allows legislators to draft more proportionate offenses.<sup>192</sup>

The element-sensitive definitions of knowledge with respect to results and circumstances contained in the Revised Criminal Code also contain a notable revision to the comparable Model Penal Code definitions. Both definitions of knowledge in the Revised Criminal Code reference “aware[ness]” as to a “practical[] certain[ty],” and, therefore, are broadly symmetrical to one another. With respect to the Revised Criminal Code’s definition of knowledge as to a result in subsection (b)(1), this does not reflect any meaningful change to the comparable Model Penal Code definition. With respect to the Revised Criminal Code’s definition of knowledge as to a circumstance in subsection (b)(2), however, use of the phrase “aware[ness]” as to a “practical[] certain[ty]” departs from the comparable Model Penal Code definition.

Consider that the Model Penal Code definition of knowledge as to a circumstance in § 2.02(2)(c)(ii) generally references an actor’s “aware[ness] that such circumstances exist.”<sup>193</sup> Just what level of awareness is necessary? It’s unclear from the text of the Model Penal Code. The commentary accompanying this definition fleetingly acknowledges that “‘knowledge’ [in this context] will often be less than absolute certainty,” but fails to specify how much less.<sup>194</sup>

Further complicating matters is the general provision in the Model Penal Code intended to address the issue of willful blindness, § 2.02(7), which broadly declares that “[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”<sup>195</sup> Situations involving willful blindness aside, the provision’s general reference to knowledge of a fact being established by proof of “aware[ness] of a high probability” seems to control the narrower language of “aware[ness]” of a circumstance referenced in the definition of knowledge under Model Penal Code § 2.02(2)(c)(ii) “since it is a weaker requirement.”<sup>196</sup> But if that’s true, then one might question what the difference between awareness as to a practical certainty and awareness as to a high probability amounts to—or whether it’s worth recognizing this distinction through a criminal code at all.<sup>197</sup>

To resolve all such issues, the Revised Criminal Code employs a simple solution: it applies the same standard for knowledge as to a result element, RCC § 206(b)(1)—namely, awareness as to a practical certainty—to the definition of knowledge as to a circumstance, RCC § 206(b)(2). Together, these two definitions of knowledge produce a culpable mental state hierarchy that is more consistent and easier to apply.

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<sup>192</sup> See sources cited *supra* note 47.

<sup>193</sup> Model Penal Code § 2.02(2) cmt. 13 at 236.

<sup>194</sup> *Id.*

<sup>195</sup> Model Penal Code § 2.02(7).

<sup>196</sup> Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 182 n.9 (2003).

<sup>197</sup> *Id.* at 182-83. The issue of willful blindness is addressed by RCC § 208(c), which is discussed in FIRST DRAFT OF REPORT NO. 3, *Recommendations for Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication*.

The consistency and ease of use reflected in the definition of knowledge contained in RCC §§ 206(b)(1) and (2) is bolstered by the clarity in statutory drafting afforded by the equivalent definitions of intent in RCC §§ 206(c)(1) and (2). These definitions of intent provide the legislature with a means of more clearly drafting inchoate offenses comprised of a knowledge-like culpable mental state applicable to one or more results and/or circumstances that need not actually occur or exist.<sup>198</sup>

The Revised Criminal Code's novel statutory provisions on intent seek to remedy a recognized "linguistic problem" underlying the Model Penal Code's culpability scheme.<sup>199</sup> As discussed above, the Model Penal Code separately codifies the alternative desire and belief states that comprise the traditional understanding of intent as "purpose" and "knowledge," respectively.<sup>200</sup> While this separation has a variety of benefits—and, for that reason, is reflected in the Revised Criminal Code—it also creates at least one notable issue: it makes it difficult to clearly draft inchoate offenses that incorporate a core culpable mental state requirement equivalent to common law intent.

At the heart of the problem is the fact that the culpable mental state under the Model Penal Code that most accurately translates common law intent is labeled "knowledge."<sup>201</sup> While equivalent to common law intent, the term knowledge implies a

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<sup>198</sup> The hallmark of inchoate crimes is the criminalization of unrealized criminal plans. *See, e.g.*, Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 759 (2012). Offenses of this nature provide the legal system with a means of distinguishing between those actors for whom some harmful conduct is an end in itself and those who planned to do some further wrong—without having to actually wait for that harm to occur. *See, e.g.*, Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 NEW CRIM. L. REV. 542, 545 (2012). At common law, the requirement that an actor engage in specified conduct "with intent" to commit some particular harm signified an inchoate offense. *See, e.g.*, LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2.

There exist two categories of inchoate crimes: general inchoate crimes and specific inchoate crimes. *See generally* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989). Specific inchoate crimes, such as burglary and larceny, require proof of some preliminary consummated harm—for example, an unlawful entry or taking—accompanied by a requirement that this conduct have been committed "with intent" to commit a more serious harm—for example, a crime inside the structure or a permanent deprivation. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27 (4th ed. 2012). General inchoate crimes, in contrast, accomplish the same outcome, but in a characteristically different way. They constitute "adjunct crimes"—that is, a category of offense that "cannot exist by itself, but only in connection with another crime," *Cox v. State*, 534 A.2d 1333, 1335 (Md. 1988)—that generally do not require that any harm actually have been realized. *See, e.g.*, Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 956 (2007). For example, whereas burglary and larceny respectively require proof of a taking or a trespass, a criminal attempt merely requires proof of significant progress towards completion of the target offense—without regard to whether this progress was itself harmful. Like burglary and larceny, however, general inchoate crimes such as a criminal attempt similarly incorporate a "with intent" requirement, that is, a requirement that the relevant conduct have been committed "with intent" to commit the target offense. *See generally* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997).

<sup>199</sup> Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1032 n.330 (1998); *see, e.g.*, Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 n.301 (1983); LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2.

<sup>200</sup> Model Penal Code § 2.02(a)(i)-(ii).

<sup>201</sup> Note that under Model Penal Code § 2.02(5), proof of a higher culpable mental state establishes a lower culpable mental state, and, therefore, "[w]hen acting knowingly suffices to establish an element, such element also is established if a person acts purposely." In practical effect, this means that anytime the culpable mental state of "knowledge" is utilized, it essentially means "purpose" or "knowledge."

basic correspondence between a person’s subjective belief concerning a proposition and the truth of that proposition, which the term intent does not otherwise imply. This communicative distinction can lead to problems in the drafting of inchoate offenses, where the phrase “with knowledge” is used as a means of translating “with intent.”

To illustrate, consider a hypothetical offense that prohibits “assault with knowledge of killing.” Assuming the drafter’s goal is to create an inchoate offense that—like the common law offense of assault with intent to kill—provides for liability in the absence of death, use of the term “knowledge” in this context is, at minimum, confusing. As one commentator phrases it, “[k]nowledge would not be the proper way to describe this mental state, because it would be odd to describe the defendant as having knowledge of a result when the result does not in fact occur.”<sup>202</sup> More substantively, however, the phrase “with knowledge of killing” risks leaving the reader with the mistaken impression that the relevant result must actually be realized, thereby obscuring the offense’s inchoate status.

The Model Penal Code appears to avoid these communicative issues by employing two different strategies. For some inchoate offenses, the Model Penal Code utilizes the phrase “with purpose” (or its substantive equivalent<sup>203</sup>) in lieu of the phrase “with intent.”<sup>204</sup> This substitution avoids any of the communicative issues noted above; however, it also seems to potentially exclude those who act with a sufficiently strong belief concerning the likelihood of a result<sup>205</sup> from the scope of inchoate liability.<sup>206</sup> For

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<sup>202</sup> Michaels, *supra* note 56, at 1032 n.330.

<sup>203</sup> As noted *supra* note 38, most modern criminal codes utilize the term “intent” for their highest culpable mental state—what the Model Penal Code otherwise defines as purpose. Indeed, the Model Penal Code itself provides that “‘intentionally’ or ‘with intent’ means purposely.” Model Penal Code § 1.13(12).

<sup>204</sup> See, e.g., Model Penal Code § 221.1 (Burglary); Model Penal Code 223.2 (Theft).

<sup>205</sup> No such curtailment arises in the context of circumstances because the Model Penal Code’s definition of purpose as to a circumstance incorporates both awareness and belief as alternative bases of liability. More specifically, under Model Penal Code § 2.02(a)(ii), a person acts “purposefully” with respect to circumstances if “the person is *aware* of the existence of such circumstances or the person *believes* or *hopes* that they exist.” This may help to explain the drafters’ decision to provide bifurcated definitions of purpose, namely, to soften the edges of their “with purpose” translation of inchoate offenses. See *supra* note 45.

<sup>206</sup> Illustrative is the core culpable mental state at issue in a generic theft offense, which implicates the unrealized result of a permanent deprivation. See Kenneth W. Simons, *Is Complexity A Virtue? Reconsidering Theft Crimes Book Review of Stuart Green, Thirteen Ways to Steal A Bicycle: Theft Law in the Information Age*, 47 NEW ENG. L. REV. 927, 937 (2013). Requiring proof that the defendant consciously desired to permanently deprive the victim, as would be the case under a “with purpose” translation of this core culpable mental state, risks excluding from liability some textbook instances of theft. Consider, for example, a person who takes his neighbor’s food in order to feed his hungry children. In this scenario, it’s unclear whether the person acts “with purpose” to permanently deprive since he desires to help his children, not to withhold or dispose of property. See *Rosemond v. United States*, 134 S. Ct. 1240, 1252 (2014) (Alito, J., concurring in part and dissenting in part) (citing V. HUGO, *LES MISÉRABLES* 54 (Fall River Press ed. 2012)). Even still, this actor is likely to be practically certain that his conduct will result in a permanent deprivation to the neighbor. The same can also be said about the aspiring gang member who collects unattended backpacks at school as a rite of initiation. At the time of the takings, the person’s desire is to gain entry into the gang, not to withhold or dispose of property—though he may be practically certain that his conduct will result in a permanent deprivation to the owners of the backpacks. In both of these examples, the actors’ culpable beliefs seem to constitute a sufficient basis to ground a theft conviction, and this holds true even if the actors *regret* the withholding or disposition of property, and *wish* their goals—child satiety and gang affiliation, respectively—could be achieved some other way. See, e.g., LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2. This illustrates why a “with purpose” translation of the



other inchoate offenses, in contrast, the Model Penal Code employs the term “belief” as a stand in for the term “knowledge.”<sup>207</sup> Notably, however, this term is never defined, which raises a host of questions concerning the meaning of the term “belief”—as well as its relationship with the Model Penal Code’s other general culpability provisions.<sup>208</sup>

To better address the above issues, the Revised Criminal Code provides an alternative to knowledge, the term intent, specifically crafted to facilitate the clear expression of a knowledge-like core culpable mental state requirement in the context of inchoate crimes. The phrase “with intent,” in conjunction with RCC §§ 206(c)(1) and (2), communicates that a subjective belief (as to a practical certainty) concerning the likelihood that a given result will occur or that a circumstance exists may provide the basis for liability, without misleadingly suggesting that the relevant results and/or circumstances it modifies need to occur or exist (as would otherwise be the case under the phrase “with knowledge”).<sup>209</sup>

Collectively, the overarching culpability framework reflected in RCC §§ 206(a), (b), and (c) should substantially enhance the overall clarity and consistency of the Revised Criminal Code.

## 2. §§ 22A-206(d) & (e)—Recklessness & Negligence Defined

***Relation to National Legal Trends.*** Subsections (d) and (e) generally reflect the contemporary common law understanding of recklessness and negligence, as well as legislative trends surrounding codification of these mental states. Consistent with legislative practice among reform jurisdictions, the definitions of recklessness and negligence provided by the Revised Criminal Code respectively codify the distinction between being culpably aware of a substantial risk and culpably failing to perceive a substantial risk. In a departure from national legal trends, however, the definitions of recklessness and negligence contained in the Revised Criminal Code have been clarified, simplified, and rendered more consistent.

The idea that non-intentional conduct can appropriately serve as the basis for criminal liability under certain circumstances has been long recognized by the common

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common law’s “with intent” requirement is potentially problematic, namely, in most situations “there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.” *Id.*

<sup>207</sup> See, e.g., Model Penal Code § 5.01(Attempts); Model Penal Code § 223.6 (Receiving Stolen Property).

<sup>208</sup> Use of the term “belief” is ambiguous on its face since beliefs come in various degrees. For example, a belief might be as strong as “a practical certainty,” which is the purely subjective form of knowledge. But beliefs can also be moderate: for example, one might “believe that something is likely true.” Weaker yet, someone might possess “belief as to a mere possibility.” It is, therefore, not clear just how strong a belief the Model Penal Code would require when it employs the term. It is also unclear, however, how the term belief is intended to interact with some of the Model Penal Code’s general culpability principles. See, e.g., Model Penal Code § 2.02(5).

<sup>209</sup> This definition of intent, when viewed in light of the fact that proof of a higher culpable mental state can satisfy a lower culpable mental state under RCC § 206(f), reflects common usage. See, e.g., Julia Kobick & Joshua Knobe, *How Research on Folk Judgments of Intentionality Can Inform Statutory Analysis*, 75 BROOK. L. REV. 409, 421–22 (2009); Adam Feltz, *The Knobe Effect: A Brief Overview*, 28 J. MIND & BEHAV. 265 (2007); Alan Leslie, Joshua Knobe & Adam Cohen, *Acting Intentionally and the Side-Effect Effect: ‘Theory of Mind’ and Moral Judgment*, 17 PSYCHOL. SCI. 421 (2006).

law.<sup>210</sup> However, while courts agreed “that something more was required for criminal liability than the ordinary negligence which is sufficient for tort liability,”<sup>211</sup> the nature of this “something extra”—above and beyond the basic unreasonableness at the heart of civil negligence—was nevertheless the source of much confusion.<sup>212</sup>

The drafters of the Model Penal Code sought to resolve this confusion through their comprehensive definitions of recklessness and negligence, which read as follows:

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when the person consciously disregards a substantial and unjustifiable risk that the material element exists or will result from the person’s conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when the person should be aware of a substantial and unjustifiable risk that the material element exists or will result from the person’s conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of the person’s conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

These definitions provide for criminal liability in two different kinds of situations involving non-intentional conduct. The first, captured by the term recklessness, “involves conscious risk creation.”<sup>213</sup> By requiring awareness of a risk, recklessness “resembles acting knowingly,” though importantly “the awareness is of [a] risk [that falls] short of [a] practical certainty.”<sup>214</sup> The second situation, captured by the term negligence, also implicates risk creation, but here liability is assigned based upon the actor’s failure to perceive the risk. Negligence can therefore be “distinguished from acting purposely, knowingly, or recklessly in that it does not involve a[ny] state of awareness.”<sup>215</sup>

Setting aside the key distinction between conscious and inadvertent risk creation (or risk taking), recklessness and negligence, as defined by the Model Penal Code, share

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<sup>210</sup> LAFAVE, *supra* note 14, at § 5.4.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1438-39 (1968)

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

many important similarities. For example, the first clause of each definition establishes that both culpable mental states involve the disregard of a risk that is “substantial and unjustifiable.” Such language was intended to exclude a wide range of activities that involve risk creation or risk taking from falling within the scope of criminal liability.<sup>216</sup> For example, opening an umbrella in a crowded public space, hitting a golf ball on a driving range, performing open-heart surgery, or building a skyscraper all entail some level of risk. In the typical case, however, these risks will be beyond the reach of the criminal law either because they are insubstantial—for example, in the case of opening an umbrella in a crowded public space—or because even if they are substantial, they are justified under the circumstances—for example, in the case of a surgeon performing open-heart surgery.<sup>217</sup>

Likewise, the second clauses of the Model Penal Code definitions of recklessness and negligence both require that the person’s conduct have been sufficiently unjustifiable and blameworthy to justify a criminal conviction.<sup>218</sup> The specific standard provided is that of a “gross deviation” from a reasonable standard of care, which, under both definitions, entails a consideration of the “nature and degree” of the risk, “the nature and purpose of the actor’s conduct and the circumstances known to him,” and “the standard of conduct” that a reasonable person “would observe in the actor’s situation.”<sup>219</sup> The Model Penal Code drafters believed that such language, when viewed as a whole, would appropriately require “the jury [to comprehensively] evaluate the actor’s conduct and determine whether it should be condemned.”<sup>220</sup>

The Model Penal Code definitions of recklessness and negligence, like those of purpose and knowledge, have been quite influential. Insofar as legislative practice is concerned, for example, “[a]t least 24 state statutes follow the Model Penal Code’s definitions of recklessness and negligence.”<sup>221</sup> Likewise, many courts in jurisdictions that never modernized their codes have opted to adopt Model Penal Code-based definitions of recklessness and negligence through case law.<sup>222</sup> (The U.S. Sentencing Commission also opted to incorporate the Model Penal Code definitions of recklessness and negligence into the U.S. Sentencing Guidelines.<sup>223</sup>)

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<sup>216</sup> Model Penal Code § 2.02 cmt. at 237, 241.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *See id.*

<sup>220</sup> *Id.*

<sup>221</sup> *United States v. Dominguez-Ochoa*, 386 F.3d 639, 646 (5th Cir. 2004). *See* Ala. Code § 13A-2-2; Alaska Stat. Ann. § 11.81.900; Ariz. Rev. Stat. Ann. § 13-105; Ark. Code Ann. § 5-2-202; Colo. Rev. Stat. Ann. § 18-1-501; Conn. Gen. Stat. Ann. § 53a-3; Del. Code Ann. tit. 11, § 231; Haw. Rev. Stat. Ann. § 702-206; 720 Ill. Comp. Stat. Ann. 5/4-4 et seq.; Me. Rev. Stat. tit. 17-A, § 35; Mo. Ann. Stat. § 562.016; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 626:2; N.Y. Penal Law § 15.05; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; Or. Rev. Stat. Ann. § 161.085; 18 Pa. Stat. and Cons. Stat. Ann. § 302; S.D. Codified Laws § 22-1-2; Tenn. Code Ann. § 39-11-302; Tex. Penal Code Ann. § 6.03; Utah Code Ann. § 76-2-103; Wash. Rev. Code Ann. § 9A.08.010; Wyo. Stat. Ann. § 6-1-104.

<sup>222</sup> *See, e.g., Bd. of Cnty. Comm’rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 422 (1997); *Lockett v. Ohio*, 438 U.S. 621, 628 (1978); *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015); *Albrecht v. State*, 658 A.2d 1122, 1140 (Md. Ct. Spec. App. 1995); *Commonwealth v. Feigenbaum*, 536 N.E.2d 325, 328 (Mass. 1989).

<sup>223</sup> *See, e.g., U.S.S.G. § 2A1.4.*

It's important to highlight, however, that state legislatures and courts rarely seem to adopt the Model Penal Code definitions of recklessness and negligence wholesale. Instead, they typically revise the definitions in one or more ways in the course of enactment. To take just a few examples: (1) some reform jurisdictions omit reference to the requirement of justifiability in their definitions of recklessness and/or negligence<sup>224</sup>; (2) some reform jurisdictions omit reference to the magnitude of the risk in their definitions of recklessness and/or negligence<sup>225</sup>; and (3) a majority of reform jurisdictions omit one or more terms and phrases from the gross deviation analysis employed in their definitions of recklessness and/or negligence.<sup>226</sup>

Modifications aside, it is nevertheless clear that the Model Penal Code definitions of recklessness and negligence today constitute the general standards for risk-based fault in the criminal law.<sup>227</sup> The definitions of recklessness and negligence incorporated into the Revised Criminal Code reflect these general standards. For example, both recklessness and negligence, as provided in RCC §§ 206(d) and (e), implicate the disregard of a substantial risk, while recklessness, but not negligence, requires proof that the person was aware of the substantial risk being disregarded. Likewise, both recklessness and negligence, as provided in RCC §§ 206(d) and (e), employ a situation-specific gross deviation standard. There are, however, a few important ways in which the definitions of recklessness and negligence incorporated into the Revised Criminal Code depart from the Model Penal Code approach.

First, the definitions of recklessness and negligence contained in the Revised Criminal Code differ from the Model Penal Code with respect to their overall organization and treatment of conduct elements.

The Model Penal Code approach is to define acting recklessly or negligently, as the case may be, “with respect to a material element of an offense.”<sup>228</sup> Not only does this fail to clearly distinguish between reckless/negligent risk creation (for results) and reckless/negligent risk taking (for circumstances)—a distinction that is otherwise evident in the Model Penal Code’s two-part definition of purpose and knowledge—but it implies that recklessness and negligence potentially apply to conduct elements as well. To enhance the precision of the law, therefore, the Revised Criminal Code provides element-sensitive definitions of recklessness and negligence that clearly distinguish between results and circumstances. Notably absent from these definitions, however, is any reference to conduct elements. This reflects the Revised Criminal Code’s broader

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<sup>224</sup> See Del. Code Ann. tit. 11, § 231; Me. Rev. Stat. tit. 17-A, § 35; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; S.D. Codified Laws § 22-1-2; Wash. Rev. Code Ann. § 9A.08.010; Mont. Code Ann. § 45-2-10.

<sup>225</sup> Del. Code Ann. tit. 11, § 231; Me. Rev. Stat. tit. 17-A, § 35; Ohio Rev. Code Ann. § 2901.22; S.D. Codified Laws § 22-1-2; Mont. Code Ann. § 45-2-10.

<sup>226</sup> For example, twenty states leave out “considering the nature and purpose of the actor’s conduct and the circumstances known to him.” Ala. Code § 13A-2-2; Alaska Stat. Ann. § 11.81.900(1); Ariz. Rev. Stat. Ann. § 13-105(10); Colo. Rev. Stat. Ann. § 18-1-501; Conn. Gen. Stat. Ann. § 53a-3(11); 11 Del. Code Ann. § 231; IL ST CH 720 § 5/4-(6-7); Ind. Code Ann. § 35-41-2-2; Kan. Stat. Ann. § 21-5202; Ky. Rev. Stat. Ann. § 501.010; Mo. Ann. Stat. § 562.016; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 626:2; N.Y. Penal Law § 15.00(6); N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; Or. Rev. Stat. Ann. § 161.085(6); Tenn. Code Ann. § 39-11-302; Tex. Penal Code Ann. § 6.03; Utah Code Ann. § 76-2-103.

<sup>227</sup> See *Brown*, 520 U.S. at 422.

<sup>228</sup> See Model Penal Code § 2.02(2)(c)-(d).

approach of excluding conduct elements from the culpable mental state analysis, which, as discussed in the commentary on RCC §§ 201(b), 203(b), and 206(a), is intended to avoid unnecessary confusion surrounding the culpability requirement governing conduct elements, to simplify the task of element analysis, and to enhance the clarity of District law.

Second, the definitions of recklessness and negligence contained in the Revised Criminal Code attempt to resolve three of the most significant textual ambiguities reflected in the relevant Model Penal Code provisions.

The first ambiguity relates to the phrase “substantial and justifiable” utilized in the Model Penal Code definition of recklessness. Model Penal Code § 2.02(2)(c) provides that “[a] person acts recklessly . . . when the person *consciously disregards a substantial and unjustifiable risk* that the material element exists or will result from the person’s conduct.” Left unspecified is what, precisely, the defendant must have been aware of. For example, potential interpretations of the foregoing language include awareness that: (1) *any* risk existed (which risk was, in fact, substantial and unjustifiable); (2) a *substantial* risk existed (which risk was, in fact, unjustifiable); or (3) that a *substantial and unjustifiable* risk existed.<sup>229</sup> Though the text of the Model Penal Code weakly suggests the third interpretation, no jurisdiction appears to apply this approach, which would require proof that the defendant was aware of the unjustifiable nature of his conduct, in practice.<sup>230</sup> Nor does it appear to have been intended by the Model Penal Code drafters.<sup>231</sup> Rather, as highlighted by a wide range of legal authorities, the second interpretation—that the awareness must encompass a risk’s substantiality but not its unjustifiability—seems to be the most appropriate reading.<sup>232</sup>

Consistent with the foregoing authorities, the Revised Criminal Code more clearly specifies that recklessness entails awareness of a risk’s substantiality, but not its unjustifiability. The relevant language in RCC §§ 206(d)(1)(A) and (2)(A) reads: “is aware of a substantial risk.” The definition of negligence in the Revised Criminal Code has been modified in a similar manner—through use of the phrase “should be aware of a substantial risk” in RCC §§ 206(e)(1)(A) and (2)(A)—to retain the original correspondence between the two mental states.

The second significant textual ambiguity reflected in the Model Penal Code definitions of recklessness and negligence concerns “the relationship between the requirement that the risk be “[un]justifiable” and that which requires the risk to be such that its disregard involves a “gross deviation” from the “standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>233</sup> On the one hand, the text of the Model Penal Code separates these two requirements into distinct clauses, which

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<sup>229</sup> See Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1379 n.130 (1992).

<sup>230</sup> See LAFAVE, *supra* note 14, at § 5.4.

<sup>231</sup> See Model Penal Code § 2.02 cmt. at 238.

<sup>232</sup> See David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 362 (1981); Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579, 594-95 (2005); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 383 n.48 (1994); Kenneth W. Simons, *Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character?”*, 6 BUFF. CRIM. L. REV. 219, 226 n.11 (2002).

<sup>233</sup> Stephen P. Garvey, *What's Wrong with Involuntary Manslaughter?*, 85 TEX. L. REV. 333, 341-42 (2006).

seems to indicate that the justifiability analysis and the gross deviation analysis are independent from one another. On the other hand, the manner in which the Model Penal Code commentary discusses these requirements strongly suggests that the justifiability analysis merely comprises part of, and is therefore necessarily included within, the gross deviation analysis.<sup>234</sup> The latter position also finds support in a wide range of legal authorities, including the various reform codes that omit any reference to justifiability from the definitions of recklessness and negligence.<sup>235</sup>

Consistent with the foregoing authorities, the definitions of recklessness and negligence incorporated into the Revised Criminal Code similarly omit any reference to justifiability. In practical effect, this means that the requirement of a gross deviation constitutes the sole basis for evaluating whether the disregard of a substantial risk is culpable enough to be criminalized under the Revised Criminal Code.<sup>236</sup> Which raises the following question: how, precisely, does the gross deviation analysis operate in practice?

This is perhaps the most important ambiguity contained in the Model Penal Code definitions of recklessness and negligence given the key role that the gross deviation analysis plays in distinguishing civil liability from criminal liability.<sup>237</sup> With respect to the gross deviation analysis, both Model Penal Code definitions generally reference a consideration of the “nature and degree” of the risk, “the nature and purpose of the actor’s conduct,” and that the evaluation should account for “the circumstances known to [the actor]” as well as the actor’s “situation.” How all of this is ultimately to be put together by the factfinder is less than clear, however.<sup>238</sup> The commentary at times gestures towards answers, noting, for example, that “less substantial risks might suffice for liability if there is no pretense of any justification for running the risk,”<sup>239</sup> as well as the fact that “moral defects can [only] properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them.”<sup>240</sup> But the drafters of the Model Penal Code did not reduce the relevant insights to a formula that can easily be applied by the fact-finder in a particular case.

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<sup>234</sup> Model Penal Code § 2.02 cmt. at 237, 241.

<sup>235</sup> See, e.g., Del. Code Ann. tit. 11, § 231; Me. Rev. Stat. tit. 17-A, § 35; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; S.D. Codified Laws § 22-1-2; Wash. Rev. Code Ann. § 9A.08.010; Mont. Code Ann. § 45-2-10; Wechsler, *supra* note 99, at 1438; Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955, 958 (2000).

<sup>236</sup> Note, however, that the explanatory note on recklessness and negligence generally clarifies that the justifiability calculus is part of the gross deviation analysis, while the factors bearing on the gross deviation analysis highlighted in the explanatory note explicitly incorporate the standard justifiability considerations. See, e.g., Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 10 (2009); Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503, 506 (2006).

<sup>237</sup> See, e.g., *Williams v. State*, 235 S.W.3d 742, 752-53 (Tex. Crim. App. 2007); *Pagotto v. State*, 732 A.2d 920, 922-26 (Md. Ct. App. 1999), *aff'd*, 361 Md. 528 (2000).

<sup>238</sup> See, e.g., Treiman, *supra* note 118, at 358; Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393 (1988).

<sup>239</sup> Model Penal Code § 2.02 cmt. at 243.

<sup>240</sup> *Id.*

Further complicating matters, the Model Penal Code’s description of the gross deviation analysis suggests that it is supposed to proceed on an element-by-element basis, that is, with respect to the “risk” concerning a single “material element.” If true, however, it is not at all clear how this was intended to operate. Where, for example, an offense applies recklessness to one offense element but knowledge to another, how is the factfinder to conduct a gross deviation analysis with respect to some, but not all, aspects of the offense? Alternatively, if recklessness or negligence is applied to more than one element in an offense definition, must the gross deviation analysis be employed multiple times? Neither the text of, nor the commentary supporting, the Model Penal Code provides answers to any of these questions.

The language of the Revised Criminal Code is intended to redress the above ambiguity surrounding the gross deviation analysis. Under RCC §§ 206(d) and (e), the factfinder is asked to simply consider whether the person’s conduct *viewed as a whole* amounted to a gross deviation from a reasonable standard of care given the person’s situation. In many cases, mere recitation of this simple statement should be satisfactory. Where, however, further precision is necessary, the explanatory note provides a more precise formula culled from a wide range of legal authorities, which clarifies the relevant considerations that should be brought to bear on whether the actor’s conduct constitutes a gross deviation.<sup>241</sup>

It’s worth noting that this formula also provides the basis—as reflected in RCC § 206(d)(3)—for more clearly distinguishing between normal recklessness and the special form of enhanced recklessness that is sometimes applied in murder and aggravated assault offenses employed across the country.<sup>242</sup> In reform jurisdictions, this enhanced recklessness is most frequently articulated through the requirement of acting “recklessly under circumstances manifesting extreme indifference to the value of human life.”<sup>243</sup> The foregoing language is directly drawn from the Model Penal Code definitions of murder and aggravated assault.<sup>244</sup> It is premised on the view—endorsed by the Model

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<sup>241</sup> For example, in Alaska:

[J]urors asked to evaluate conduct resulting in death to determine whether it was negligent, reckless or malicious must weigh four factors: (1) The social utility of the actor’s conduct, (2) the magnitude of the risk his conduct creates including both the nature of foreseeable harm and the likelihood that the conduct will result in that harm; (3) the actor’s knowledge of the risk; and (4) any precautions the actor takes to minimize the risk.

*Neitzel v. State*, 655 P.2d 325, 337 (Alaska Ct. App. 1982); see *Jeffries v. State*, 169 P.3d 913, 916 (Alaska 2007). For general support for application of a multi-factor approach, as well specific support for the considerations stated in the explanatory note, see Robinson, *supra* note 95, at 453; LAFAVE, *supra* note 14, at § 5.4; Kimberly Kessler Ferzan, *Plotting Premeditation’s Demise*, 2012 LAW & CONTEMP. PROBS. 83, 86.

<sup>242</sup> See, e.g., Michaels, *supra* note 89; LAFAVE, *supra* note 14, at § 14.4.

<sup>243</sup> See, e.g., Ala. Code § 13A-6-2; Alaska Stat. § 11.41.110; Ariz. Rev. Stat. Ann. § 13-1104; Ark. Code Ann. § 5-10-103; Colo. Rev. Stat. Ann. § 18-3-102; Kan. Stat. Ann. § 21-5403; Ky. Rev. Stat. Ann. § 507.020; N.H. Rev. Stat. Ann. § 630:1-b. “Even absent such language in the applicable statute, the Model Penal Code formulation is sometimes employed by courts.” LAFAVE, *supra* note 14, at § 14.4. See, e.g., *United States v. Velazquez*, 246 F.3d 204 (2d Cir. 2001); *United States v. Lesina*, 833 F.2d 156 (9th Cir. 1987).

<sup>244</sup> See Model Penal Code §§ 210.2(b), 211.1(2)(a).

Penal Code drafters—that reckless conduct can, under certain circumstances, be so extreme that it is as culpable as knowing or purposeful conduct.<sup>245</sup>

Notably, the Model Penal Code drafters did not believe these circumstances could be further clarified beyond use of the phrase “under circumstances manifesting extreme indifference to the value of human life.” For example, the Model Penal Code drafters justified their decision to utilize the phrase in the context of homicide as follows:

Whether recklessness is so extreme that it demonstrates similar indifference [to human life] is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.<sup>246</sup>

There are two problems with this “I know it when I see it approach” to *mens rea*.<sup>247</sup> First, “[i]n the absence of a legal framework that provides an intelligible basis for making the critical distinctions in *mens rea*, it seems highly likely that arbitrary and discriminatory factors could be used by decisionmakers—whether consciously or unconsciously—to fill in the gap.”<sup>248</sup> Second, case law and scholarly commentary indicate that the contours of enhanced recklessness can be fleshed out in a more coherent fashion.<sup>249</sup> The relevant factors courts apply, and which have been proposed by commentators, tend to be no different than those applicable to normal recklessness—and which are reflected in the explanatory note.<sup>250</sup> (Indeed, at least one jurisdiction appears to have successfully asked jurors to apply a comparable four-factor test to distinguish between normal recklessness and enhanced recklessness in the context of homicide for over three decades.<sup>251</sup>)

Consistent with the foregoing authorities, the Revised Criminal Code addresses the culpable mental state of enhanced recklessness as follows. Subsection (d)(3) establishes that “[a] person’s reckless conduct occurs ‘under circumstances manifesting extreme indifference’ to the interests protected by an offense when such conduct constitutes an extreme deviation from the standard of care that a reasonable person would observe in the person’s situation.” This clarifies that enhanced recklessness, whenever it is employed in the Revised Criminal Code, entails proof of normal recklessness plus an extreme (rather than gross) deviation. The factors elucidated in the underlying explanatory note, in turn, provide an intelligible basis for identifying an extreme deviation, and distinguishing it, where necessary, from a gross deviation.

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<sup>245</sup> See Model Penal Code § 210.2 cmt. at 21-22.

<sup>246</sup> See *id.*

<sup>247</sup> John C. Duffy, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder*, 57 DUKE L.J. 425, 444 (2007).

<sup>248</sup> Michael Serota, *Mens Rea, Criminal Responsibility, and the Death of Freddie Gray*, 114 MICH. L. REV. FIRST IMPRESSIONS 31, 39 (2015); see, e.g., Michaels, *supra* note 89, at 794; John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 214 (1985); *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

<sup>249</sup> See sources cited *supra* note 127.

<sup>250</sup> See sources cited *supra* note 127.

<sup>251</sup> See *Jeffries*, 169 P.3d at 916; *Neitzel v. State*, 655 P.2d at 336.



Admittedly, the foregoing framework requires the exercise of a significant amount of discretion. But so does any other approach to enhanced recklessness. There simply are limits on the precision of any formulation of a normative judgment, such as that entailed by enhanced recklessness.<sup>252</sup> Still, providing courts and juries with a standard—guided by an explanation of the relevant factors to be considered—seems more likely to lead to consistent and fair outcomes than providing no guidance at all.<sup>253</sup>

### 3. § 206(f)—Proof of Greater Culpable Mental State Satisfies Requirement for Lower

**Relation to National Legal Trends.** Subsection (f) reflects the common law and legislative practice among reform jurisdictions.

Courts have long recognized that “the kaleidoscopic nature of the varying degrees of mental culpability”<sup>254</sup> specified by legislatures ultimately amount to little more than “fine gradations along but a single spectrum of culpability.”<sup>255</sup> It is well-established among common law authorities, for example, that criminal intent and criminal recklessness lie on a *mens rea* continuum, with the latter representing a subset of the former,<sup>256</sup> such that “it is impossible to commit a crime intentionally without concomitantly committing that crime recklessly.”<sup>257</sup>

The hierarchical relationship between the culpable mental states employed in the Model Penal Code is addressed by § 2.02(5), which serves two separate functions.<sup>258</sup> Substantively speaking, it clarifies that purpose is more culpable than knowledge, which is more culpable than the recklessness, which is more culpable than negligence.<sup>259</sup> So, for example, “if [a] crime can be committed recklessly, it is no less committed if the actor acted purposely.”<sup>260</sup> As a drafting matter, however, this provision “makes it unnecessary

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<sup>252</sup> Robinson, *supra* note 95, at 451-52.

<sup>253</sup> *Id.*

<sup>254</sup> *People v. Green*, 56 N.Y.2d 427, 432 (1982).

<sup>255</sup> *People v. Cameron*, 506 N.Y.S.2d 217, 218 (1986) (citing *Green*, 56 N.Y.2d at 433).

<sup>256</sup> *United States v. Shaid*, 916 F.2d 984, 990 (5th Cir. 1990) (citing *United States v. Welliver*, 601 F.2d 203, 209–10 (5th Cir. 1979) *United States v. Reynolds*, 573 F.2d 242, 244-45 (5th Cir. 1978); *United States v. Wilson*, 500 F.2d 715, 720 (5th Cir. 1974)).

<sup>257</sup> *Green*, 56 N.Y.2d at 433 (quoting *People v. Stanfield*, 36 N.Y.2d 467 (1975)). LaFave believes this to be a “quite logical” outcome that is consistent with the case law. LAFAVE, *supra* note 14, at § 5.4 (citing *State v. Stewart*, 122 P.3d 1269 (N.M. 2005); *Simmons v. State*, 72 P.3d 803 (Wyo. 2003)).

<sup>258</sup> The relevant provision reads:

**Substitutes for Negligence, Recklessness and Knowledge.** When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

Model Penal Code § 2.02(5).

<sup>259</sup> *See id.*

<sup>260</sup> Explanatory Note on Model Penal Code § 2.02(5).

to state in the definition of an offense that the defendant can be convicted if it is proved that he was more culpable than the definition of the offense requires.”<sup>261</sup>

Codification of a general provision based on Model Penal Code § 2.02(5) is a standard part of modern code reform efforts. Most reform jurisdictions—as well as all of the major model codes and recent code reform projects—codify a general provision comparable to Model Penal Code § 2.02(5).<sup>262</sup> Several courts in jurisdictions that have not modernized their criminal codes have also recognized the virtues of this “common legal notion”<sup>263</sup> and similarly apply it through case law.<sup>264</sup> Consistent with the foregoing trends, RCC § 206(f) incorporates a substantively identical provision into the Revised Criminal Code.

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<sup>261</sup> *Id.*

<sup>262</sup> For reform jurisdictions, *see* Ala. Code § 13A-2-4; Alaska Stat. Ann. § 11.81.610; Ariz. Rev. Stat. Ann. § 13-202; Ark. Code Ann. § 5-2-203; Colo. Rev. Stat. Ann. § 18-1-503; Del. Code Ann. tit. 11, § 253; Haw. Rev. Stat. Ann. § 702-208; Kan. Stat. Ann. § 21-5202; Me. Rev. Stat. tit. 17-A, § 34; Mo. Ann. Stat. § 562.021; Mont. Code Ann. § 45-2-102; N.H. Rev. Stat. Ann. § 626:2; N.J. Stat. Ann. § 2C:2-2; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; Or. Rev. Stat. Ann. § 161.115; 18 Pa. Stat. and Cons. Stat. Ann. § 302; S.D. Codified Laws § 22-1-2; Tex. Penal Code Ann. § 6.02; Utah Code Ann. § 76-2-104; Wash. Rev. Code Ann. § 9A.08.010. For model codes, *see* Proposed Federal Criminal Code § 302(4). For recent reform projects, *see* Kentucky Revision Project § 501.206; Illinois Reform Project § 205.

<sup>263</sup> *Kolstad v. Am. Dental Ass’n*, 139 F.3d 958, 970 (D.C. Cir. 1998) (Randolph, J., concurring).

<sup>264</sup> *See, e.g., United States v. Nguyen*, CRIM.A. 99-210, 1999 WL 1220761 (E.D. La. Dec. 15, 1999); *State v. Stewart*, 122 P.3d 1269, 1278 (N.M. 2005); *O’Brien v. State*, 45 P.3d 225, 232 (Wyo. 2002); *State v. Smith*, 441 A.2d 84, 92 (Conn. 1981); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 56 (2010) (Breyer, J., dissenting).

**§ 22A-207 RULES OF INTERPRETATION APPLICABLE TO CULPABLE MENTAL STATE REQUIREMENT**

(a) DISTRIBUTION OF ENUMERATED CULPABLE MENTAL STATES. Any culpable mental state specified in an offense applies to all subsequent results and circumstances until another culpable mental state is specified, with the exception of any result or circumstance for which the person is strictly liable under § 22A-207(b).

(b) IDENTIFICATION OF ELEMENTS SUBJECT TO STRICT LIABILITY. A person is strictly liable for any result or circumstance in an offense:

(1) That is modified by the phrase “in fact,” or

(2) To which legislative intent explicitly indicates strict liability applies.

(c) DETERMINATION OF WHEN RECKLESSNESS IS IMPLIED. A culpable mental state of “recklessly” applies to any result or circumstance not otherwise subject to a culpable mental state under § 22A-207(a), or subject to strict liability under § 22A-207(b).

**1. § 22A-207(a)—Distribution of Enumerated Culpable Mental States**

**Relation to National Legal Trends.** Subsection (a) generally reflects common law interpretive principles and legislative practice in reform jurisdictions.

“In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.”<sup>265</sup> It is, therefore, unsurprising that judges typically make the same assumption while attempting to discern the meaning of criminal statutes—indeed, “the manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage.”<sup>266</sup> For example, “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with [a culpable mental state such as] the word ‘knowingly’ as applying that word to each element”<sup>267</sup>—what is considered the “normal, commonsense reading of a subsection of a criminal statute.”<sup>268</sup>

Consistent with this approach to reading criminal statutes, the drafters of the Model Penal Code codified a rule of distribution governing enumerated culpable mental states in § 2.02(4).<sup>269</sup> This rule establishes that, where an offense definition specifies one

<sup>265</sup> *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009).

<sup>266</sup> *Id.* at 652.

<sup>267</sup> *Id.*; see, e.g., *Liparota v. United States*, 471 U.S. 419 (1985).

<sup>268</sup> *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring).

<sup>269</sup> The relevant provisions reads:

**Prescribed Culpability Requirement Applies to All Material Elements.** When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

culpable mental state, the courts are to apply that culpable mental state to all of the objective elements of that offense, subject to legislative intent to the contrary. The commentary supporting the Model Penal Code provision suggests that this rule will embody the most likely legislative intent—the “normal probability” is that an articulated culpability requirement “was designed to apply to all material elements.”<sup>270</sup>

Codification of a rule of distribution based on Model Penal Code § 2.02(4) is a standard part of modern code reform efforts. A majority of reform jurisdictions codify a general provision comprised of a rule based on Model Penal Code § 2.02(4).<sup>271</sup> And in those jurisdictions that lack statutory rules of interpretation in their criminal codes, courts at times have specifically endorsed Model Penal Code § 2.02(4)—or something like it—through case law.<sup>272</sup>

Consistent with the foregoing legal trends, § 22A-207(a) incorporates a comparable rule of distribution into the Revised Criminal Code. There are, however, two important variances between § 22A-207(a) and the standard legislative approach reflected in reform codes. The first variance is that whereas the standard legislative approach is to only apply the rule of distribution to offenses that use a single culpable mental state but do not “distinguish[] among the material elements thereof,” § 22A-207(a) applies even where an offense definition does distinguish between such elements to some degree. The second variance is that the general exception to the rule incorporated into the standard legislative approach—when “a contrary purpose plainly appears”—is replaced with a reference to the more precise rules governing strict liability in § 22A-207(b).

These modest variances are necessary to facilitate the clear and consistent interpretation of the District’s criminal statutes.<sup>273</sup> For example, even where an offense definition does apply distinct mental states to different aspects of an offense, there still remain questions about whether and to what extent the enumerated mental states were intended to “travel.” Subsection (a) more precisely establishes that, as a general rule, a specified culpable mental state stops traveling when another culpable mental state is specified, in which case the latter culpable mental state travels, and so on and so forth. Likewise, the exception to the general rule of distribution reflected in reform codes—when “a contrary purpose plainly appears”—is ambiguous. Subsection (a) supplants it with the more precise rules governing strict liability in § 22A-207(b).

## 2. § 22A-207(b)—Identification of Elements Subject to Strict Liability

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Model Penal Code § 2.02(4).

<sup>270</sup> Model Penal Code § 2.02 cmt. at 129.

<sup>271</sup> Ala. Code § 13A-2-4; Ariz. Rev. Stat. Ann. § 13-202; Ark. Code Ann. § 5-2-203; Colo. Rev. Stat. Ann. § 18-1-503; Conn. Gen. Stat. Ann. § 53a-5; Del. Code Ann. tit. 11, § 252; Haw. Rev. Stat. Ann. § 702-207; Ind. Code Ann. § 35-41-2-2; 720 Ill. Comp. Stat. Ann. 5/4-3; Me. Rev. Stat. tit. 17-A, § 34; Mont. Code Ann. § 45-2-103; N.H. Rev. Stat. Ann. § 626:2; N.J. Stat. Ann. § 2C:2-2; N.Y. Penal Law § 15.15; N.D. Cent. Code Ann. § 12.1-02-02; 18 Pa. Stat. and Cons. Stat. Ann. § 302.

<sup>272</sup> See, e.g., *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1239 (D.C. Cir. 2008); sources cited *supra* notes 4-7.

<sup>273</sup> For a comprehensive discussion of the problems reflected in the Model Penal Code’s rules of interpretation, see Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

**Relation to National Legal Trends.** Subsection (b) is broadly consistent with legislative practice among reform jurisdictions.

Application of strict liability to at least some objective elements in felony offenses is, as noted in the commentary to § 22A-205, well established in American criminal law. Less well established is the manner in which the application of strict liability to one or more objective elements in felony offenses should be communicated as a matter of legislative drafting. This is likely a product of the fact that the Model Penal Code generally does not recognize the application of strict liability to one or more objective elements in felony offenses. In the absence of a strong model, a variety of approaches have proliferated in the states.<sup>274</sup>

There are two principal ways that reform codes address strict liability in their general part. The first is a general provision which establishes that strict liability applies to any “element of [a] crime as to which it is expressly stated that it must ‘in fact’ exist.”<sup>275</sup> The second is a general provision which broadly establishes that strict liability applies to an objective element whenever a statute “clearly” or “plainly” indicates a legislative intent to impose strict liability.<sup>276</sup>

The Revised Criminal Code incorporates slightly modified versions of both approaches. For example, § 22A-207(b)(i) specifically dictates that “[a] person is strictly liable for any result or circumstance in an offense . . . [t]hat is modified by the phrase ‘in fact.’” This is substantively similar to the first approach used in reform codes; however, the phrase “expressly stated” has been replaced with the term “modified,” which more clearly and directly expresses the requisite relationship. In contrast, § 22A-207(b)(ii) more generally establishes that “[a] person is strictly liable for any result or circumstance in an offense . . . [when] legislative intent explicitly indicates strict liability applies.” This is substantively similar to the second approach used in reform codes; however, rather than use vague terms such as “clearly” or “plainly,” § 22A-207(b)(ii) uses the narrower and more precise term “explicitly.” This should help to limit litigation and inconsistent outcomes the former language has engendered.<sup>277</sup>

### 3. § 22A-205(c)—Determination of When Recklessness Is Implied

**Relation to National Legal Trends.** Subsection (c) generally reflects common law interpretive principles and legislative practice in reform jurisdictions.

The concept of a default culpable mental state requirement is a well-established part of the common law. Courts have “repeatedly held,” for example, that “‘mere omission from a criminal enactment of any mention of criminal intent’ should not be read ‘as dispensing with it.’”<sup>278</sup> This “rule of construction reflects the basic principle that ‘wrongdoing must be conscious to be criminal.’”<sup>279</sup> The “central thought” animating this rule of construction—that a defendant must be “blameworthy in mind” before he can be

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<sup>274</sup> For a comprehensive overview of the treatment of strict liability in the states, see Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285 (2012).

<sup>275</sup> See, e.g., Me. Rev. Stat. tit. 17-A, § 34; N.D. Cent. Code Ann. § 12.1-02-02.

<sup>276</sup> See, e.g., Mo. Ann. Stat. § 562.026; Tex. Penal Code Ann. § 6.02; Ala. Code § 13A-2-4; N.J. Stat. Ann. § 2C:2-2; Utah Code Ann. § 76-2-102.

<sup>277</sup> See Brown, *supra* note 17.

<sup>278</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Morissette*, 342 U.S. at 250).

<sup>279</sup> *Id.* at 2009 (quoting *Morissette*, 342 U.S. at 252).

found guilty—is “as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”<sup>280</sup> As a result, courts have for a long time opted to “interpret criminal statutes to include broadly applicable [*mens rea*] requirements, even where the statute by its terms does not contain them.”<sup>281</sup> That being said, given the substantial confusion surrounding the common law approach to *mens rea*, the meaning of this default culpable mental state requirement has historically been less than clear.

In light of these considerations, the drafters of the Model Penal Code codified rule § 2.02(3), which establishes that a culpable mental state of recklessness applies in situations of interpretive uncertainty.<sup>282</sup> The drafters’ selection of recklessness as the appropriate default culpability level was based, *inter alia*, on their view that this reflected “the common law position.”<sup>283</sup> Whether or not this is true then is less than clear; however, it clearly seems true today given that “recklessness is generally accepted as the theoretical norm” for criminal liability,<sup>284</sup> and—as articulated in one recent Supreme Court concurrence—likely constitutes the contemporary basis for the common law presumption of *mens rea*.<sup>285</sup>

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<sup>280</sup> *Morissette*, 342 U.S. at 250, 252.

<sup>281</sup> *X-Citement Video*, 513 U.S. at 70.

<sup>282</sup> The relevant provision reads:

**Culpability Required Unless Otherwise Provided.** When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

Model Penal Code § 2.02(3).

<sup>283</sup> Model Penal Code § 2.02(3) cmt. at 127.

<sup>284</sup> Robinson & Grall, *supra* note 12, at 701.

<sup>285</sup> As Justice Alito frames the argument for recklessness in the context of interpreting the federal threats statute:

[W]e should presume that an offense like that [of threats] requires more than negligence with respect to a critical element like the one at issue here. [] As the Court states, “[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute ‘only that *mens rea* which is necessary to separate wrongful conduct from “otherwise innocent conduct.”” [] Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.

Once we have passed negligence, however, no further presumptions are defensible. In the hierarchy of mental states that may be required as a condition for criminal liability, the *mens rea* just above negligence is recklessness. Negligence requires only that the defendant “should [have] be [en] aware of a substantial and unjustifiable risk,” [] while recklessness exists “when a person disregards a risk of harm of which he is aware” [] And when Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.

Codification of a rule of implication based on Model Penal Code § 2.02(3) is a standard part of modern code reform efforts. Numerous reform jurisdictions codify a general provision providing a comparable default rule.<sup>286</sup> And several courts in jurisdictions with criminal codes lacking general culpability provisions have recognized the virtues of this rule and similarly apply it through case law.<sup>287</sup> Consistent with the foregoing legal trends, § 22A-207(c) incorporates a comparable rule of implication into the Revised Criminal Code. It's important to note, however, that given the precision and comprehensiveness of §§ 22A-207(a) and (b), the applicability of the recklessness default reflected in § 22A-207(c) is likely to apply less frequently than in other reform codes.

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There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct . . . .

*Elonis*, 135 S. Ct. at 2015 (internal citations omitted); see John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

<sup>286</sup> Del. Code Ann. tit. 11, § 251; Haw. Rev. Stat. Ann. § 702-204; Ind. Code Ann. § 35-41-2-2; Kan. Stat. Ann. § 21-5202; 18 Pa. Stat. and Cons. Stat. Ann. § 302; Ark. Code Ann. § 5-2-203; 720 Ill. Comp. Stat. Ann. 5/4-3; Mont. Code Ann. § 45-2-103; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.21; Tenn. Code Ann. § 39-11-301; Tex. Penal Code Ann. § 6.02; Utah Code Ann. § 76-2-102.

<sup>287</sup> See, e.g., *State v. Sivo*, 925 A.2d 901, 913 (R.I. 2007); *State v. Lima*, 546 A.2d 770, 772 (R.I. 1988); *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983); *United States v. Nofziger*, 878 F.2d 442, 450 (D.C. Cir. 1989).

**§ 22A-208 PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND  
IGNORANCE**

(a) EFFECT OF ACCIDENT, MISTAKE, AND IGNORANCE ON LIABILITY. A person is not liable for an offense when that person’s accident, mistake, or ignorance as to a matter of fact or law negates the existence of a culpable mental state applicable to a result or circumstance in that offense.

(b) CORRESPONDENCE BETWEEN MISTAKE AND CULPABLE MENTAL STATE REQUIREMENTS. For purposes of determining when a particular mistake as to a matter of fact or law negates the existence of a culpable mental state applicable to a circumstance:

(1) *Purpose.* Any reasonable or unreasonable mistake as to a circumstance negates the existence of the purpose applicable to that element.

(2) *Knowledge.* Any reasonable or unreasonable mistake as to a circumstance negates the existence of the knowledge applicable to that element.

(3) *Recklessness.* Any reasonable mistake as to a circumstance negates the recklessness applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the recklessness applicable to that element if the person did not recklessly make that mistake.

(4) *Negligence.* Any reasonable mistake as to a circumstance negates the existence of the negligence applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the negligence applicable to that element if the person did not recklessly or negligently make that mistake.

(c) IMPUTATION OF KNOWLEDGE FOR DELIBERATE IGNORANCE. When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if:

(1) The person was reckless as to whether the circumstance existed; and

(2) The person avoided confirming or failed to investigate whether the circumstance existed with the purpose of avoiding criminal liability.

**1. §§ 22A-208(a) & (b)—Effect of Accident, Mistake and Ignorance on Liability & Correspondence Between Mistake and Culpable Mental State Requirements**

*Relation to National Legal Trends.* Subsections (a) and (b) codify well-accepted common law principles and are generally in accordance with national legislative trends. Importantly, however, these provisions depart from standard legislative practice in three ways: (1) by addressing the relationship between mistake, ignorance, and culpable mental states without reference to “defenses”; (2) by clarifying that the same logical relevance



approach governing mistake and ignorance similarly applies to accidents; and (3) by further clarifying the nature of the correspondence between mistake and culpable mental state requirements under the traditional reasonable/unreasonable distinction.

Claims that a defendant did not satisfy the *mens rea* of the charged offense by virtue of some accident,<sup>288</sup> mistake<sup>289</sup> or ignorance<sup>290</sup> as to a matter of fact or law have long been recognized by the common law as a viable defense theory.<sup>291</sup> At the same time, however, courts have historically struggled to deal with these claims in a clear, consistent, and principled manner—indeed, “[n]o area of the substantive criminal law has traditionally been surrounded by more confusion.”<sup>292</sup>

The most frequently referenced form of this type of claim is based on an erroneous factual belief—or generalized ignorance—concerning the ownership status of a particular piece of property.<sup>293</sup> In a paradigm mistake of fact scenario, a person takes a piece of property owned by someone else motivated by the mistaken belief that it was abandoned.<sup>294</sup> If later prosecuted for a theft offense, that person will argue that because of this mistaken belief as to the property’s ownership statute, he or she lacked the *mens rea* necessary for a conviction.<sup>295</sup>

At common law, courts relied upon a three-part offense categorization scheme to address claims of this nature.<sup>296</sup> For specific intent crimes, the general rule was that an honestly held mistake could serve as a defense to the crime charged, regardless of whether the mistake was reasonable or unreasonable.<sup>297</sup> For general intent crimes, in

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<sup>288</sup> Generally speaking, “[a]n accident occurs when one brings about a result without desiring or foreseeing it.” Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 504-07 (1990) [hereinafter, *Mistake and Impossibility*].

<sup>289</sup> In contrast to accidents, “[m]istakes occur in the realm of perception; they involve false beliefs.” Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 65, 73 (1996).

<sup>290</sup> “‘Ignorance’ implies a total want of knowledge—a blank mind—regarding the matter under consideration.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.01 n.2 (6th ed. 2012). This is in contrast to mistakes, which “suggests a wrong belief about the matter.” *Id.* As a result, the terms “[i]gnorance” and “mistake” are “not synonyms.” *Id.* Nevertheless, “this distinction typically is not drawn” in the relevant cases. *Id.* What is important is that both terms “describe the absence of a particular state of mind as to a circumstance element, but not as to a conduct or result element.” Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 732 (1983). For purposes of this commentary, ignorance can be assimilated within mistake.

<sup>291</sup> WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.6 (Westlaw 2017); DRESSLER, *supra* note 19, at § 12.01. Note that mistakes or ignorance as to a matter of *penal* law typically was not, nor is currently, recognized as a viable defense since such issues rarely negate the *mens rea* of an offense. *Id.* This commentary does not discuss such issues except to the extent that proof of a culpable mental state as to a matter of penal law is an element of an offense. For discussion of offenses that incorporate proof of a culpable mental state as to a matter of penal law as an element of an offense, see Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1579-80 (2006).

<sup>292</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

<sup>293</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

<sup>294</sup> See, e.g., *Simms*, 612 A.2d at 219. For an example of an accident claim, in contrast, imagine that the person later realizes the property was not, in fact, abandoned and thereafter attempts to return it to its lawful owner. If, in the course of trying to return that property, he or she unintentionally drops it on the floor, thereby destroying it, the person could raise the accidental nature of the dropping as a defense in the context of a destruction of property prosecution.

<sup>295</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

<sup>296</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

<sup>297</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

contrast, courts applied a reasonable mistake doctrine, under which an honestly held mistake could serve as a defense to the crime charged only if it was reasonable.<sup>298</sup> And for strict liability crimes, courts simply held that no mistake, no matter its reasonableness, could serve as a defense.<sup>299</sup>

Categorical rules of this nature were understood to address the level of culpability required by the class of offense at issue. The problem, however, is that there was little principled basis upon which to pin the distinction between “general intent” and “specific intent” in the first place.<sup>300</sup> After all, “[n]either common experience nor psychology knows of any such phenomenon as ‘general intent’ distinguishable from ‘specific intent.’”<sup>301</sup> In the absence of legislative guidance on whether an offense was one of specific intent or general intent, that classification decision—as well as the ultimate policy judgment concerning whether any particular kind of mistake ought to provide the basis for exoneration—was left to the courts.

In making that policy determination, moreover, this binary categorization scheme failed to provide courts with a basis for accounting for the different kinds of mistakes that could potentially arise. For example, the distinction between reasonable and unreasonable mistakes at the heart of the common law approach overlooked the potential relevance of a reckless mistake—which “occurs when an actor is aware of a substantial risk that the circumstance exists”—to liability.<sup>302</sup>

Perhaps more problematic, however, was the fact that courts themselves often failed to accurately perceive the nature of what they were doing. Whether in the context of considering claims of mistake or accident, judicial reliance on the distinctions between general intent and specific intent crimes had a tendency to lead courts to view the relevant issues as distinct from the government’s burden of proof, and, therefore, to treat them as “affirmative defenses”<sup>303</sup>—for which the defendant may ultimately bear the burden of proof—rather than “absent element defenses”<sup>304</sup>—for which the defendant may not.<sup>305</sup>

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<sup>298</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

<sup>299</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

<sup>300</sup> The main, and perhaps only, exception to this phenomenon were those offenses that expressly required proof of “an intent or purpose to do some future act, or to achieve some further consequence (i.e., a special motive for the conduct), beyond the conduct or result that constitutes the actus reus of the offense.” DRESSLER, *supra* note 19, at § 10.06. These so-called partially inchoate offenses were quite consistently treated as specific intent offenses at common law. See Model Penal Code § 2.08 cmt. at 356.

<sup>301</sup> *People v. Kelley*, 176 N.W.2d 435, 443 (Mich. 1970).

<sup>302</sup> ROBINSON & CAHILL, *supra* note 10, at 195.

<sup>303</sup> An affirmative defense is contingent upon conditions or circumstances unrelated to the elements contained in the charged offense. When an affirmative defense—typically either a justification or excuse—is successfully raised it exonerates the accused *notwithstanding the fact that the government proved all of the elements of an offense beyond a reasonable doubt*. ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65(c).

<sup>304</sup> An absent element defense is contingent upon conditions or circumstances directly related to the elements of the charged offense. When an absent element defense is successfully raised it exonerates the accused *because the government cannot, by virtue of the defense’s existence, prove all of the elements of an offense beyond a reasonable doubt*. ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65(c).

<sup>305</sup> The United States Supreme Court has held that the states and the federal government must be allocated the burden of persuasion with regard to the requisite culpable mental state for each objective element of the crime(s) charged. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510 (1979). For compilations of case law addressing mistake and accident claims which may conflict with this principle, see, for example, Robinson

The source of most of the foregoing problems, as many jurisdictions have come to recognize, was the flawed method of analyzing culpability, offense analysis, upon which the common law approach to mistake and accident was premised. By “failing to distinguish between elements of the crime, to which different mental states may apply,”<sup>306</sup> offense analysis lacked the conceptual toolkit necessary to appreciate what the modern conception of culpability, element analysis, clarified: resolving claims of mistake, ignorance, and accident amount to little more than a “negative statement” of the culpable mental state governing the particular objective element to which it applies.<sup>307</sup>

To appreciate the reciprocal nature of this relationship consider the role that a mistaken belief as to abandonment, such as that discussed *supra*, plays in the context of a theft offense with the following *actus reus*: “No person shall unlawfully use the property of another.” In this context, the nature of the mistaken belief as to abandonment that will exonerate is part and parcel with the culpable mental state requirement (if any) applicable to the circumstance “of another.”<sup>308</sup>

For example, application of a knowledge mental state requirement to that circumstance means that any honest mistake as to the property’s ownership status shall exonerate, since someone who wholeheartedly believed—whether reasonably or unreasonably—that property X was abandoned cannot, by definition, have been practically certain (i.e., knew) that property X was owned by someone else. But if, in contrast, the government need only prove the accused was negligent as to whether the property was “of another” to secure a conviction, only a reasonable mistake (or at least a mistake that is not grossly unreasonable) as to the property’s ownership status can negate the existence of the culpable mental state requirement. Negligence, after all, does not require proof that the accused was aware of the substantial risk he or she disregarded, only that the reasonable person in the accused’s situation *would have been aware of that risk*.<sup>309</sup>

This kind of element analysis offers similar insights for the adjudication of accident claims, which can primarily be distinguished from mistake claims by the objective element to which they relate: whereas mistakes implicate the culpable mental state governing circumstance elements, accidents typically involve the culpable mental

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& Grall, *supra* note 19, at 758; Danye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 255 nos. 100 & 101 (1997); see also Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 356-57 (1986).

<sup>306</sup> Ortberg, 81 A.3d at 307.

<sup>307</sup> Robinson & Grall, *supra* note 19, at 726–27. As Dressler similarly observes: “[B]ecause of a mistake, a defendant may not possess the specific state of mind required in the definition of the crime. In such circumstances, the defendant must be acquitted because the prosecutor has failed to prove an express element of the offense.” DRESSLER, *supra* note 19, at § 12.02.

<sup>308</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

<sup>309</sup> Likewise, if a culpable mental state of recklessness governed the circumstance “of another,” then an unreasonable mistake as to whether property X was abandoned can negate the existence of the requisite culpable mental state requirement, so long as the defendant was merely negligent, but not reckless, in making that mistake. See Robinson & Grall, *supra* note 19, at 726–27.

state governing result elements.<sup>310</sup> For example, “[o]ne makes a ‘mistake’ as to another’s age or property, the obscene nature of a publication, or other circumstance elements, but one ‘accidentally’ injures another, pollutes a stream, or interferes with a law enforcement officer.”<sup>311</sup> “To say,” therefore, “that a non-negligent accident that causes a prohibited result provides a defense is simply to say that all offenses containing result elements require at least negligence as to causing the prohibited result.”<sup>312</sup>

The drafters of the Model Penal Code, themselves initially responsible for devising element analysis, understood the extent to which the common law confusion surrounding issues of mistake and ignorance could ultimately be traced back to judicial reliance on offense analysis. Addressing the varied problems this reliance produced was, therefore, at the forefront of the drafters’ minds as they undertook their work of simplifying and rendering more coherent the American law of culpability.

Aided by the insights of element analysis, the drafters accurately perceived that “ignorance or mistake has only evidential import; it is significant whenever it is logically relevant, and it may be logically relevant to negate the required mode of culpability.”<sup>313</sup> These principles were understood by the drafters to be implicit in the requirement that the government prove every element of an offense—including culpable mental states—beyond a reasonable doubt.<sup>314</sup> Nevertheless, the drafters nevertheless chose to explicitly codify them for purposes of clarity.

The relevant provision, § 2.04(1) of the Model Penal Code, establishes that:

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense;  
or

(b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

The explanatory note accompanying this provision communicates the drafters’ stated intent of clarifying that “ignorance or mistake is a defense to the extent that it negatives a required level of culpability or establishes a state of mind that the law provides is a defense,” which in turn depends “upon the culpability level for each element of the offense, established according to its definition and the general principles set forth in Section 2.02.”<sup>315</sup>

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<sup>310</sup> See, e.g., Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1080 (1997); Simons, *Mistake and Impossibility*, *supra* note 17, at 504-07; Husak, *supra* note 18, at 65.

<sup>311</sup> Robinson & Grall, *supra* note 19, at 732.

<sup>312</sup> *Id.* As the DCCA observed in *Carter v. United States*: “It is only where there is a reasonable theory of the evidence under which the parties involved may be held to have exercised due care notwithstanding that the accident occurred, that an unavoidable accident instruction is proper.” 531 A.2d at 964 (quoting *Bickley v. Farmer*, 215 Va. 484, 488 (1975)).

<sup>313</sup> Model Penal Code § 2.04 cmt. at 269.

<sup>314</sup> Robinson & Grall, *supra* note 19, at 727.

<sup>315</sup> Model Penal Code § 2.04—Explanatory Note.

Generally speaking, Model Penal Code § 2.04(1) has been quite influential. It is now commonly accepted, for example, that “ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged.”<sup>316</sup> And codification of a general provision modeled on § 2.04(1) is a well-established part of modern code reform efforts: a strong majority of reform jurisdictions—as well as all of the major model codes and recent comprehensive code reform projects—codify a comparable provision.<sup>317</sup> Likewise, courts in jurisdictions that never modernized their codes have endorsed Model Penal Code § 2.04(1) through case law.<sup>318</sup>

Notwithstanding the broad popularity of the Model Penal Code approach, however, many reform jurisdictions have opted to modify § 2.04(1) in one or more ways.<sup>319</sup> For example, a plurality of jurisdictions link the significance of mistakes to disproving the requisite culpable mental state without reference to “defenses” at all—as is the case in Model Penal Code § 2.04(1)(a)—and instead focus solely on when a given mistake “negatives” an element of the offense.<sup>320</sup> Another common variance is reflected in the plurality of jurisdictions that omit the second prong of Model Penal Code § 2.04(1)(b) altogether, opting against inclusion of an explicit statement that “[i]gnorance or mistake as to a matter of fact or law [serves as] a defense [when] the law provides that the state of mind established by such ignorance or mistake constitutes a defense.”<sup>321</sup>

Modifications aside, it is nevertheless clear that Model Penal Code § 2.04(1) broadly reflects the standard legislative approach for dealing with issues of mistake and ignorance. Consistent with national codification trends, §§ (a) and (b) incorporate a comparable standard into the Revised Code, which clarifies what is otherwise implicit in

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<sup>316</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; *see, e.g., People v. Andrews*, 632 P.2d 1012, 1016 (Colo. 1981) *People v. Mayberry*, 542 P.2d 1337, 1346 (Cal. 1975). There is, however, one exception: “if the defendant would be guilty of another crime had the situation been as he believed, then he may be convicted of the offense of which he would be guilty had the situation been as he believed it to be.” LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. For further discussion of this issue, see *infra* note 69.

<sup>317</sup> For reform jurisdictions, see Ala. Code § 13A-2-6; Alaska Stat. Ann. § 11.81.620; Ariz. Rev. Stat. Ann. § 13-204; Ark. Code Ann. § 5-2-206; Colo. Rev. Stat. Ann. § 18-1-504; Haw. Rev. Stat. Ann. § 702-218; 720 Ill. Comp. Stat. Ann. 5/4-8; Ind. Code Ann. § 35-41-3-7; Kan. Stat. Ann. § 21-5207; Ky. Rev. Stat. Ann. § 501.070; Me. Rev. Stat. tit. 17-A, § 36; Mont. Code Ann. § 45-2-103; N.H. Rev. Stat. Ann. § 626:3; N.J. Stat. Ann. § 2C:2-4; N.Y. Penal Law § 15.20; N.D. Cent. Code Ann. § 12.1-02-03; 18 Pa. Stat. and Cons. Stat. Ann. § 304; Tex. Penal Code Ann. § 8.02; Utah Code Ann. § 76-2-304. For model codes, see Brown Commission § 304. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207. Note also that “[e]ight other states that do not emulate the Model Penal Code’s key culpability provisions have also codified the mistake of fact doctrine,” most of which “also take the position that the doctrine primarily sanctions a challenge to the prosecution’s ability to prove the requisite culpable mental state.” Holley, *supra* note 34, at 247-48.

<sup>318</sup> *See, e.g., United States v. Aitken*, 755 F.2d 188, 193 (1st Cir. 1985); *Com. v. Lopez*, 745 N.E.2d 961, 964 (Mass. 2001).

<sup>319</sup> Holley, *supra* note 34, at 247-49 (collecting citations).

<sup>320</sup> For reform jurisdictions, see Ala. Code § 13A-2-6; Alaska Stat. Ann. § 11.81.620; Ariz. Rev. Stat. Ann. § 13-204; Colo. Rev. Stat. Ann. § 18-1-504; Conn. Gen. Stat. Ann. § 53a-6; Ky. Rev. Stat. Ann. § 501.070; Mo. Ann. Stat. § 562.031; N.H. Rev. Stat. Ann. § 626:3; N.Y. Penal Law § 15.20. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207.

<sup>321</sup> For reform jurisdictions, see Ariz. Rev. Stat. Ann. § 13-204(a); Ill. Comp. Stat. 720 § 5/4-8; Ind. Code Ann. § 35-41-3-7; Kan. Stat. Ann. § 21-5207; Mo. Ann. Stat. § 562.031; Tenn. Code Ann. § 39-11-502; Tex. Penal Code Ann. § 8.02; Utah Code Ann. § 76-2-304. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207.

the requirement that a conviction rest upon proof of all offense elements beyond a reasonable doubt: that a person's mistake or ignorance will typically relieve that person of liability when (and only when) it precludes the person from acting with the culpable mental state requirement applicable to an objective element. That being said, there are three important ways in which the Revised Code departs from Model Penal Code § 2.04(1).

First, the logical relevance principle incorporated into the Revised Code does not reference "defenses" in any capacity. For example, § (a) reframes the rule of logical relevance stated in Model Penal Code § 2.04(1)(a) to solely focus on whether a given mistake or ignorance "negates" the existence of a culpable mental state requirement. Likewise, § (a) omits a provision like Model Penal Code § 2.04(1)(b), thereby avoiding any reference to specific laws providing for "[i]gnorance or mistake as to a matter of fact or law serv[ing] as a defense."

Both of these modifications—each of which is consistent with the plurality legislative trends noted above—are intended to avoid the significant judicial and legislative confusion that "characterizing the mistake of fact doctrine as a 'defense'" has produced in many jurisdictions.<sup>322</sup> In an attempt to avoid this kind of confusion, § (a) more clearly communicates that mistake "does not sanction a true defense, but in fact primarily recognizes an attack on the prosecution's ability to prove the requisite culpable mental state beyond a reasonable doubt."<sup>323</sup>

A related area of confusion, addressed by § (b), is the nature of the correspondence between mistake and culpable mental state requirements. Although courts in reform jurisdictions generally seem to have recognized that "determining whether a reasonable or an unreasonable mistake as to a particular [] circumstance element will provide a defense requires nothing more than determining what culpable state of mind is required as to that element,"<sup>324</sup> judges have struggled to accurately translate this principle into specific rules that accurately translate the traditional distinctions between reasonable and unreasonable mistakes into rules that track the relevant culpable mental states.<sup>325</sup> This is particularly true, moreover, in the area where the translation is most difficult, determining the kind of mistake that negates the existence

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<sup>322</sup> Holley, *supra* note 34, at 254; see Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 205 (2003).

<sup>323</sup> Holley, *supra* note 34, at 247. As LaFave phrases it: "Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense. LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. Consistent with that analysis, Model Penal Code § 2.04(1)(b), by providing that "[i]gnorance or mistake as to a matter of fact or law [serves as] a defense [when] the law provides that the state of mind established by such ignorance or mistake constitutes a defense," is "doubly superfluous." ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62. For an application of this provision, see Model Penal Code § 223.1(3)(a), which provides a defense for an actor who took property when he "was unaware that the property or service was that of another . . ." For recognition by the Model Penal Code drafters that this defense is redundant and that such an actor would be exculpated by the normal operation of the culpability requirements, see Model Penal Code § 223.1 cmt. at 153

<sup>324</sup> Robinson & Grall, *supra* note 19, at 729. As the New Jersey Supreme Court frames the inquiry: "[W]e relate the type of mistake involved to the essential elements of the offense, the conduct proscribed, and the state of mind required to establish liability for the offense." *State v. Sexton*, 733 A.2d 1125, 1130 (N.J. 1999).

<sup>325</sup> ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62 (collecting citations).

of recklessness.<sup>326</sup> With that in mind, and consistent with case law,<sup>327</sup> commentary,<sup>328</sup> and the general provisions incorporated into two recent comprehensive criminal code reform projects,<sup>329</sup> § (b) provides District courts with the basic rules of translation. Such guidance is intended to avoid the confusion which silence on such issues can create, and, therefore, increase the clarity and consistency of District law.

The third noteworthy aspect of the Revised Code is its application of the logical relevance principle incorporated into § (a) to accidents, alongside mistakes and ignorance. This dual application of the logical relevance principle constitutes a departure from modern legislative trends: few reform codes address the import of accidents and, to the extent they do, accidents are viewed through the lens of legal causation.<sup>330</sup>

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<sup>326</sup> As Robinson and Grall observe:

[T]he translation is uncertain at its most critical point: in determining the kind of mistake that provides a defense when recklessness, the most common culpability level, as to a circumstance is required. [A] negligent or faultless mistake negates (necessarily precludes the existence of) recklessness. While a “negligent mistake” may be said to be an “unreasonable mistake,” all “unreasonable mistakes” are not “negligent mistakes.” A mistake may also be unreasonable because it is reckless. Reckless mistakes, although unreasonable, will not negate recklessness. Thus, when offense definitions require recklessness as to circumstance elements, as they commonly do, the reasonable-unreasonable mistake language inadequately describes the mistakes that will provide a defense because of the imprecision of the term “unreasonable mistake.” Reckless-negligent-faultless mistake language is necessary for a full and accurate description.

Robinson & Grall, *supra* note 19, at 729; *see, e.g.*, ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62; Holley, *supra* note 34, at 233 n.12.

<sup>327</sup> For example, in *Laseter v. State*, an Alaska appellate court determined because the offense of sexual assault in the first degree requires recklessness as to lack of consent in Alaska, it was reversible error to instruct the jury to acquit if the jury found that defendant had a “reasonable belief” that the victim consented—the “reasonable belief” instruction permitted the jury to convict on the basis of negligence as to lack of consent. 684 P.2d 139, 142 (Alaska Ct. App. 1984). For a similar recognition in the context of negligence and unreasonable mistakes, *see Doe v. Breedlove*, 906 So. 2d 565, 573 (La. Ct. App. 2005).

<sup>328</sup> *See, e.g.*, sources cited *supra* note 55.

<sup>329</sup> For example, § 207(2)-(3) of the Illinois Reform Project reads:

(2) *Correspondence Between Mistake Defenses and Culpability Requirements.* Any mistake as to an element of an offense, including a reckless mistake, will negate the existence of intention or knowledge as to that element. A negligent mistake as to an element of an offense will negate the existence of intention, knowledge, or recklessness as to that element. A reasonable mistake as to an element of an offense will negate intention, knowledge, recklessness, or negligence as to that element.

(3) *Definitions.*

(a) A “reckless mistake” is an erroneous belief that the actor is reckless in forming or holding.

(b) A “negligent mistake” is an erroneous belief that the actor is negligent in forming or holding.

(c) A “reasonable mistake” is an erroneous belief that the actor is non-negligent in forming or holding.

Section 501.207 of the Kentucky Revision Project proposes a substantively identical general provision.

<sup>330</sup> *See* Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat.

More specifically, these few reform code provisions incorporate the “fresh approach”<sup>331</sup> to legal causation developed by the drafters of the Model Penal Code and implemented through Model Penal Code § 2.03(2).<sup>332</sup> For the reasons discussed in the commentary to Revised Code § 22A-204(c), however, this approach generally constitutes a problematic departure from the common law.<sup>333</sup> With respect to treatment of accidents in particular, though, what the Model Penal Code (and relevant state-based provisions) miss is that whether a claim of accident or mistake is raised, both effectively raise a culpable mental state issue, namely, whether the government can meet its affirmative burden of proof concerning the culpable mental state requirement governing an offense.<sup>334</sup>

This insight is reflected in District case law, which recognizes that “[d]efenses of accident and mistake of fact (or non-penal law) have potential application to any case in which they could rebut proof of a required mental element.”<sup>335</sup> And it is also reflected in case law from outside of the District, which similarly views accidents through the lens of *mens rea*.<sup>336</sup> In accordance with these authorities, and in furtherance of the interests of clarity and consistency, § (a) explicitly articulates that accidents are subject to the same general rule of logical relevance as mistakes.

Viewed collectively, the broadly applicable logical relevance principle set forth by §§ (a) and (b) should secure for the District one of the primary benefits of element

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and Cons. Stat. Ann. § 303. For reform jurisdictions with similar provisions, see Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat. and Cons. Stat. Ann. § 303.

<sup>331</sup> Model Penal Code § 2.03 cmt. at 254.

<sup>332</sup> The relevant provisions addressing accidents in Model Penal Code § 2.03(2) read:

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused . . . .

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused . . . .

<sup>333</sup> See Commentary to Revised Criminal Code § 204(c), Nationwide Legal Trends.

<sup>334</sup> See, e.g., Paul H. Robinson, *The Model Penal Code’s Conceptual Error on the Nature of Proximate Cause, and How to Fix it*, 51 No. 6 CRIM. LAW BULLETIN Art. 3 (Winter 2015).

<sup>335</sup> D.C. Crim. Jur. Instr. § 9.600 (collecting relevant cases). Outside of the District, court decisions often similarly contrast accident with culpability requirements as to results. See, e.g., *People v. Eveland*, 81 Ill. App. 3d 97 (1980); *People v. Schwartz*, 64 Ill. App. 3d 989 (1978); *People v. Morrin*, 31 Mich. App. 301 (1971).

<sup>336</sup> ROBINSON, *supra* note 14, 1 CRIM. L. DEF. § 63 n.4; see, e.g., *People v. Eveland*, 81 Ill. App. 3d 97 (1980); *People v. Schwartz*, 64 Ill. App. 3d 989 (1978); *People v. Morrin*, 31 Mich. App. 301 (1971); *City of Columbus v. Bee*, 425 N.E.2d 409 (Ohio Ct. App. 1979); *Hall v. State*, 431 A.2d 1258 (Del. 1981).



analysis: “eliminating the need for separate bodies of law such as mistake and accident by demonstrating that these apparently independent doctrines are actually concerned with culpability as to particular objective elements.”<sup>337</sup> There is, however, one additional benefit of codifying this logical relevance principle that bears notice: it should provide the basis for more clearly and consistently dealing with those exceptional situations where the distinctively culpable nature of a particular kind of mistake, ignorance, or accident justifies imputing the relevant culpable mental state—considerations of logical relevance aside.

An illustrative example is presented by an actor who suspects a prohibited circumstance exists but deliberately avoids the acquisition of guilty knowledge in order to preserve a defense.<sup>338</sup> Under these circumstances, it is clear that—pursuant to § (a)—the actor’s ignorance would negate the existence of the culpable mental state of knowledge applicable to that circumstance. At the same time, however, it is also generally recognized that deliberate ignorance of this nature should not preclude a conviction for a crime that imposes a requirement of knowledge as to a prohibited circumstance given the comparable blameworthiness of the actor’s conduct. Consistent with this recognition, Revised D.C. Code § 208(c) clearly delineates deliberate ignorance as an exception to the logical relevance principle stated in § (a) by authorizing courts to impute knowledge in the relevant circumstances. (Additional imputation provisions have not been incorporated into § 208 to deal with situations involving accident-based<sup>339</sup> or mistake-based<sup>340</sup> divergences.<sup>341</sup>

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<sup>337</sup> Robinson & Grall, *supra* note 19, at 704.

<sup>338</sup> See *infra*, Commentary to Revised D.C. Code § 208(c), National Legal Trends, for a more detailed discussion of the topic of deliberate ignorance.

<sup>339</sup> Accident-based divergences most frequently arise where the victim or property actually harmed or affected by an actor’s conduct is different than the particular victim or property the person intended or risked harming or affecting, as the case may be. Divergence of this nature is most commonly associated with bad-aim cases: “[W]hen one person (A) acts (or omits to act) with intent to harm another person (B), but because of a bad aim he instead harms a third person (C) whom he did not intend to harm.” LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 6.4. Typically, these situations are dealt with by the judicially created doctrine of “transferred intent,” which treats an actor such as A “just as guilty as if he had actually harmed the intended victim.” LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 6.4; see *Ruffin v. United States*, 642 A.2d 1288 (D.C. 1994). Likewise, under a corollary doctrine of “transferred recklessness” courts allow for a “defendant’s conscious awareness of the danger to one person [to suffice for liability] when another person is harmed *and* the defendant was negligent as to that person.” *Id.*; see also *Flores v. United States*, 37 A.3d 866 (D.C. 2011). Under the Model Penal Code, in contrast, this kind of divergence is viewed through the lens of legal causation; Model Penal Code § 2.03(2) provides that the variance between the actual result and the result designed, contemplated, or risked is immaterial if the only difference is whether a “different person or different property” is injured.

<sup>340</sup> Mistake-based divergences arise where the character of the circumstance actually harmed or affected by the actor’s conduct is distinct from the character of the circumstance the person intended or risked harming or affecting. Divergence of this nature is most commonly associated with the commission of property crimes that grade based upon the nature of the property violated: consider, for example, the prosecution of defendant who, “in a jurisdiction which by statute makes burglary of a dwelling a more serious offense than burglary of a store, reasonably believes that the building he has entered is a store when it is in fact a dwelling.” LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. Historically, these issues were disposed of by the judicially-created “lesser legal wrong” or “moral wrong” doctrines, which dictated that “the mistake by the defendant may be disregarded because of the fact that he actually intended to do some legal or moral wrong.” *Id.* The Model Penal Code, in contrast, denies a mistake defense under these circumstances if the “defendant would be guilty of another offense had the situation been as he supposed,” but thereafter

### 3. § 22A-208(c)—Imputation of Knowledge for Deliberate Ignorance

**Relation to National Legal Trends.** Subsection (c) codifies a universally recognized common law principle, which is only addressed by a few modern criminal codes. Express codification of this principle is intended to enhance the clarity, consistency, and proportionality of District law.

The doctrine of willful blindness is a well-established part of Anglo-American criminal law,<sup>342</sup> which has been developed to deal with situations involving what is most aptly referred to as deliberate ignorance<sup>343</sup>—that is, where an actor who suspects a prohibited circumstance exists “deliberately omits to make further inquiries, because he wishes to remain in ignorance.”<sup>344</sup>

Deliberate ignorance poses a problem for the legal system because many criminal offenses, particularly those involving illegal contraband, require proof of knowledge as to the existence of a prohibited circumstance. So, for example, the run-of-the-mill drug offense requires proof that the defendant was aware that he was possessing, transferring, or selling an illegal substance. In order to avoid the reach of these kinds of statutes, then, sophisticated criminal actors—often a participant in a drug trafficking scheme—may take steps to ensure that such knowledge is never actualized.

Courts and legislatures have sought to avoid this potential legal loophole through creation of willful blindness doctrine, which provides a mechanism for holding certain kinds of deliberately ignorant actors responsible when they are charged with crimes that impose fact-based knowledge requirements, notwithstanding the absence of knowledge. Generally speaking, the operative mechanism at work is a rule of imputation: willful blindness doctrine effectively establishes an alternative means of establishing knowledge,

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“reduce[s] the grade and degree of the offense of which [defendant] may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.” Model Penal Code § 2.04(2).

<sup>341</sup> Reform codes do not typically codify general provisions addressing accident-based or mistake-based divergences, see LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. §§ 5.6, 6.4, while both of the relevant Model Penal Code provisions addressing these issues, Model Penal Code §§ 2.03(2) and 2.04(2), have been the subject of significant criticism. See, e.g., Richard Singer, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139 (2000); Peter Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321 (2013); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984). It is also an open question whether a special doctrine is even necessary to deal with accident-based divergences, see *Brooks v. United States*, 655 A.2d 844, 848 (D.C. 1995) (citing *Moore v. United States*, 508 A.2d 924 (D.C. 1986)), or whether the offenses in the Revised D.C. Code will be structured in a manner to necessitate a statement on mistake-based divergences, see *Carter v. United States*, 591 A.2d 233, 234 (D.C. 1991) (discussing D.C. Code § 48-904.01).

<sup>342</sup> See generally Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 196-97 (1990). The doctrine has its roots in the 19th-century English legal system, see *Regina v. Sleep*, 169 Eng. Rep. 1296 (Cr. Cas. Res. 1861); however, almost as soon as British courts recognized the concept their American counterparts across the Atlantic followed suit, see *People v. Brown*, 16 P. 1 (Cal. 1887).

<sup>343</sup> Many different labels are applied to describe this problem, including connivance, willful ignorance, conscious avoidance, and deliberate ignorance. See, e.g., ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 867 (3d ed. 1982); Rollin M. Perkins, “Knowledge” as a Mens Rea Requirement, 29 HASTINGS L.J. 953, 956-57 (1978). This commentary uses the phrase “deliberate ignorance” throughout to describe the problem, and “willful blindness” to describe the doctrinal solution.

<sup>344</sup> GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157, 159 (2d ed. 1961).

contingent upon proof of certain inculpatory conditions that adequately capture the conduct of the deliberately ignorant actor.<sup>345</sup>

The creation of willful blindness doctrine has been deemed a “practical necessity given the ease with which a defendant could otherwise escape justice by deliberately refusing to confirm the existence of one or more facts that he believes to be true.”<sup>346</sup> However, willful blindness doctrine is most frequently justified not by reference to pragmatic considerations, but rather, in moral terms: courts and commentators alike frequently reference the fact that “deliberate ignorance and positive knowledge are equally culpable.”<sup>347</sup> This so-called “equal culpability thesis” posits that “[deliberate] ignorance is the ‘moral equivalent’ of knowledge; it involves a degree of culpability that is equal to genuine knowledge.”<sup>348</sup>

There are two basic versions of the willful blindness doctrine applied by American courts and legislatures. The first is the traditional common law approach, which has two components: (1) a subjective belief requirement, which requires proof that the defendant possessed some modicum of suspicion regarding the existence of a prohibited circumstance; and (2) a purposeful avoidance requirement, which requires proof that the defendant engaged in conduct—whether an act or omission—in some way calculated towards avoiding guilty knowledge.

The primary marker of the traditional common law approach is the use of “[p]urposefulness-type language” to describe the relationship between the actor and the guilty knowledge that he or she avoided acquiring.<sup>349</sup> Illustrative are the following phrases drawn from the case law: “purposely refrains from obtaining . . . knowledge”;<sup>350</sup> “deliberately chose not to learn”;<sup>351</sup> “with a conscious purpose to avoid learning the truth”;<sup>352</sup> and “deliberately closed his eyes to what would otherwise have been obvious to him.”<sup>353</sup>

These so-called “willfulness-based constructions of the doctrine”<sup>354</sup> primarily look for a “calculated effort to avoid the sanctions of the statute while violating its substance.”<sup>355</sup> Implicit in these willfulness-based constructions, however, is a requirement that a defendant’s calculated effort have been accompanied by at least some

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<sup>345</sup> See ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65. In practical effect, then, the “law allows ignorance to substitute for knowledge provided that the defendant is at fault for being ignorant and positively sought to avoid criminal liability thanks to such ignorance.” Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 551 (2012).

<sup>346</sup> *United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002).

<sup>347</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.2 (quoting *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976)).

<sup>348</sup> Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 69 (1994); see Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859 (1999).

<sup>349</sup> Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1371 (1992). Note that Charlow categorizes approaches to willful blindness doctrine in a different, and more fine-grained, manner.

<sup>350</sup> *Rumely v. United States*, 293 F. 532, 553 n.2 (2d Cir. 1923).

<sup>351</sup> *United States v. Olivares-Vega*, 495 F.2d 827, 830 n.10 (2d Cir. 1974).

<sup>352</sup> *United States v. Gurary*, 860 F.2d 521, 526 n.5 (2d Cir. 1989).

<sup>353</sup> *United States v. Callahan*, 588 F.2d 1078, 1082 (5th Cir. 1979).

<sup>354</sup> Charlow, *supra* note 86, at 1370.

<sup>355</sup> *Jewell*, 532 f.2d at 704.

level of suspicion regarding the existence of a prohibited circumstance. This subjective belief requirement reflects the fact that without some awareness as to the “probability of unlawfulness, the need to investigate may be overlooked,” while, perhaps more fundamentally, “there is no conscious purpose to avoid learning the truth when the risk of unlawfulness has not been realized.”<sup>356</sup>

Collectively, the dual requirements of subjective belief and purposeful avoidance that comprise the common law approach constitute the majority view on willful blindness doctrine in America.<sup>357</sup> This traditional framing of the issue is reflected in most judicial formulations of the doctrine<sup>358</sup> and in at least one criminal code.<sup>359</sup>

The second approach to willful blindness doctrine is rooted in the general culpability provisions of the Model Penal Code. More specifically, Model Penal Code § 2.02(2) generally defines knowingly with respect to a circumstance element to require proof of an awareness that a particular circumstance exists.<sup>360</sup> This definition of knowingly is thereafter modified by Model Penal Code § 2.02(7), which establishes that: “When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”<sup>361</sup> The relevant explanatory note describes this provision as an “elaboration on the definition of ‘knowledge’ when the issue is whether the defendant knew of the existence of a particular fact,”<sup>362</sup> while the accompanying commentary explains that this provision is designed to deal with the situation where a defendant “is aware of the probable existence of a material fact but does not determine whether it exists or does not exist.”<sup>363</sup>

Viewed as a whole, the Model Penal Code appears to deal with the problem of deliberate ignorance by redefining knowledge with respect to circumstances to apply to

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<sup>356</sup> Perkins, *supra* note 80, at 964.

<sup>357</sup> See Charlow, *supra* note 86, at 1368-70.

<sup>358</sup> For example, as the U.S. Supreme Court observed in *Global-Tech Appliances, v. SEB S.A.*:

While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.

563 U.S. 754, 769 (2011). For additional judicial authorities, see *infra* notes 108, 110, 114, and 116.

<sup>359</sup> For example, the Ohio criminal code contains a provision which reads:

When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

Ohio Rev. Code Ann. § 2901.22(B).

<sup>360</sup> More specifically, Model Penal Code § 2.02(2)(b)(i) reads: “A person acts knowingly with respect to a material element of an offense when . . . if the element involves . . . attendant circumstances, he is aware that . . . such circumstances exist.”

<sup>361</sup> Model Penal Code § 2.02(7).

<sup>362</sup> Model Penal Code § 2.02(7).

<sup>363</sup> Model Penal Code § 2.02 cmt. at 248.

actors who satisfy two criteria: (1) awareness of a high probability of the existence of a fact; and (2) the absence of a belief that the fact at issue does not exist.<sup>364</sup>

Notwithstanding the impact of the Model Penal Code on many other areas of culpability, the Code's approach to willful blindness has not been widely adopted or followed. For example, "[v]ery few of the modern recodifications contain a provision of this type."<sup>365</sup> Likewise, "courts rarely, if ever, use these elements alone to describe the notion of willful ignorance."<sup>366</sup>

The Model Penal Code approach to willful blindness has also been the subject of academic criticism, which highlights two main problems. First, willful blindness is not, as the Code seems to assume, a form of knowledge: "[B]eing aware that something is highly probable simply isn't the same as actually knowing it."<sup>367</sup> Whereas knowledge requires belief, "awareness that something is highly probable may stop short of the inferential leap into belief."<sup>368</sup> Second, and perhaps more problematically, the Model Penal Code places all of the focus on how certain the actor is about a fact, i.e., "[t]he inquiry is about the actor's subjective state at the moment of the misdeed."<sup>369</sup> However, the focus in a run-of-the-mill deliberate ignorance case is on whether the actor purposefully avoided guilty knowledge, i.e., "[t]he inquiry is about whatever steps the actor took to ward off knowledge prior to the misdeed."<sup>370</sup>

Consistent with the foregoing legal trends, § (c) codifies a rule of knowledge imputation that is modeled on the widely followed common law approach: § (c)(1) codifies a subjective belief requirement, alongside a purposeful avoidance requirement in § (c)(2). It's important to note, however, that the precise manner in which these requirements are codified addresses two issues that have been the subject of disagreement among those jurisdictions that subscribe to the common law view.

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<sup>364</sup> In practical effect, this means that under the Model Penal Code "a defendant who has a belief that would otherwise subject him to liability is excused if he also has a mistaken belief to the contrary." Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1104 (1985). Here's an example of how this might operate:

[A] defendant who is aware of a high probability that his car is full of marijuana is excused from liability for transporting marijuana across the U.S. border if he also believes (mistakenly) that there was no marijuana in his car. The Model Penal Code does not require that the mistaken belief cause the defendant to drive the car (and the marijuana) across the border. His mistaken belief excuses him even though, had he known the marijuana was in the car, he still would have crossed the border.

*Id.*

<sup>365</sup> LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.2 (citing the following statutes as being based on the Model Penal Code approach: Alaska Stat. § 11.81.900(a)(2); Del. Code Ann. tit. 11, § 255; Ill. Comp. Stat. Ann. ch. 720 § 5/4-5; Mont. Code Ann. § 45-2-101; and N.J. Stat. Ann. § 2C:2-2).

<sup>366</sup> Charlow, *supra* note 86, at 1368. Note, however, that aspects of Model Penal Code § 2.02(7) have been quite influential in judicial formulations of willful blindness doctrine. See, e.g., *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2070; *United States v. Jacobs*, 475 F.2d 270, 287 (2d Cir. 1973).

<sup>367</sup> David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 961 (1999).

<sup>368</sup> Luban, *supra* note 104, at 960.

<sup>369</sup> Luban, *supra* note 104, at 962. Or, as another commentator phrases it: Rather than focus on how deliberate the individual was in avoiding knowledge, the Model Penal Code simply demotes the requisite *mens rea* requirement to something short of actual knowledge." Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 194-95 (2011); see Robbins, *supra* note 79, at 231.

<sup>370</sup> Luban, *supra* note 104, at 962; see Roiphe, *supra* note 106, at 194-95.

The first issue is the threshold level of awareness necessary to ground a finding of deliberate ignorance. Among those jurisdictions that subscribe to the common law approach, one group utilizes the “high probability” language of Model Penal Code § 2.02(7) to express the level of subjective belief required for application of willful blindness doctrine.<sup>371</sup> Under this approach, mere suspicion that some prohibited circumstance exists is insufficient; instead, the government must prove that the accused believed the existence of the relevant fact to be highly probable. Other jurisdictions, in contrast, apply a lower threshold, such as criminal recklessness—the “standard definition” of which is the “conscious disregard [of] a substantial [] risk”<sup>372</sup>—to establish the level of subjective belief necessary to activate willful blindness doctrine.<sup>373</sup>

The subjective belief requirement incorporated into § (c)(1) reflects the latter, less demanding approach. It establishes that insofar as an actor’s level of awareness is concerned, proof of recklessness—as defined under § 206(c)(2)—will suffice. This is consistent with the view of the numerous state and federal courts that apply this lower threshold,<sup>374</sup> and it better communicates the limited importance of an “agent’s estimation of the probability of the truth of a proposition” with respect to “judgments about whether he is wilfully ignorant.”<sup>375</sup> After all, “an actor can screen herself from knowledge of facts regardless of whether their probability is high or low,” but in either case, the actor is appropriately treated as though he or she possessed guilty knowledge so long as the prior purposeful avoidance is sufficiently culpable.<sup>376</sup>

The second issue addressed by § (c)—and over which jurisdictions that otherwise subscribe to the common law approach disagree—is the appropriate scope of this purposeful avoidance condition. Some jurisdictions endorse a formulation of willful blindness doctrine that would seemingly allow for proof of any form of “deliberate action” calculated to avoid confirming the relevant prohibited circumstance at issue to suffice.<sup>377</sup> Under this unmitigated form of purposeful avoidance, the *reason for the conduct* appears to be immaterial.<sup>378</sup> Another group of jurisdictions, in contrast, appear

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<sup>371</sup> See, e.g., *United States v. Fernandez*, 553 F. App’x 927, 936-37 (11th Cir. 2014); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1237 (11th Cir. 2009); *United States v. Aleman*, 548 F.3d 1158, 1166 (8th Cir. 2008); *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2070 (collecting cases).

<sup>372</sup> Model Penal Code § 2.02 (c); see *Bd. of Cnty. Comm’rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 422 (1997).

<sup>373</sup> See, e.g., *Gallo*, 543 F.2d at 368 n.6.; *United States v. Jacobs*, 475 F.2d at 287-88; *United States v. Cook*, 586 F.2d 572, 579-80 (5th Cir. 1978); *United States v. Thomas*, 484 F.2d 909, 913 (6th Cir. 1973); *United States v. Egenberg*, 441 F.2d 441, 444 (2d Cir. 1971); Charlow, *supra* note 86, at 1368-70 nn.74-86 (collecting cases).

<sup>374</sup> See *supra* note 110.

<sup>375</sup> Husak & Callender, *supra* note 85, at 39.

<sup>376</sup> Luban, *supra* note 104, at 960. A person is deliberately ignorant, as one commentator phrases it, when he “has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance.” WILLIAMS, *supra* note 81, at 157. However, “to have a suspicion that *P*, it does not seem one must think *P* highly likely—the mere belief that it is somewhat likely seems to suffice.” Alexander F. Sarch, *Willful Ignorance, Culpability, and the Criminal Law*, 88 ST. JOHN’S L. REV. 1023, 1101 (2014); see Husak & Callender, *supra* note 85, at 39.

<sup>377</sup> See, e.g., *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003); *United States v. Stadtmauer*, 620 F.3d 238, 257 (3d Cir. 2010); *United States v. Mendoza-Medina*, 346 F.3d 121, 132-33 (5th Cir. 2003); *United States v. Mitchell*, 681 F.3d 867, 876 (6th Cir. 2012); *United States v. Geisen*, 612 F.3d 471, 485-86 (6th Cir. 2010).

<sup>378</sup> Sarch, *supra* note 113, at 1046.

to formulate the purposeful avoidance requirement in a more narrowly-tailored manner, limiting the reach of willful blindness doctrine to those situations where “one’s specific reason for remaining in ignorance [was] that one wanted to preserve a defense.”<sup>379</sup>

The purposeful avoidance requirement incorporated into § (c)(2) reflects the latter, more demanding approach. It establishes that the basis for the person’s conduct—avoiding confirming or failed to investigate whether the circumstance existed—must be a purpose to avoid criminal liability. This is consistent with the view of the numerous courts that apply a comparable standard,<sup>380</sup> and it better captures those situations where an actor’s conduct is truly the “moral equivalent” of knowledge, namely, where it is motivated by a desire to avoid criminal liability.<sup>381</sup> In other situations, such as where the “failure to gain more information [was] due to mere laziness, stupidity, or the absence of curiosity,” the actor’s conduct does not appear to be just as culpable as knowing conduct.<sup>382</sup>

Which is not to say that such individuals—or any other kind of actor who avoids the acquisition of guilty knowledge for reasons beyond the preservation of a criminal defense—are *morally blameless*. Indeed, many such individuals may have recklessly disregarded a given circumstance. However, the legislature may always lower the culpable mental state requirement governing a prohibited circumstance from knowledge to recklessness to capture these individuals. What the legislature should not do, however—and which the federal courts have warned against—is ignore the fact that “recklessness [is] not the same as intentional [or] knowing conduct,” or formulate willful blindness doctrine in a manner that creates a risk that the “jury [will] convict a defendant for [merely] acting recklessly.”<sup>383</sup>

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<sup>379</sup> *Id.*; see, e.g., *United States v. Fernandez*, 553 F. App’x 927, 936-37 (11th Cir. 2014); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1237 (11th Cir. 2009); *United States v. Hillman*, 642 F.3d 929, 939 (10th Cir. 2011); *United States v. Aleman*, 548 F.3d 1158, 1166 (8th Cir. 2008). The circuit split is recognized in *Alston-Graves*, 435 F.3d at 341. Although the U.S. Supreme Court in *Global-Tech Appliances, Inc.* does not endorse a side, it’s worth noting the following recognition in the majority opinion hints at a motive requirement: “On the facts of this case, we cannot fathom what motive Sham could have had for withholding this information other than to manufacture a claim of plausible deniability in the event that his company was later accused of patent infringement.” 131 S. Ct. at 2071.

<sup>380</sup> See sources cited *supra* note 116.

<sup>381</sup> Husak & Callender, *supra* note 85, at 37-38; see, e.g., LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.2; Sarch, *supra* note 113, at 1046.

<sup>382</sup> Husak & Callender, *supra* note 85, at 37-38.

<sup>383</sup> *Alston-Graves*, 435 F.3d at 340. One policy reason for safeguarding this distinction, recently articulated by a federal court of appeals, is to avoid imposing “unpleasant and sometimes risky obligation[s]” on many people”:

Shall someone who thinks his mother is carrying a stash of marijuana in her suitcase be obligated, when he helps her with it, to rummage through her things? . . . Shall all of us who give a ride to child’s friend search her purse or his backpack? No[thing] prevents FedEx from opening packages before accepting them, or prevents bus companies from going through the luggage of suspicious looking passengers. But these businesses are not “knowingly” transporting drugs in any particular package, even though they know that in a volume business in all likelihood they sometimes must be. They forego inspection to save time, or money, or offense to customers, not to avoid criminal responsibility . . . For that matter, someone driving his mother, a child of the sixties, to Thanksgiving weekend, and putting her suitcase in the trunk, should not have to open it and go through her clothes.

Subsection (c)(2), by imposing a narrower purposeful avoidance requirement oriented towards the avoidance of criminal liability, should avoid these kinds of issues, while the broader subjective belief requirement reflected in § (c)(1) should avoid unnecessarily excluding otherwise deliberately ignorant actors from the scope of willful blindness doctrine. When viewed collectively, therefore, § (c) provides a clear, comprehensive, and proportionate mechanism for imputing knowledge in those situations where deliberate ignorance is truly the moral equivalent of knowledge.



## § 22A-209 PRINCIPLES OF LIABILITY GOVERNING INTOXICATION

(a) **RELEVANCE OF INTOXICATION TO LIABILITY.** A person is not liable for an offense when that person's intoxication negates the existence of a culpable mental state applicable to a result or circumstance in that offense.

(1) *Definition of Intoxication.* "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.

(b) **CORRESPONDENCE BETWEEN INTOXICATION AND CULPABLE MENTAL STATE REQUIREMENTS.**

(1) *Purpose.* A person's intoxication negates the existence of the culpable mental state of purpose applicable to a result or circumstance when, due to the person's intoxicated state, that person does not consciously desire to cause that result or that the circumstance exists.

(2) *Knowledge.* A person's intoxication negates the existence of the culpable mental state of knowledge applicable to a result or circumstance when, due to the person's intoxicated state, that person is not practically certain that the person's conduct will cause that result or that the circumstance exists.

(3) *Recklessness.* A person's intoxication negates the existence of the culpable mental state of recklessness applicable to a result or circumstance when, due to the person's intoxicated state, that person is not aware of a substantial risk that the person's conduct will cause that result or that the circumstance exists, unless that person's conduct satisfies subsection (c), in which case the culpable mental state of recklessness is established.

(c) **IMPUTATION OF RECKLESSNESS FOR SELF-INDUCED INTOXICATION.** When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if:

(1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and

(2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists.

***Relation to National Legal Trends.*** Section 209 reflects common law principles and legislative practice in many reform jurisdictions. However, the precise manner in which § 209 addresses the issue of intoxication simplifies and renders more transparent the approach in reform codes.

In "early American law," there was a "stern rejection of inebriation as a defense" by the courts, which did not "permit the defendant to show that intoxication prevented the

requisite *mens rea*.”<sup>384</sup> However, “by the end of the 19th century, in most American jurisdictions, intoxication could be considered in determining whether a defendant possessed the *mens rea*” in some circumstances.<sup>385</sup> At the same time, the courts perennially struggled to identify those circumstances in a principled or clear way.<sup>386</sup> The cause for the confusion, like that surrounding the common law’s treatment of accident, mistake, and ignorance, was judicial reliance on offense analysis.<sup>387</sup>

By conceiving of offenses as being comprised of a singular “umbrella culpability requirement that applie[s] in a general way to the offense as a whole”<sup>388</sup> courts lacked the tools necessary to recognize when intoxication could plausibly negate the existence of the culpable mental state governing one or more objective elements in an offense—let alone devise a principled policy exception to deal with those situations where intoxication should be precluded from providing the basis for exoneration.<sup>389</sup> Instead, courts chose, on an offense-by-offense basis, those crimes for which an intoxication defense seemed appropriate.<sup>390</sup> The labels of “general intent” and “specific intent” were utilized by courts to describe the *conclusion* of that process, namely, a “specific intent crime” was one for which evidence of voluntary intoxication may be relevant, while a “general intent” crime was one for which an intoxication defense could not be raised.”<sup>391</sup>

This distinction between general intent and specific intent crimes was generally understood to represent a pragmatic “compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender.”<sup>392</sup> Though some courts (including the DCCA<sup>393</sup>) have at times spoken as through there exists some “intrinsic meaning to the terms,”<sup>394</sup> in reality they are little more than “shorthand devices best and most precisely invoked to contrast offenses that, as a matter of policy, may be punished despite the actor’s voluntary intoxication . . . with offenses that, also as a matter of policy, may not be punished in light of such intoxication.”<sup>395</sup> Lacking a clear or consistent framework to describe the relationship between *mens rea* and intoxication, however, judicial determinations typically lacked “even the pretense of a theoretical justification” or a “logical explanation.”<sup>396</sup>

With acceptance of element analysis in reform jurisdictions came a clearer and more nuanced understanding of the issues presented by an intoxicated actor. Most importantly, element analysis highlights that—as with issues of accident, mistake, and

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<sup>384</sup> *Montana v. Egelhoff*, 518 U.S. 37, 44 (1996); see, e.g., Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 484-91 (1997).

<sup>385</sup> *Egelhoff*, 518 U.S. at 44; see, e.g., Keiter, *supra* note 29, at 484-91.

<sup>386</sup> See, e.g., PAUL H. ROBINSON, 1 CRIM. L. DEF. § 65 (Westlaw 2017); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 24.03 (6th ed. 2012).

<sup>387</sup> See, e.g., ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.

<sup>388</sup> PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 155 (2d ed. 2012).

<sup>389</sup> See, e.g., ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.

<sup>390</sup> See, e.g., ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.

<sup>391</sup> See, e.g., ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.

<sup>392</sup> *People v. Hood*, 1 Cal. 3d 444, 455 (1969).

<sup>393</sup> See, e.g., *Kyle*, 759 A.2d at 199; *Washington*, 689 A.2d at 573.

<sup>394</sup> Keiter, *supra* note 29, at 497.

<sup>395</sup> *People v. Whitfield*, 7 Cal. 4th 437, 463 (1994) (Mosk, J., concurring in part and dissenting in part). Which is to say that “[t]he distinction between general intent and specific intent evolved as a judicial response to the problem of the intoxicated offender.” *Hood*, 1 Cal. 3d at 455.

<sup>396</sup> ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65.

ignorance—intoxication is only plausibly relevant when it negates the existence of one or more of the culpable mental states incorporated into the crime charged, which, as a practical matter, is possible for any subjective culpable mental state<sup>397</sup>—for example, purpose,<sup>398</sup> knowledge,<sup>399</sup> or recklessness.<sup>400</sup> By clarifying that intoxication can plausibly negate the existence of any subjective culpable mental state, however, element analysis also reveals a fundamental tension presented by an intoxicated actor: whereas that actor may not have been aware of a risk to a protected societal interest *because of* his or her intoxicated state, getting intoxicated is itself a risky activity and thus intuitively seems like an inappropriate basis for exonerating an actor in some cases.<sup>401</sup>

Illustrative is the situation of a person who knowingly drinks a significant amount of alcohol at a house party, and thereafter, in a highly inebriated state, walks onto the patio, grabs a golf club, and begins hitting golf balls out of the yard, which—unbeknownst to the person given his intoxicated state—repeatedly shatter the windows of nearby homes, causing thousands of dollars in damage. If this person is later charged with a property destruction offense that prohibits “recklessly damaging the property of another,” the person may argue that, due to the person’s intoxicated state, he or she lacked the awareness of a substantial risk of harm necessary to establish recklessness under the statute. At the same time, however, given the known risks associated with intoxicants, as well as the fact that the person has in effect culpably created the conditions of his own defense, it may be inappropriate to allow self-induced intoxication of this nature to constitute a means of exoneration.<sup>402</sup>

The drafters of the Model Penal Code, informed by the insights of element analysis, appreciated both the general nature of the relationship between intoxication and culpable mental states, as well as the specific tension that relationship could create under particular circumstances.<sup>403</sup> And they also appreciated the range of problems that judicial reliance on offense analysis had created for the common law of intoxication.<sup>404</sup>

The drafters’ solution was the creation of a legislative framework comprised of an imputation approach to intoxication, which generally accepted that evidence of intoxication could be presented whenever relevant to negating the existence of a culpable mental state. However, the framework also provided that where self-induced intoxication

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<sup>397</sup> See, e.g., Miguel Angel Mendez, *A Sisyphian Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 433 (1995); *State v. Coates*, 735 P.2d 64, 72 (Wash. 1987) (Goodloe, J. concurring); *Egelhoff*, 518 U.S. at 62-70 (O’Conner, J. dissenting).

<sup>398</sup> Intoxication has the capacity to negate the culpable mental state of purpose when, due to the person’s intoxicated state, that person was unable or otherwise failed to consciously desire to cause a prohibited result or to consciously desire that a prohibited circumstance have existed.

<sup>399</sup> Intoxication has the capacity to negate the culpable mental state of knowledge when, due to the person’s intoxicated state, that person was unable to or otherwise failed to be practically certain that a prohibited result would follow from his or her conduct or to be practically certain that a prohibited circumstance existed.

<sup>400</sup> Intoxication has the capacity to negate the culpable mental state of recklessness when, due to the person’s intoxicated state, that person was unable to or otherwise failed to be aware of a substantial risk that a prohibited result would follow from his or her conduct or to be aware of a substantial risk that a prohibited circumstance existed.

<sup>401</sup> See, e.g., JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 537 (2d ed. 1960).

<sup>402</sup> See, e.g., WAYNE R. LAFAVE, 2 *SUBST. CRIM. L.* § 9.5 (Westlaw 2017).

<sup>403</sup> See Model Penal Code § 2.08 cmt. at 354-59.

<sup>404</sup> See *id.*

was at issue, proof that the actor would have been aware of a risk had he or she been sober could provide an alternative basis for establishing recklessness.<sup>405</sup>

This approach is implemented through Model Penal Code § 2.08. Model Penal Code § 2.08(1) establishes that intoxication “is not a defense unless it negatives an element of the offense.” Though framed in the negative, this provision essentially recognizes that intoxication, whether self-induced or involuntary, may always serve as an absent element defense whenever it logically precludes the government from meeting its burden. However, Model Penal Code § 2.08(2) then creates an exception to this rule as it pertains to crimes defined in terms of recklessness. That rule reads as follows:

When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.<sup>406</sup>

In practical effect, this provision “boosts the negligence of voluntarily intoxicated persons” at the time of their conduct “to the culpability of recklessness,” subject to a causation limitation, i.e., the accused’s intoxicated state must have been the *cause of her unawareness* in order to activate the rule.<sup>407</sup>

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<sup>405</sup> The Model Penal Code justified this resolution of the “[t]wo major problems” present by intoxication claims as follows:

The first . . . is the question whether intoxication ought to be accorded a significance that is entirely co-extensive with its relevance to disprove purpose or knowledge . . . . We submit that the answer clearly ought to be affirmative . . . . [W]hen purpose or knowledge, as distinguished from recklessness, is made essential for conviction, the reason very surely is that in the absence of such states of mind the conduct involved does not present a comparable danger . . . ; or that the actor is not deemed to present as significant a threat . . . ; or, finally, that the ends of legal policy are served by bringing to book or subjecting to graver sanctions those who consciously defy the legal norm . . . .

The second and more difficult question relates to recklessness, where awareness of the risk created by the actor’s conduct ordinarily is a requisite for liability. . . . [A]wareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor’s powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor’s moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes . . . .

Model Penal Code § 2.08 cmt. at 358-59.

<sup>406</sup> Model Penal Code § 2.08(2).

<sup>407</sup> Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, 1220-21 (1999). Under the Model Penal Code approach, “if negligence is the mens rea required for the crime, and the question is whether defendant failed to advert to a risk to which the reasonable person would have adverted . . . defendant’s voluntary intoxication as the explanation for his not recognizing the risk would establish his inadvertence as unreasonable.” Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 217 (1996). As a result, the Model Penal Code approach also embodies an “Intoxication Negligence Principle: If a defendant is unaware of a condition and intoxicated, and he became intoxicated

The Model Penal Code drafters believed that the foregoing approach would provide the basis for a clearer and more principled treatment of intoxication claims than was otherwise evident in the common law. At the same time, however, the approach they devised was explicitly intended to approximate the prevailing common law trends. As the drafters observed:

To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant. When, on the other hand, recklessness or negligence . . . suffices to establish the offense, an exculpation based on intoxication is precluded by the law.<sup>408</sup>

Viewed through the lens of the common law, then, the logical relevance test in Model Penal Code § 2.08(1) roughly approximates the specific intent rule governing intoxication claims, while the rule of reckless imputation in Model Penal Code § 2.08(2) roughly approximates the general intent rule—an approximation that has been recognized by a range of legal authorities.<sup>409</sup>

The imputation approach to intoxication developed by the Model Penal Code has been quite influential. A substantial number of reform jurisdictions—as well as all major model codes and recent comprehensive code reform projects—codify comparable provisions.<sup>410</sup> Likewise, “the majority of cases in America support the creation of a

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voluntarily, then in assessing negligence with respect to that condition, he is to be compared to a sober reasonable person.” Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 547 (2012). Note, however, that the Code’s recklessness imputation provision in no way alters the ordinary requirements regarding mental states of purpose or knowledge. Rather, the Model Penal Code framework grants to voluntarily intoxicated persons the same defenses of absence of purpose or absence of knowledge that other persons possess, despite the fact that the intoxication may be responsible for their lack of purpose or knowledge. See Westin, *supra* note 52, at 1220-21.

<sup>408</sup> Model Penal Code § 2.08 cmt. at 354.

<sup>409</sup> For example, the Brown Commission observes that “[t]he [common law] decisions in which intoxication evidence has been considered” with respect to specific intent crimes can fruitfully be understood “in terms of whether . . . purpose or knowledge is required.” NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970) (hereinafter “Working Papers”). Likewise, Wharton’s treatise observes that “[a] ‘specific intent’ is usually interpreted to mean [purposely] or knowingly.” CHARLES E. TORCIA, 2 WHARTON’S CRIMINAL LAW § 111 (15th ed. 2014). And both state and federal courts have observed that “a general intent crime” is one “for which recklessness is the required mens rea, and as to which voluntary intoxication may not provide a defense.” *People v. Carr*, 81 Cal. App. 4th 837, 843 (2000); see, e.g., *United States v. Zunie*, 444 F.3d 1230, 1234-35 (10th Cir. 2006) (citing *United States v. Loera*, 923 F.2d 725 (9th Cir.1991) and *United States v. Ashley*, 255 F.3d 907 (8th Cir. 2001)); see also *Parker*, 359 F.2d at 1012 n.4.

<sup>410</sup> See Ala. Code § 13A-3-2; Ariz. Rev. Stat. Ann. § 13-105; Conn. Gen. Stat. Ann. § 53a-7; Ky. Rev. Stat. Ann. § 501.020(3); Me. Rev. Stat. Ann. tit. 17-A, § 37; N.H. Rev. Stat. Ann. § 626:2; N.J. Stat. Ann. § 2C:2-8; N.Y. Penal Law § 15.05; N.D. Cent. Code § 12.1-04-02; Or. Rev. Stat. § 161.125; Tenn. Code Ann. § 39-11-503; Utah Code Ann. § 76-2-306. Alaska appears to adopt an imputation approach, but applies it to knowledge as well. See Alaska Stat. Ann. § 11.81.900. In contrast, Washington appears to apply a logical relevance test to all culpable mental states in the absence of a rule of imputation. See Wash. Rev. Code Ann. § 9A.16.090. For the imputation approach developed by the drafters of the federal

special rule relating to intoxication, so that, if the only reason why the defendant does not realize the riskiness of his conduct is that he is too intoxicated to realize it, he is guilty of the recklessness which the crime requires.”<sup>411</sup>

Nevertheless, adherence to the imputation approach is by no means universal among reform jurisdictions. For example, a significant plurality followed a different legislative path to addressing intoxication—what might be referred to as the “evidentiary approach.”<sup>412</sup> At the heart of the evidentiary approach is an evidentiary exclusion, which broadly limits the presentation of evidence regarding the voluntary intoxication of an accused as it pertains to a required culpable mental state.<sup>413</sup>

Illustrative is § 45-2-203 of the Montana Criminal Code, which establishes that “an intoxicated condition . . . may not be taken into consideration in determining the existence of a mental state that is an element of the offense.”<sup>414</sup> Or, similarly, consider § 702-230 of the Hawaii Criminal Code, which establishes that “[e]vidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of the offense.”<sup>415</sup>

Generally speaking, these statutes dictate that a defendant may not present, and the jury may not consider, intoxication evidence for the purpose of disproving any kind of culpable mental state<sup>416</sup>—though it should be noted that some reform jurisdictions which otherwise subscribe to the evidentiary approach make exceptions for particular culpable mental states or particular crimes.<sup>417</sup> Whatever the scope of these general provisions, however, the evidentiary limitations they apply share three similar implications.

First, whereas the limitation *does* preclude the defense from rebutting the government’s burden by relying upon evidence that she was intoxicated, it *does not* prevent the government from using evidence of intoxication to show that a defendant possessed a required culpable mental state for an offense.<sup>418</sup>

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criminal code, see Brown Commission § 502. For the imputation approach applied in recent code reform projects, see Kentucky Revision Project § 503.302 and Illinois Reform Project § 302.

<sup>411</sup> LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5. For federal cases citing to the Model Penal Code approach, see, for example, *United States v. Fleming*, 739 F.2d 945, 948 n.3 (4th Cir. 1984); *Leal v. Holder*, No. 12-73381, 2014 WL 5742137, at \*5 (9th Cir. Nov. 6, 2014); *United States v. Johnson*, 879 F.2d 331, 334 n.1 (8th Cir. 1989); *United States v. Fleming*, 739 F.2d 945, 948 n.3 (4th Cir. 1984).

<sup>412</sup> See, e.g., Haw. Rev. Stat. § 702-230; Mont. Code Ann. § 45-2-203; Ohio Rev. Code Ann. § 2901.21; Ind. Code Ann. § 35-41-2-5. For compilations and analysis of the evidentiary approach, see Westen, *supra* note 52, at 1225-26; ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65 n.11.

<sup>413</sup> The practice of excluding certain kinds of evidence, even if probative, for policy reasons is generally well established. See, e.g., F.R.E. 403; F.R.E. 802; *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

<sup>414</sup> Mont. Code Ann. § 45-2-203.

<sup>415</sup> Haw. Rev. Stat. § 702-230.

<sup>416</sup> *But see* *infra* note 80 for a discussion of ambiguity surrounding the relationship between the evidentiary approach and intoxication-induced accidents or mistakes.

<sup>417</sup> For example, Colorado appears to allow the presentation of intoxication evidence for “specific intent” crimes. Colo. Rev. Stat. Ann. § 18-1-804. And Pennsylvania appears to allow the presentation of intoxication evidence “whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.” 18 Pa. Stat. and Cons. Stat. Ann. § 308.

<sup>418</sup> For example, the government may find it useful to introduce evidence of voluntary intoxication to show that a bartender who tends to get into fights when intoxicated intended to strike a patron whom he struck.

Second, the limitation *does not* preclude the government or defense from presenting proof of self-induced intoxication to show that the accused either did, or did not, commit the *actus reus* of the offense.<sup>419</sup>

Third, and perhaps most importantly, such an approach *does not* enable prosecutors to substitute proof of self-induced intoxication for proof of a statutorily required culpable mental state—indeed, even if the accused was intoxicated at the time of the charged crime, the government nevertheless retains the burden under this approach to prove an offense’s culpability requirement beyond a reasonable doubt.<sup>420</sup>

These implications are quite different than those that follow from the imputation approach (separate and apart from the culpable mental states to which they apply). For example, the imputation approach generally renders intoxication evidence immaterial to disproving recklessness by eliminating recklessness as a culpable mental state that the prosecution is required to prove in cases of voluntary intoxication—negligence plus the absence of recklessness caused by voluntary intoxication will suffice.<sup>421</sup> In contrast, the evidentiary approach explicitly precludes defendants from introducing evidence of voluntary intoxication to negate the existence of any culpable mental state that the prosecution invariably retains an obligation to prove—even in cases of voluntary intoxication.<sup>422</sup>

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<sup>419</sup> This is of course obvious where intoxication is actually an element of an offense (e.g., “driving while intoxicated” offenses) that must be proven beyond a reasonable doubt. But it is also true where an accused seeks to raise her intoxication as part of an *alibi defense*, i.e., a claim that the accused, because of her intoxication, could not have actually engaged in the physical activity required for commission of the offense.

<sup>420</sup> For example, as the Hawaii Supreme Court observed in *State v. Souza*, an evidentiary approach statute “does not deprive a defendant of the opportunity to present evidence to rebut the *mens rea* element of the crime,” but “merely prohibits the jury from considering self-induced intoxication to negate the defendant’s state of mind.” 813 P.2d 1384, 1386 (Haw. 1991).

<sup>421</sup> Under an imputation approach, a jury may therefore be charged in a case involving the culpable mental state of recklessness to which a voluntary intoxication defense has been raised as follows:

The defendant has been charged with an offense which ordinarily requires a mental state of recklessness on a defendant’s part. However, the offense does not require recklessness of a defendant whose voluntary intoxication causes her to lack recklessness that she would otherwise possess. Accordingly, you may find the defendant guilty if you find either that she possessed a mental state of recklessness with respect to the conduct with which she is charged or that, while being negligent, and due to voluntary intoxication, she lacked a mental state of recklessness that she would otherwise have possessed.

Westen, *supra* note 52, at 1226.

<sup>422</sup> Under an evidentiary approach, a jury could therefore receive the following charge in a case implicating voluntary intoxication:

The defendant has been charged with an offense that requires that she have acted with the culpable mental state of \_\_. However, in considering whether the defendant possessed such mental states, you shall disregard any evidence of the defendant’s voluntary intoxication in so far as it negates findings of culpability that you would otherwise make. Accordingly, you shall find the defendant guilty if, and only if, you find that the evidence shows that the defendant acted with the culpable mental state of \_\_\_—evidence of her voluntary intoxication to the contrary notwithstanding.

The foregoing practical differences, in turn, bring with them distinct constitutional implications: whereas the imputation approach does not appear to raise any meaningful constitutional issues,<sup>423</sup> the evidentiary approach has produced a large amount of constitutional litigation, some of which may still be unfolding.<sup>424</sup>

At the heart of this litigation is the U.S. Supreme Court's splintered decision in *Montana v. Egelhoff*, where the justices struggled to address the constitutionality of Montana's intoxication statute, which provides that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense."<sup>425</sup> A 5-4 majority ultimately held that the evidentiary limitation inherent in the Montana statute did not violate a defendant's constitutional right to present relevant evidence in criminal cases; however, the Court did so in a severely fractured opinion in which a narrow concurrence, penned by Justice Ginsburg, appears to govern.<sup>426</sup>

According to Justice Ginsburg, the Montana statute, although framed as an evidentiary limitation, was actually "a measure redefining mens rea."<sup>427</sup> That is, she interpreted Montana's statute to mean that any Montana offense may alternatively be established by proving the defendant, even if lacking one or more of the statutorily required culpable mental states, acted "under circumstances that would otherwise establish [that culpable mental state] 'but for' [the defendant's] voluntary intoxication."<sup>428</sup> Practically speaking, therefore, Justice Ginsburg deemed the evidentiary approach constitutional by more or less interpreting it as a rule of imputation.<sup>429</sup>

With the foregoing distinctions and complications in mind, legal commentary has been particularly critical of the evidentiary approach.<sup>430</sup> For example, Sanford Kadish has described the evidentiary approach as having a deeply problematic "Alice-in-Wonderland quality," given that it "retain[s] a *mens rea* requirement in the definition of the crime, but keep[s] the defendant from introducing evidence to rebut its

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Westen, *supra* note 52, at 1226.

<sup>423</sup> Generally speaking, the practice of imputing *mens rea* based on prior culpable conduct is a basic feature of American criminal law, see Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984)—and to the extent constitutional challenges have been raised with respect to the imputation approach to intoxication, they have been summarily rejected. See, e.g., *State v. Shine*, 479 A.2d 218 (Conn. 1984); *State v. Glidden*, 441 A.2d 728, 730 (N.H. 1982).

<sup>424</sup> See, e.g., *Souza*, 813 P.2d at 1386; *Commonwealth v. Rumsey*, 454 A.2d 1121, 1122 (Pa. 1983); *Sanchez v. State*, 749 N.E.2d 509 (Ind. 2001); *Rothwell v. Hense*, SACV 11-01046 SS, 2011 WL 5295286 (C.D. Cal. Nov. 3, 2011); *Leal v. Long*, No. SACV 12-0934-MWF JPR, 2013 WL 831038 (C.D. Cal. Jan. 15, 2013).

<sup>425</sup> Mont. Code Ann. § 45-2-203. For general critiques of *Egelhoff*, see, for example, Alexander, *supra* note 52, at 211; LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5.

<sup>426</sup> As the U.S. Supreme Court has observed: "The holding of the Court [in a fractured opinion] may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977).

<sup>427</sup> *Egelhoff*, 518 U.S. at 58.

<sup>428</sup> *Id.*

<sup>429</sup> See LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5.

<sup>430</sup> See, e.g., Westen, *supra* note 52; at 1228-47; LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5. For an argument that the evidentiary approach creates a "permissive but irrebuttable inference" of *mens rea* in intoxication cases, see Alexander, *supra* note 52, at 199-200.



presence.”<sup>431</sup> Others believe the evidentiary approach to be “draconian,”<sup>432</sup> “arbitrary,”<sup>433</sup> and “clearly wrong.”<sup>434</sup> Finally, content aside, legal commentary highlights the extent to which it is unclear—both as a matter of policy and constitutional law—whether the evidentiary approach impermissibly “exclude[s] evidence of intoxication-induced accidents or mistakes” (as distinguished from the “intoxication-induced blackout” at issue in *Egelhoff*).<sup>435</sup>

In light of the above considerations, the Revised Criminal Code adopts a legal framework to address issues of intoxication that broadly accords with the imputation approach—namely it incorporates a rule of logical relevance, § 209(a), alongside a rule of recklessness imputation, § 209(c).

Overall, the imputation approach is a laudable attempt at translating the confusing and haphazard common law approach to intoxication—currently applicable in the District—into clear rules.<sup>436</sup> Although this framework is, as the Model Penal Code drafters themselves recognized, imperfect, it does a better job of collectively balancing the competing policy considerations implicated by the intoxicated actor than does the evidentiary approach.<sup>437</sup> It also finds strong support in legislative practice among reform

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<sup>431</sup> Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 955 (1999); see DRESSLER, *supra* note 31, at § 24.03.

<sup>432</sup> Alexander, *supra* note 52, at 215.

<sup>433</sup> *Commonwealth v. Henson*, 476 N.E.2d 947, 954 (Mass. 1985).

<sup>434</sup> LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5.

<sup>435</sup> Westen, *supra* note 52, at 1246. As Westen explains, *Egelhoff* involved an intentional killing which, the defendant argued, occurred “while in an automaton-like state of ‘blackout’ of which he had no memory.” *Id.* at 1247. When the defendant “sought to buttress his testimony of blackout with evidence of heavy intoxication at the time, the Montana courts invoked Montana Code section 45-2-203 to bar the evidence.” *Id.* This was directly in accordance with the Montana legislature’s intent, as well as the legislative intent underlying similar statutes, which were “clearly designed to exclude evidence of intoxication-induced blackouts.” *Id.* at 1248. Less clear, however, is how these statutes are intended to deal with the situation of a defendant who seeks to buttress his testimony of mistake or accident with intoxication evidence, as would be the case where “[a] radio thief asserts that he thought the radio belonged to himself” and thereafter attempts to “support his claim, which otherwise might be unbelievable, with evidence that he was drunk.” *Id.* (quoting Arthur A. Murphy, *Has Pennsylvania Found A Satisfactory Intoxication Defense?*, 81 DICK. L. REV. 199, 202 (1977)). As Westen highlights, considerable authority—including an amicus brief submitted by eighteen jurisdictions that apply some form of an evidentiary approach, see Brief of the States of Hawaii, et al., as Amicus Curiae, *Egelhoff* (No. 95-966), at \*17-18—suggests that the Montana statute “would not operate to exclude evidence of voluntary intoxication to prove accident or mistake” as a policy matter. Westen, *supra* note 52, at 1248-50 nos. 137-144; see also *id.* at 1250 (noting policy reasons for making this distinction). In any event, *Egelhoff* did not resolve this issue as a constitutional matter. *Id.* at 1250.

<sup>436</sup> See sources cited *supra* notes 53-54 and accompanying text.

<sup>437</sup> See Model Penal Code § 2.08 cmt. at 358-59; Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 436 (1998). Insofar as scholarly views are concerned, support for the imputation approach is less pronounced than the overwhelming disdain for the evidentiary approach. See, e.g., Alexander, *supra* note 52, at 215. For criticism of the Model Penal Code approach, see ROBINSON, 1 CRIM. L. DEF. § 65; Alexander, *supra* note 52, at 214-15; Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 15-17 (1985); Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 609-10 (2001).

jurisdictions and in case law.<sup>438</sup> Finally, this framework should avoid the potential constitutional issues implicated by *Egelhoff*.<sup>439</sup>

It's important to note that while the intoxication framework reflected in § 209 is broadly consistent with Model Penal Code § 2.08 and the general intoxication provisions in reform codes that were modeled on it, § 209 departs from the standard imputation approach in a few notable ways.

First, the logical relevance principle incorporated into § 209(a) does not reference “defenses” in any capacity; instead, it mirrors the logical relevance principle governing accidents, mistake, and ignorance under § 208(a) by establishing that: “A person is not liable for an offense when that person’s intoxication negates the existence of a culpable mental state applicable to a result or circumstance in that offense.” This is in contrast to the standard logical relevance principle, reflected in MPC § 2.08(1) and incorporated into numerous state criminal codes, which establishes that the “intoxication of the actor is not a defense unless it negates an element of the offense.”<sup>440</sup> To improve the clarity and consistency of the Revised Criminal Code, this departure is intended to better communicate that intoxication, like mistake, “does not sanction a true defense, but in fact primarily recognizes an attack on the prosecution’s ability to prove the requisite culpable mental state beyond a reasonable doubt.”<sup>441</sup>

Second, § 209(b) departs from legislative practice by clarifying the nature of the correspondence between intoxication and culpable mental state requirements. Neither the Model Penal Code, nor reform codes, explicitly state when intoxication has the tendency to negate the existence of a given culpable mental state requirement. Subsection 209(b), in contrast, provides a set of general rules, which broadly establish that intoxication has the tendency to negate the existence of any subjective culpable mental state—namely, purpose, knowledge, and recklessness—when, due to the person’s intoxicated state, that person did not act with the desire or level of awareness applicable to a result or circumstance under a given offense definition.<sup>442</sup> These rules explicitly articulate what is otherwise inherent in the requirement that the government prove the elements of an offense beyond a reasonable doubt. (In this sense, they run parallel with § 208(b), which serves a similar function in the context of mistake.) By providing District judges with these basic rules of translation, § 208(b) should enhance the clarity and consistency of District law.

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<sup>438</sup> See sources cited *supra* notes 55-56 and accompanying text.

<sup>439</sup> Note also that, *Egelhoff* aside, other U.S. Supreme Court case law suggests that jury instructions in jurisdictions that apply the evidentiary approach must be “carefully fashioned.” LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5. That is, an instruction which “creates a reasonable likelihood that the jury would believe that if defendant was intoxicated, he was criminally responsible regardless of his state of mind . . . violates due process under” the U.S. Supreme Court’s decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Id.* (quoting *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993)).

<sup>440</sup> See sources cited *supra* note 55.

<sup>441</sup> DANNYE HOLLEY, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 247-49 (1997). Which is to say that the intoxication “defense” most closely resembles a mistake of fact “defense”: “[n]either affirmatively exculpates; rather, they represent a failure of proof of an essential element (the requisite mens rea) of the crime, as evaluated in the act-oriented framework.” Keiter, *supra* note 29, at 497; see DRESSLER, *supra* note 31, at § 24.07.

<sup>442</sup> Note, however, that the rule of imputation governing self-induced intoxication in § 209(c) severely limits the situations in which intoxication will actually negate recklessness.

Third, § 209(c) states a rule of recklessness imputation through a two-prong approach, which affirmatively and explicitly enunciates the government’s burden of proof in cases of self-induced intoxication. This is intended to address two related flaws in Model Penal Code § 2.08(2) and the similar provisions incorporated into numerous state criminal codes.

The first flaw is one of drafting: typically, the rule of recklessness imputation is framed in the negative, establishing those situations where “unawareness is immaterial” for purposes of dealing with self-induced intoxication when it ought to be framed in the positive, establishing the government’s affirmative burden of proof with respect to recklessness in cases involving self-induced intoxication. A few reform jurisdictions appear to have recognized this problem, opting to reframe Model Penal Code § 2.08(2) as an alternative definition of “recklessly” contained in their general parts.<sup>443</sup>

Even these jurisdictions, however, fail to address a second flaw in Model Penal Code § 2.08(2): its failure to explicitly clarify what the government’s burden of proof actually is. To generally state, for example, “that defendants are guilty of crimes of recklessness if they ‘would have been aware’ of the risks if sober, can be interpreted in [a variety of] ways.”<sup>444</sup> That being said, it is reasonably clear from the Model Penal Code commentary that the drafters “intended to hold voluntarily intoxicated persons responsible for conduct that would constitute negligence if they were sober.”<sup>445</sup> If true, however, then they should have more clearly articulated this “Intoxication Recklessness Principle”<sup>446</sup> through the text of the Model Penal Code itself.

In the interests of clarity and consistency in the Revised Criminal Code, § (c) resolves both of these flaws by affirmatively articulating when and how proof of self-induced intoxication can provide an alternative means for proving recklessness. It authorizes courts to impute the culpable mental state of recklessness in the context of self-induced intoxication based upon proof that: (1) but for the person’s intoxicated state the person would have been aware of a substantial risk that the person’s conduct would cause a result or that a circumstance existed; and (2) the person otherwise acted negligently as to the requisite result or circumstance.

One final group of variances relate to intoxication-related issues that the Revised Criminal Code does not address. For example, § 209 is generally silent on the meaning of self-induced intoxication, the difference between self-induced and involuntary intoxication, and on the appropriate treatment of involuntary intoxication that is not

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<sup>443</sup> See, e.g., N.Y. Penal Law § 15.05; N.H. Rev. Stat. Ann. § 626:2; Ala. Code § 13A-2-2.

<sup>444</sup> Westen, *supra* note 52, at 1220 n.72. For example, Model Penal Code § 2.08(2) *could* be interpreted to “mean that voluntarily intoxicated defendants are responsible for crimes of recklessness at Time2 if they are negligent in being unaware of substantial and unjustified risks at that time, regardless of whether their intoxication causes them to be unaware of risks of which they would otherwise be conscious.” *Id.* However, there does not appear to be any support for this approach in legal authority, see *Glidden*, 441 A.2d at 731, while such an approach would “punish[] [actors] in excess of the risks and harms which their intoxicated creates,” Westen, *supra* note 52, at 1220 n.72.

<sup>445</sup> Westen, *supra* note 52, at 1222 (discussing Model Penal Code § 2.08 cmt. at 358-59); see DRESSLER, *supra* note 31, at § 24.07.

<sup>446</sup> Yaffe, *supra* note 52, at 546. As Yaffe explains, this principle dictates that “[i]f a defendant is negligent and intoxicated, and he became intoxicated voluntarily, then, for legal purposes, he is to be treated as though he were reckless.” *Id.*

logically relevant to negating proof of a required culpable mental state.<sup>447</sup> This is in contrast to Model Penal Code § 2.08, which codifies an affirmative defense applicable to instances of involuntary intoxication of this nature,<sup>448</sup> alongside definitions of “self-induced intoxication”<sup>449</sup> and “pathological intoxication.”<sup>450</sup>

Section 209 does not incorporate a comparable Model Penal Code-based general provision addressing involuntary intoxication that is not logically relevant to negating proof of a required culpable mental state for pragmatic reasons. These issues are typically—and most appropriately—addressed through affirmative defenses;<sup>451</sup> however, affirmative defenses are not within the scope of the CCRC’s planned review.<sup>452</sup>

In contrast, § 209 does not codify additional general definitions—beyond that of “intoxication”<sup>453</sup>—for two main policy reasons. First, only “[a] few of the modern recodifications” have codified additional general definitions of this nature.<sup>454</sup> And second, these definitions are—both as initially developed by the drafters of the Model Penal Code and as thereafter adopted by a handful of state legislatures—comprised of a wide range of flaws, which are not easily remedied.<sup>455</sup>

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<sup>447</sup> The explanatory note to § 209(c) generally establishes that self-induced intoxication “occurs when a person culpably introduces a substance into his or her body with the tendency to cause a disturbance of mental or physical capacities.” However, this general language leaves undefined the key term “culpably.”

<sup>448</sup> Model Penal Code § 2.08 establishes, in relevant part, that:

(3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.

(4) Intoxication that (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

<sup>449</sup> Model Penal Code § 2.08 (5)(b) defines “self-induced intoxication” as “intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime.”

<sup>450</sup> Model Penal Code § 2.08 (5)(c) defines “pathological intoxication” to mean “intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.”

<sup>451</sup> See ROBINSON, *supra* note 31, at 2 CRIM. L. DEF. § 176.

<sup>452</sup> See Commentary to Revised Criminal Code §§ 201(a) and (b).

<sup>453</sup> Section 209(a) of the Revised Criminal Code codifies a definition of “intoxication” which is identical to the definition of “intoxication” proposed by the drafters of the Model Penal Code, see Model Penal Code § 2.08(5)(a), and comparable to that codified by many reform jurisdictions, see Ala. Code § 13A-3-2; Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-2-207; Colo. Rev. Stat. Ann. § 18-1-804; Conn. Gen. Stat. Ann. § 53a-7; Ga. Code Ann. § 16-3-4; Haw. Rev. Stat. Ann. § 702-230; Me. Rev. Stat. tit. 17-A, § 37; N.J. Stat. Ann. § 2C:2-8; Ohio Rev. Code Ann. § 2901.21; Tenn. Code Ann. § 39-11-503; Tex. Penal Code Ann. § 8.04.

<sup>454</sup> LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5 n.60; see Ala. Code § 13A-3-2; Ark. Code Ann. § 5-2-207; Colo. Rev. Stat. Ann. § 18-1-804; Haw. Rev. Stat. Ann. § 702-230; Me. Rev. Stat. tit. 17-A, § 37; Tenn. Code Ann. § 39-11-503; Wyo. Stat. Ann. § 6-1-202.

<sup>455</sup> For discussion of these flaws, see ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65.

The Revised Criminal Code, by remaining silent on the foregoing issues, intends to leave them to the courts—which is where they currently exist under current District law and where they still exist in most reform jurisdictions.<sup>456</sup>

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<sup>456</sup> For a collection of relevant case law, see LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5; and ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65.

## § 22A-210 ACCOMPLICE LIABILITY

(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

- (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
- (2) Purposely encourages another person to engage in specific conduct constituting that offense.

(b) PRINCIPLE OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist.

(c) PRINCIPLE OF CULPABLE MENTAL STATE EQUIVALENCY APPLICABLE TO RESULTS WHEN DETERMINING DEGREE OF LIABILITY. An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.

(d) RELATIONSHIP BETWEEN ACCOMPLICE AND PRINCIPAL. An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein, although the other person claimed to have committed the offense:

- (1) Has not been prosecuted or convicted; or
- (2) Has been convicted of a different offense or degree of an offense; or
- (3) Has been acquitted.

***Relation to National Legal Trends.*** RCC §§ 210(a), (b), (c), and (d) are in part consistent with, and in part inconsistent with, national legal trends.

Comprehensively codifying the culpable mental state requirement and conduct requirement applicable to accomplice liability is in accordance with widespread, modern legislative practice. However, the manner in which RCC § 210 codifies these requirements departs from modern legislative practice in some notable ways.

Most of the substantive policies incorporated into RCC §§ 210(a), (b), (c), and (d)—for example, the conduct requirement, the requirement of purpose as to conduct, and the principle of culpable mental state equivalency applicable to results—reflect majority or prevailing national trends governing the law of complicity. Other policy recommendations—for example, precluding derivative liability for failed accomplices and the principle of intent elevation applicable to circumstances—address issues upon which American criminal law is either divided or unclear.

A more detailed analysis of national legal trends and their relationship to RCC §§ 210(a), (b), (c), and (d) is provided below. The analysis is organized according to four main topics: (1) the conduct requirement; (2) the culpable mental state requirement; (3) the relationship between the accomplice and the principal; and (4) codification practices

RCC § 210(a): Relation to National Legal Trends on Conduct Requirement. The conduct requirement of accomplice liability is comprised of two main kinds of actions: (1) assisting a party with commission of a crime; and (2) encouraging a party to commit a crime.<sup>457</sup> In practice, the categories of assistance and encouragement frequently overlap since knowledge that aid will be given can influence the principal's decision to go forward.<sup>458</sup> Nevertheless, there remains an important analytic difference between the two: whereas assistance is subject to criminal liability because of the accomplice's *material contribution* to the principal's *execution* of a crime, encouragement is subject to criminal liability because of the accomplice's *psychological contribution* to the principal's *decision* to commit a crime.<sup>459</sup>

Contemporary American legal authorities—as reflected in case law, legislation, and commentary—express these two alternative means of satisfying the conduct requirement of accomplice liability in a variety of different ways.<sup>460</sup> Phrasing aside, though, modern common law trends, as summarized below, converge on most (though not all) aspects of their meaning and practical import.

The most common and well-established basis for satisfying the conduct requirement of accomplice liability is *assistance by affirmative conduct*.<sup>461</sup> Often, an accomplice will assist the principal actor by furnishing the means of committing a crime—for example, by providing guns,<sup>462</sup> money,<sup>463</sup> supplies<sup>464</sup> or other instrumentalities.<sup>465</sup> Also typical is the situation of an accomplice who assists the principal actor by providing opportunities or lending a hand in preparation or execution

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<sup>457</sup> Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 342 (1985); see, e.g., LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.04 (6th ed. 2012); Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 135–36 (2015); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 226 (2000).

<sup>458</sup> Kadish, *supra* note 79, at 342.

<sup>459</sup> *Id.* at 342-43.

<sup>460</sup> See *infra* notes 83-137 and accompanying text.

<sup>461</sup> This is universally reflected in complicity legislation through the use of statutory terms such as “aid,” “assist,” and “cause.” See, e.g., Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Colo. Rev. Stat. Ann. § 18-1-603; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; S.D. Cod. Laws § 22-33-3; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Ga. Code Ann. § 16-2-20; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Cal. Penal Code § 31; Nev. Rev. Stat. Ann. § 195.020; R.I. Gen. Laws Ann. § 11-1-3; S.C. Code Ann. § 16-1-40.

<sup>462</sup> *Commonwealth v. Richards*, 293 N.E.2d 854 (Mass. 1973); *State v. Williams*, 199 S.E. 906 (S.C. 1938).

<sup>463</sup> *Malatkofski v. United States*, 179 F.2d 905 (1st Cir. 1950) (supplying money for bribe).

<sup>464</sup> *Bacon v. United States*, 127 F.2d 985 (10th Cir. 1942) (sale of liquor to illegal importer).

<sup>465</sup> *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969).

of the offense—for example, by serving as a lookout,<sup>466</sup> driving the getaway car,<sup>467</sup> signaling the approach of the victim,<sup>468</sup> sending the victim to the actor,<sup>469</sup> preventing a warning from reaching the victim,<sup>470</sup> or preventing escape by the victim.<sup>471</sup> Importantly, in any of these situations, it need not be proven that the accomplice directly assisted the principal’s conduct; rather, working through an intermediary will suffice.<sup>472</sup>

Although less common, *assistance by omission* may also, under appropriate circumstances, provide the basis for satisfying the conduct requirement of accomplice liability.<sup>473</sup> Generally speaking, those circumstances are understood to exist when an accomplice, with the intent to aid the commission of an offense: (1) fails to fulfill a legal duty to act; and (2) the failure to do so assists the principal actor.<sup>474</sup> So, for example, a corrupt police officer who fails to stop a crime with the intent to aid the perpetrators may be deemed an accomplice to that crime.<sup>475</sup> Likewise, a conductor on a train may be held criminally liable for failing to take steps to prevent the transportation of illegal substances on his or her train.<sup>476</sup> And a parent may be convicted as an accomplice in the

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<sup>466</sup> *State v. Berger*, 121 Iowa 581 (1903); *Clark v. Commonwealth*, 269 Ky. 833, 108 S.W.2d 1036 (1937).

<sup>467</sup> *People v. Silva*, 143 Cal.App.2d 162 (1956); *Staten v. State*, 519 So.2d 622 (Fla. 1988); *People v. Hartford*, 159 Mich.App. 295 (1987).

<sup>468</sup> *State v. Hamilton*, 13 Nev. 386 (1878).

<sup>469</sup> *United States v. Winston*, 687 F.2d 832 (6th Cir. 1982); *State v. Gladstone*, 78 Wash.2d 306 (1970); *State v. Ryder*, 267 Or.App. 150 (2014).

<sup>470</sup> *State ex rel. Martin v. Tally*, 102 Ala. 25 (1894).

<sup>471</sup> *State v. Davis*, 182 W.Va. 482 (1989); *see also United States v. Ortega*, 44 F.3d 505 (7th Cir. 1995) (defendant, sitting in the backseat of an automobile in which a drug transaction was occurring, pointed to the bag of heroin; held: this act, done knowingly, was sufficient to constitute aiding).

<sup>472</sup> *State v. Ives*, 37 Conn.App. 40 (1995); *Commonwealth v. Stout*, 356 Mass. 237 (1969). And, where aiding an abetting a crime that, by definition, has multiple act-elements is at issue, it need not be proven that the accomplice’s physical assistance encompassed each of those elements. LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. Instead, the conduct requirement of accomplice liability is satisfied where the secondary party “facilitate[s] any part—even though not every part—of a criminal venture.” *Rosemond v. United States*, 134 S. Ct. 1240, 1246–47 (2014). So, for example, one is an accomplice to the crime of using or carrying a gun in connection with a drug trafficking crime if one’s conduct facilitates or promotes either the drug transaction or the firearm use. *See id.*

<sup>473</sup> LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. This common law principle is “often not explicitly stated in accomplice liability statutes.” *Id.* at n. 51. Those statutes that do so, however, are based upon Model Penal Code § 2.06(3), which establishes that one may be deemed an accomplice if, “having a legal duty to prevent the commission of the offense, [he or she] fails to make proper effort to do so.” For reform codes that adopt a similar approach, *see* Ala. Code § 13A-2-23; Ark. Code Ann. § 5-2-403; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ky. Rev. Stat. Ann. § 502.020; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-13; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02. *Cf. State v. Jackson*, 137 Wash.2d 712 (1999) (where state’s accomplice liability statute “was modeled, in part, on the accomplice liability provision in the Model Penal Code,” but did not include the subsection specifically dealing with liability based on omission, this manifests legislative “intent to reject the concept of extending accessory liability for omissions to act”).

<sup>474</sup> *See, e.g., LAFAVE, supra* note 23, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 79, at § 30.04; *Burkhardt v. United States*, 13 F.2d 841, 842 (6th Cir. 1926).

<sup>475</sup> *See, e.g., Model Penal Code* § 2.06 cmt. at 320 (“The policeman or the watchman who closes his eyes to a robbery or burglary fails to present an obstacle to its commission that he is obliged to interpose. If his purpose is to promote or facilitate its perpetration, a fact that normally can be proved only by preconcert with the criminals, no reason can be offered for denying his complicity.”).

<sup>476</sup> *Powell v. United States*, 2 F.2d 47 (4th Cir. 1924).



perpetration of an assault, battery, or criminal homicide upon his or her child by another person if the parent fails to make efforts to prevent commission of the offense.<sup>477</sup>

Encouragement provides an alternative and broad means of satisfying the conduct requirement of accomplice liability.<sup>478</sup> Generally speaking, encouragement entails providing another person with either reasons or incentives to engage in a particular course of conduct.<sup>479</sup> In practice, there are a variety of ways in which this kind of psychological influence manifests itself.<sup>480</sup> For example, one may become an accomplice by advising or counseling<sup>481</sup> another to commit a crime; by commanding, directing, or

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<sup>477</sup> *People v. Rolon*, 160 Cal. App. 4th 1206, 1209 (Ct. App. 2008); see, e.g., *State v. Oliver*, 85 N.C.App. 1 (1987) (mother an accomplice in sexual assault on her child where she was in bed with the child when the child was raped and she failed to take any steps to avert the assault); *State v. Walden*, 306 N.C. 466 (1982) (mother an accomplice to another's beating of her child where she present but did not intervene); *State v. Williquette*, 125 Wis.2d 86 (1985). But see *Commonwealth v. Raposo*, 413 Mass. 182 (1992) (mother not accomplice on theory that she failed to intervene to prevent rape by third party).

<sup>478</sup> This proposition is articulated by "accomplice liability statutes in the modern recodifications [in] various [ways]." LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2 n.10. The Model Penal Code approach is to state generally that solicitation of the crime is sufficient. See Model Penal Code § 2.06(3) ("A person is an accomplice of another person in the commission of an offense if . . . he . . . solicits such other person to commit it."). Many reform codes similarly use the term "solicits." See Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.Y. Penal Law § 20.00; Ohio Rev. Code Ann. § 2923.03; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020. And some of these statutes also employ the term "encourages." Ark. Code Ann. § 5-2-403; Ga. Code Ann. § 16-2-20; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201.

Others accomplice liability statutes specify certain kinds or degrees of encouragement. For example, some use "procures" or "hires." See Ala. Code § 13A-2-23; Fla. Stat. Ann. § 777.011; Ga. Code Ann. § 16-2-20; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; La. Rev. Stat. Ann. § 14:24; Minn. Stat. Ann. § 609.05; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Wis. Stat. Ann. § 939.05; Wyo. Stat. § 6-1-201. Some use "induces" or "coerces." See Ala. Code § 13A-2-23; Ark. Code Ann. § 5-2-403; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.D. Cent. Code § 12.1-03-01. Some use "commands" or "directs." See Ariz. Rev. Stat. Ann. § 13-301; Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; Ky. Rev. Stat. Ann. § 502.020; N.Y. Penal Law § 20.00; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201. And some use "requests" or "importunes." See Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; N.Y. Penal Law § 20.00; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020.

<sup>479</sup> Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 343 (1985); see also Model Penal Code § 5.02 cmt. at 372 (1985) ("[Encouragement] encompasses actors who bolster the fortitude of those who have already decided to commit crimes, so long as the encouragement is done with the requisite criminal purpose. It also covers forms of communication designed to lead the recipient to act criminally, even if the message is not as direct as a command or request.").

<sup>480</sup> LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2 n.10; see also Model Penal Code § 5.02 cmt. at 372 (1985) ("Encouragement also covers forms of communication designed to lead the recipient to act criminally, even if the message is not as direct as a command or request. Whether one can 'encourage' without communicating a desire that a crime be committed may be more arguable....").

<sup>481</sup> See Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Colo. Rev. Stat. Ann. § 18-1-603; Del. Code Ann. tit. 11, § 271; Fla. Stat. Ann. § 777.011; Ga. Code Ann. § 16-2-20; Kan. Stat. Ann. § 21-5210;

requesting<sup>482</sup> another to commit a crime; or by procuring, inducing, or coercing<sup>483</sup> another person to commit a crime.<sup>484</sup> These pathways of influence may, in turn, be communicated directly or by an intermediary,<sup>485</sup> through words or gestures,<sup>486</sup> via threats or promises,<sup>487</sup> and occur either before or at the actual time the crime is being committed.<sup>488</sup>

The breadth of accomplice liability for encouragement is borne out in case law. It is well established, for example, that while mere presence at the scene of the crime cannot, by itself, provide a sufficient basis for satisfying the encouragement prong,<sup>489</sup> presence coupled with minimal other conduct can justify such a finding. This includes proof that the defendant was standing at the scene of the crime ready to give some aid, if

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Ky. Rev. Stat. Ann. § 502.020; La. Rev. Stat. Ann. § 14:24; Minn. Stat. Ann. § 609.05; N.M. Stat. Ann. § 30-1-13; S.D. Cod. Laws. § 22-3-3; Wis. Stat. Ann. § 939.05; Wyo. Stat. § 6-1-201.

<sup>482</sup> See Ariz. Rev. Stat. Ann. § 13-301; Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; Ky. Rev. Stat. Ann. § 502.020; N.Y. Penal Law § 20.00; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201; Or. Rev. Stat. § 161.155; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201.

<sup>483</sup> See Ala. Code § 13A-2-23; Fla. Stat. Ann. § 777.011; Ga. Code Ann. § 16-2-20; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; La. Rev. Stat. Ann. § 14:24; Minn. Stat. Ann. § 609.05; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Wis. Stat. Ann. § 939.05; Wyo. Stat. § 6-1-201; Ark. Code Ann. § 5-2-403; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302.

<sup>484</sup> One commentator explains the nuances of these terms as follows:

*Advise*, like counsel, imports offering one's opinion in favor of some action. *Persuade* is stronger, suggesting a greater effort to prevail on a person, or counseling strongly. *Command* is even stronger, implying an order or direction, commonly by one with some authority over the other. *Encourage* suggests giving support to a course of action to which another is already inclined. *Induce* means to persuade, but may suggest influence beyond persuasion. *Procure* seems to go further, suggesting bringing something about in the sense of producing a result.

Kadish, *supra* note 101, at 343.

<sup>485</sup> See *People v. Wright*, 26 Cal.App.2d 197 (1938).

<sup>486</sup> See *United States v. Whitney*, 229 F.3d 1296 (10th Cir. 2000); *Alonzi v. People*, 198 Colo. 160 (1979); *State v. Wilson*, 39 N.M. 284 (1935); *McGhee v. Commonwealth*, 221 Va. 422 (1980); *State v. Haddad*, 189 Conn. 383 (1983); *Commonwealth v. Richards*, 363 Mass. 299 (1973).

<sup>487</sup> See *State v. Scott*, 80 Conn. 317 (1907).

<sup>488</sup> See *Workman v. State*, 216 Ind. 68 (1939).

<sup>489</sup> For example, in *Pope v. State*, the Maryland Court of Appeals held that a defendant who “stood by while the mother killed the child,” but “neither actually aided the mother in the acts of abuse nor did she counsel, command or encourage her,” was not an accomplice. 284 Md. 309 (1979). See, e.g. *United States v. Andrews*, 75 F.3d 552 (9th Cir. 1996); *United States v. Minieri*, 303 F.2d 550 (2d Cir. 1962); *State v. Gomez*, 102 Ariz. 432, 432 P.2d 444 (1967); *McGill v. State*, 252 Ind. 293, 247 N.E.2d 514 (1969); *Rodriguez v. State*, 107 Nev. 432, 813 P.2d 992 (1991); *State v. Scott*, 289 N.C. 712, 224 S.E.2d 185 (1976); *Commonwealth v. Flowers*, 479 Pa. 153, 387 A.2d 1268 (1978); *State v. Gazerro*, 420 A.2d 816 (R.I. 1980); *State v. Hoselton*, 179 W.Va. 645, 371 S.E.2d 366 (1988). See also Ill. Comp. Stat. Ann. ch. 720, § 5/5-2 (“Mere presence at the scene of a crime does not render a person accountable for an offense; a person’s presence at the scene of a crime, however, may be considered with other circumstances by the trier of fact when determining accountability”).

needed, where the principal was aware of the defendant's intentions,<sup>490</sup> where a prior agreement to assist existed,<sup>491</sup> or where the defendant uttered the words "[l]et's get out of here."<sup>492</sup> It also includes proof of the defendant's presence during the planning stages of a burglary coupled with a general exhortation that the principal parties take some minor item from the site of the planned intrusion.<sup>493</sup>

One noteworthy point of disagreement among contemporary common law authorities relevant to the conduct requirement of accomplice liability is whether an accomplice's conduct must *actually* facilitate or promote the commission of the offense by the principal actor. At stake in the dispute is the treatment of an unsuccessful accomplice, who has attempted, but ultimately failed, to assist or encourage the principal's conduct. For example, where A attempts to assist P by opening a window to allow P to enter a dwelling unlawfully, but P (unaware of the open window) enters through a door, is A an accomplice to P's trespass?<sup>494</sup> Alternatively, if A utters words of encouragement to P who fails to hear them, but nevertheless proceeds to enter the dwelling unlawfully anyways, is A an accomplice to P's trespass?<sup>495</sup>

There are two main approaches to dealing with these kinds of questions: that of the common law and that of the Model Penal Code. Under the common law approach, one cannot be an accomplice if he or she performs an act of assistance or encouragement, but that assistance or encouragement is wholly ineffectual.<sup>496</sup> On this accounting, the "words used to define the scope of accomplice liability"—namely, assistance and encouragement—are understood to "contain an implicit requirement that the defendant's words or actions contribute somehow to the criminal venture."<sup>497</sup> Importantly, this contribution need not, in the eyes of the common law, be substantial<sup>498</sup> or even causally

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<sup>490</sup> *Commonwealth v. Morrow*, 363 Mass. 601 (1973); *Skidmore v. State*, 80 Neb. 698 (1908); *State v. Chastain*, 104 N.C. 900 (1889); *Andrew v. State*, 237 P.3d 1027 (Alaska App. 2010); *State v. Arceneaux*, 983 So.2d 148 (La. App. 2008); *Jones v. State*, 173 Md.App. 430 (2007).

<sup>491</sup> *Hicks v. United States*, 150 U.S. 442 (1893).

<sup>492</sup> *Fuller v. State*, 198 So. 2d 625, 630 (Ala. Ct. App. 1966).

<sup>493</sup> *State v. Helmenstein*, 163 N.W.2d 85 (N.D. 1968). For case law from other common law countries, see, for example, *R v. Giannetto*, [1997] 1 Cr. App. R. 1 (trial judge instructed the jury, "[s]uppos[e] somebody came up to [him] and said, 'I am going to kill your wife,' if [the secondary party] played any part, . . . [like] patting him on the back, nodding, saying 'oh goody,' that would be sufficient . . ."); *Wilcox v. Jeffery*, [1951] 1 All E.R. 464 (K.B.) (presence in the audience of an illegal concert in order to write a story about it for a periodical rendered D an accomplice as he was "present, taking part, concurring, or encouraging" the illegal events; "[i]f he had booed, it might have been some evidence that he was not aiding and abetting"); *R v. Coney*, [1882] 8 Q.B.D. 534 (D was a spectator at an illegal boxing match; the court did not disagree that, assuming the requisite *mens rea*, a spectator could be held as an accomplice).

<sup>494</sup> Kadish, *supra* note 101, at 358-59.

<sup>495</sup> *Id.*

<sup>496</sup> See, e.g., Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 (1983); ("At common law, an unsuccessful attempt to aid, one that was unknown to the perpetrator and that neither encouraged nor assisted him, would not support accomplice liability."); DRESSLER, *supra* note 79, at § 30.06.

<sup>497</sup> Eric A. Johnson, *Criminal Liability for Loss of A Chance*, 91 IOWA L. REV. 59, 110-11 (2005); see *State v. Hunter*, 227 S.E.2d 535, 548 (N.C. 1976) (finding that the causal connection is "inherent" in the words "counsel, procurement, command, or aid"); Robinson & Grall, *supra* note 118, at 758 ("Courts often employ language that appears to require actual assistance.")

<sup>498</sup> DRESSLER, *supra* note 79, at § 30.06; *State v. Noriega*, 928 P.2d 706, 709 n.2 (Ariz. Ct. App. 1996); *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. 2004) (amount of aid "need not be substantial");

necessary.<sup>499</sup> Nevertheless, absent proof that the defendant's conduct *in some way* assisted or influenced the commission of the offense, he or she cannot, under the common law approach, be deemed an accomplice.

Under the Model Penal Code approach, in contrast, there is no requirement that an accomplice have actually aided or encouraged the principal's conduct in any way. Instead, as Model Penal Code § 2.06(3) phrases it, any person who “*agrees or attempts to aid [an]other person in planning or committing of an offense*” may—assuming the requisite culpable mental state—be held criminally liable for the conduct of another.<sup>500</sup>

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*Fuson v. Commonwealth*, 251 S.W. 995, 997 (Ky. Ct. App. 1923); *see* Kinports, *supra* note 79, at 135-36 (“Any voluntary act of aid or encouragement, no matter how trivial, suffices.”).

<sup>499</sup> “The prosecution is not required,” as one commentator observes, “to establish that the crime would not have occurred but for the accessory or that the accomplice contributed a substantial amount of assistance.” DRESSLER, *supra* note 79, at § 30.06. “Rather than basing liability on the theory that the accomplice caused the crime, the accomplice is convicted because her voluntary association with the offense makes her blameworthy.” *Id.* What the courts mean by “contribute,” then, “is something closely akin to lost chance.” Johnson, *supra* note 119, at 111. Here, for example, is one famous description provided by the Alabama Supreme Court in *State v. Tally*:

It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it. If the aid in homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a single chance of life which but for it he would have had, he who furnishes such aid is guilty, though it cannot be known or shown that the dead man, in the absence thereof, would have availed himself of that chance; as, where one counsels murder, he is guilty as an accessory before the fact, though it appears to be probable that murder would have been done without his counsel; and as, where one being present by concert to aid if necessary is guilty as a principal in the second degree, though, had he been absent murder would have been committed, so, where he who facilitates murder even by so much as destroying a single chance of life the assailed might otherwise have had, he thereby supplements the efforts of the perpetrator, and he is guilty as principal in the second degree at common law, and is principal in the first degree under our statute, notwithstanding it may be found that in all human probability the chance would not have been availed of, and death would have resulted anyway.

102 Ala. 25, 69–70, 15 So. 722, 738–39 (1894).

<sup>500</sup> Model Penal Code § 2.06(3)(a)(ii) (“aids or agrees or attempts to aid such other person in planning or committing” the offense). As the accompanying commentary explains:

So long as [a purpose to facilitate an offense] is proved, there is, it would seem, little risk of innocence; nor does there seem to be occasion to inquire into the precise extent of influence exerted on the ultimate commission of the crime. The inclusion of attempts to aid may go in part beyond-present law, but attempted complicity ought to be criminal, and to distinguish it from effective complicity appears unnecessary where the crime has been committed. Where complicity is based upon agreement or-solicitation, one does not for evidence that they were actually operative psychologically on the person who committed the offense; there ought to be no difference in the case of aid.

Model Penal Code § 2.06(3)(a)(ii) cmt. at 314.

Practically speaking, this language “removes the need for the accomplice to make any contribution to the commission of the offense or to an attempt.”<sup>501</sup>

Since completion of the Model Penal Code, “[a] substantial minority of states” have adopted the drafters’ recommended approach to dealing with unsuccessful accomplices.<sup>502</sup> Policies of this nature are common among reform jurisdictions; however, quite a few of those jurisdictions most influenced by the Model Penal Code in general nevertheless opted to drop the “agrees or attempts to aid” clause recommended by the Code’s drafters.<sup>503</sup> Such variance is not surprising, though, once one considers the potential consequences at stake.

Although pitched as a matter of criminal law doctrine, the issue of failed accomplices is primarily a matter of grading. For example, under the common law approach, a failed accomplice would likely be guilty of an attempt to commit the target of the complicity based upon an individual assessment of his or her conduct.<sup>504</sup> In those jurisdictions (a strong majority) that grade attempts less severely, this would ultimately subject the failed accomplice to a lower level of potential punishment than the successful principal.<sup>505</sup> Under the Model Penal Code approach, in contrast, “an unfulfilled agreement or unsuccessful attempt to assist or encourage is graded the same as the substantive offense that does not materialize.”<sup>506</sup> In practical effect, this means that the

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<sup>501</sup> Robinson & Grall, *supra* note 118, at 736. Allowing for attempts to aid to satisfy the conduct requirement of accomplice liability constitutes a clear and “significant departure” from the common law approach. DRESSLER, *supra* note 79, at § 30.06.

More nuanced is the import of allowing for agreements to aid to provide the basis for accomplice liability. In most cases, for example, A’s agreement to aid in the commission of an offense serves as encouragement to P and, therefore, functions as a basis for common law accomplice liability. *Id.* The Model Penal Code does not, however, require proof of such encouragement; rather, it is enough that A manifested his participation in the offense by agreeing to aid. *Id.*

<sup>502</sup> Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 140 (1985); Weisberg, *supra* note 79, at 234 (“This equation of “attempted complicity” with attempt to perpetrate a substantive offense has been incorporated into the penal codes of about a dozen states.”); see Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02. See also Del. Code Ann. tit. 11, § 271 (“attempts to cause”).

For jurisdictions that adopt “an agreement to aid,” see Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; Wash. Rev. Code § 9A.08.020.

<sup>503</sup> See Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 322 (1994) (citing Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110(2)(B); Colo. Rev. Stat. Ann. § 18-1-603; Minn. Stat. Ann. § 609.05; N.Y. Penal Code § 20.00; N.D. Cent. Code § 12.1-03-01(1)(b); Ohio Rev. Code Ann. § 2923.03(A)(2); Utah Code Ann. § 76-2-202).

<sup>504</sup> Robinson, *supra* note 125, at 305.

<sup>505</sup> *Id.* So, for example, “[w]here the actor tries but fails to aid an arsonist, unbeknownst to the arsonist, and therefore has no causal connection with the offense harm or evil, his liability [] is attempt liability not substantive offense liability, and accordingly graded less.” *Id.*

<sup>506</sup> *Id.* at 304. So, for example, an actor who unsuccessfully attempts to assist a perpetrator bent on arson is liable for arson even though he gets the date confused and does not actually aid the perpetrator. *Id.*

failed accomplice is subject to the same level of potential punishment as the successful principal.<sup>507</sup>

So, then, which outcome is preferable? At its core, the choice is between objectivist and subjectivist policies. The common law approach to dealing with failed accomplices reflects a more objectivist view of the criminal law, under which causing harm or evil is the gravamen of a criminal offense. Where the defendant's conduct is ineffectual, therefore, his or her punishment ought to be reduced accordingly.<sup>508</sup> The Model Penal Code approach, in contrast, "is consistent with the subjectivist view that an actor's liability ought to be based on the actor's own conduct and attendant state of mind, rather than on subsequent events over which the actor has no control, such as whether the attempt to aid is successful."<sup>509</sup>

Both objectivist and subjectivist policies stand on firm theoretical ground.<sup>510</sup> However, community sentiment favors objectivist grading policies—both generally<sup>511</sup> and as it relates to the treatment of accomplices in particular.<sup>512</sup> And, insofar as legislative practice is concerned, the sentencing policies employed in most jurisdictions reflect the more objectivist approach to grading.<sup>513</sup> Where, as in the District, this is the case, it can be argued that acceptance of the Model Penal Code approach to dealing with failed accomplices produces a "particularly troublesome result," namely, it affords unsuccessful accomplices and successful perpetrators the same punishment, notwithstanding the fact that attempts and completed offenses are typically punished differentially.<sup>514</sup> "To be consistent," therefore, more objectivist states ought to "reject that portion of the Model Penal Code complicity provision that rests accomplice liability—i.e., liability for the full substantive offense—on an ineffective attempt or agreement to aid."<sup>515</sup>

One other issue relevant to the conduct requirement of accomplice liability relates to the nature of the communication implicated by the would-be accomplice's conduct where it is based solely on encouragement, namely, just how detailed must the communication be? The question is significant given the free speech interests implicated by solicitations to engage in criminal conduct.<sup>516</sup>

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<sup>507</sup> *Id.*

<sup>508</sup> *Id.*

<sup>509</sup> *Id.* at 304–05.

<sup>510</sup> See RCC § 301(c): Relation to National Legal Trends (detailing the extent to which most jurisdictions discount the penalties for criminal attempts in comparison to the penalties applicable to completed offenses).

<sup>511</sup> For example, public opinion surveys seem to consistently find that lay judgments of relative blameworthiness view the consummation of results as an important and significant grading factor. See, e.g., PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 14-28, 157-97 (1995).

<sup>512</sup> For example, one survey evaluating community sentiment on unsuccessful accomplices in particular, finds that in cases where an "accomplice provides no real assistance or encouragement of any kind," lay jurors report "a very low assignment of liability." *Id.* at 263-64.

<sup>513</sup> See *id.*

<sup>514</sup> Robinson, *supra* note 125, at 305.

<sup>515</sup> *Id.*

<sup>516</sup> DRESSLER, *supra* note 78, at § 28.01 (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645); see Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016) ("Solicitation may help cause crime by encouraging people to commit it. Aiding and

As a constitutional matter, the U.S. Supreme Court case law surrounding the relationship between the First Amendment and criminalization of speech has historically been murky.<sup>517</sup> Most recently, in *United States v. Williams*, the U.S. Supreme Court clarified that “[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection.”<sup>518</sup> But it also reaffirmed the crucial yet nevertheless ambiguous distinction “between a proposal to engage in illegal activity and the abstract advocacy of illegality,” the latter being entitled to constitutional protection.<sup>519</sup>

Constitutional considerations aside, there “remains a legislative question” concerning whether and to what extent criminal liability based upon encouragement “should be curtailed to avoid chilling speech.”<sup>520</sup> “The main problem,” as the drafters of the Model Penal Code phrase it, is how to prevent

[L]egitimate agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime. It would not be difficult to convince a jury that inflammatory rhetoric on behalf of an unpopular cause is in reality an invitation to violate the law rather than an effort to seek its change through legitimate criticism. Minority criticism has to be extreme in order to be politically audible, and if it employs the typical device of lauding a martyr, who is likely to have been a lawbreaker, the eulogy runs the risk of being characterized as a request for emulation.<sup>521</sup>

In light of these constitutional and policy considerations, the modern approach to criminalizing encouragement, reflected in both contemporary solicitation and complicity statutes, is to require the solicitation of “specific conduct that would constitute” the target crime.<sup>522</sup> Practically speaking, this requires proof of the utterance of a communication

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abetting may help cause crime by informing them how to commit it (or how to avoid being caught)—and may in turn encourage people to commit it as well.”)

<sup>517</sup> See, e.g., *Yates v. United States*, 354 U.S. 298, 318 (1957) (holding that, with respect to violations of the Smith Act, there must be advocacy of action to accomplish the overthrow of the government by force and violence rather than advocacy of the abstract doctrine of violent overthrow), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”). For discussion of these cases and their progeny, see, for example, Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005); Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981 (2016); Model Penal Code § 5.02 cmt. at 378-79; *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 248 (4th Cir. 1997).

<sup>518</sup> *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

<sup>519</sup> *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928-929 (1982)).

<sup>520</sup> Model Penal Code § 5.02 cmt. at 375-76.

<sup>521</sup> *Id.*

<sup>522</sup> Model Penal Code § 5.02(1). Such language is rooted in the Model Penal Code’s general solicitation provision, which reads: “A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in *specific conduct* that would constitute such crime . . .” Model Penal Code § 5.02(1); see Model Penal Code

that, when viewed “in the context of the knowledge and position of the intended recipient, [carries] meaning in terms of some concrete course of conduct that it is the actor’s object to incite.”<sup>523</sup>

Consistent with national legal trends outlined above, RCC § 210 codifies the following policies relevant to the conduct requirement of accomplice liability. Subsection (a)(1) establishes the first of two alternative means of being an accomplice: by “assist[ing] another person with the planning or commission of conduct constituting that offense.” Subsection thereafter (a)(2) establishes that “encourag[ing] another person to engage in specific conduct constituting that offense” provides an alternative means of being an accomplice. Omitted from either formulation is an “agreement or attempt to aid,” which clarifies that an unsuccessful attempt at facilitating or promoting an offense will not suffice to establish accomplice liability. Rather, it must be proven that the defendant’s conduct, in fact, assisted or influenced the commission of an offense by another.

RCC § 210(a), (b), & (c): Relation to National Legal Trends on Culpable Mental State Requirement. It has been observed that the culpable mental state requirement of accomplice liability is a “very difficult” topic,<sup>524</sup> which has been the subject of “a long history of disagreement”<sup>525</sup> as well as “[c]onsiderable confusion.”<sup>526</sup> Legal authorities

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§ 5.02 cmt. at 376 n.48 (analyzing legislative trends based on, or in accordance with, the “specific conduct” principle incorporated into the Model Penal Code). Thereafter, the Model Penal Code’s general provision on accomplice liability incorporates the specific conduct principle through reliance on the term “solicitation” as the basis for codifying the encouragement prong. Model Penal Code § 2.06(3)(a)(i) (“A person is an accomplice of another person in the commission of an offense if . . . with the purpose of promoting or facilitating the commission of the offense, he . . . solicits such other person to commit it.”); *see supra* note 125 (collecting legislative authorities that similarly incorporate the term “solicits” into their accomplice liability statutes). For an example of a reform jurisdiction applying this two-step approach, compare Oregon’s general solicitation statute, Or. Rev. Stat. Ann. § 161.435(1) (“A person commits the crime of solicitation if with the intent of causing another to engage in *specific conduct* constituting a crime . . .”), with its general accomplice liability statute, Or. Rev. Stat. Ann. § 161.155 (“A person is criminally liable for the conduct of another person constituting a crime if . . . With the intent to promote or facilitate the commission of the crime the person . . . *Solicits* or commands such other person to commit the crime . . .”).

<sup>523</sup> Model Penal Code § 5.02 cmt. at 375-76.; *see, e.g., State v. Johnson*, 202 Or. App. 478, 483 (2005). This standard is relatively broad. For example, it does not require specificity as to “the details (time, place, manner) of the conduct that is the subject of the solicitation.” *Johnson*, 202 Or. App. at 483; *see* Model Penal Code § 5.02 cmt. at 376 (“It is, of course, unnecessary for the actor to go into great detail as to the manner in which the crime solicited is to be committed.”). Nor does it require that “the act of solicitation be a personal communication to a particular individual.” LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Schleifer*, 99 Conn. 432, 121 A. 805 (Dist. Ct. 1923) (information charging one with soliciting from a public platform a number of persons to commit the crimes of murder and robbery is sufficient). But it does bring with it a few limitations. For example, “general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently specific . . . to constitute criminal solicitation.” Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor does criminal liability extend to “a situation where the defendant makes a general solicitation (however reprehensible) to a large indefinable group to commit a crime.” *People v. Quentin*, 296 N.Y.S.2d 443, 448 (Dist. Ct. 1968); *see Johnson*, 202 Or. App. at 484 (observing that a “general exhortation to ‘go out and revolt’ does not constitute solicitation).

<sup>524</sup> Weisberg, *supra* note 79, at 232.

<sup>525</sup> Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131, 131 (2015).



generally agree that “a person is an accomplice in the commission of an offense if he intentionally aids the primary party to commit the offense charged.”<sup>527</sup> Upon closer analysis, however, this broad statement obscures a range of complexities surrounding the culpable mental state requirement of accomplice liability.<sup>528</sup> The relevant complexities follow the same pattern as those surrounding the general inchoate offenses of solicitation and conspiracy.<sup>529</sup>

Ordinarily, a clear element analysis of a consummated crime entails a consideration of “the actor’s state of mind—whether he must act purposely, knowingly, recklessly, or negligently—with respect to” the results and circumstances of an offense.<sup>530</sup> The same is also true of the culpable mental state requirement applicable to accomplice liability, which—like that of solicitation and conspiracy liability—must be analyzed with respect to the culpable mental state requirement applicable to the target offense.<sup>531</sup> At the same time, the multi-participant nature of this theory of liability raises its own set of culpable mental state considerations, namely, the relationship between the actor’s mental state and future conduct (committed by someone else), which culminates in commission of the target offense.<sup>532</sup> For this reason, it is often said that accomplice liability—like solicitation<sup>533</sup> and conspiracy liability<sup>534</sup>—is comprised of “dual intent” requirements.<sup>535</sup>

More specifically, the first intent requirement relates to the accomplice’s culpable mental state with respect to the future conduct of the principal: generally speaking, the accomplice must “intend,” by his or her assistance, to promote or facilitate conduct

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<sup>526</sup> LAFAYE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2.

<sup>527</sup> DRESSLER, *supra* note 79, at § 30.05.

<sup>528</sup> Here, for example, is how one commentator has summarized some of the relevant questions:

[A]re there two mens rea requirements here, a “primary” mens rea having as its object the aiding of the conduct of another person, and a second requirement having as its object the elements of the underlying crime aided? If so, does the secondary requirement expand or limit the liability otherwise permitted by the primary requirement? What is the relationship between the mens rea required for conviction of guilty principals and the secondary mens rea required for conviction as an accomplice? Does this vary depending on the kind of element (circumstance or result) of the underlying offense involved?”

Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 396 (2007).

<sup>529</sup> See generally RCC § 302: Relation to National Legal Trends on Culpable Mental State Requirement; RCC § 303: Relation to National Legal Trends on Culpable Mental State Requirement.

<sup>530</sup> Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 967 (1961).

<sup>531</sup> *Id.*

<sup>532</sup> See, e.g., Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).

<sup>533</sup> For discussion of the dual intent requirement in the context of solicitation, see, for example, DRESSLER, *supra* note 79, at § 28.01; *State v. Garrison*, 40 S.W.3d 426 (Tenn. 2000).

<sup>534</sup> For discussion of the dual intent requirement in the context of conspiracy, see, for example, *State v. Maldonado*, 2005-NMCA-072, ¶ 10, 137 N.M. 699, 702; *United States v. Piper*, 35 F.3d 611, 614-15 (1st Cir. 1994).

<sup>535</sup> For discussion of the dual intent requirement in the context of complicity, see, for example, DRESSLER, *supra* note 79, at § 30.05; *People v. Childress*, 363 P.3d 155, 164 (Colo. 2015); *State v. Foster*, 522 A.2d 277, 281 (Conn. 1987).

planned to culminate in an offense.<sup>536</sup> The second intent requirement, in contrast, relates to the accomplice's culpable mental state with respect to the results and/or circumstance elements that comprise the target offense: generally speaking, the accomplice must "intend," by his or her assistance, to bring them about.<sup>537</sup>

To illustrate how these dual intent requirements fit together, consider the following scenario.<sup>538</sup> Police receive a report that someone posing as a janitor in a District of Columbia government building, P, intends to murder a plain-clothes police officer sitting in the lobby to the entrance, V. According to this reliable tip, P's plan is to quickly unhinge a large television that stands high above V, with the hopes that it will kill V upon impact. Soon thereafter, two officers arrive at the front of the building, only to observe an individual, A, with a large collection of packages blocking the front entrance to the building. The officers' entry into the building is delayed due to A's blockage, which in turn enables P to successfully carry out the assassination. If A later finds herself in D.C. Superior Court charged with aiding the murder of a police officer committed by P, can she be convicted as an accomplice?

The answer to this question depends upon whether A's state of mind fulfills both of the dual intent requirements governing accomplice liability. For example, if A was blocking the entrance to the building because she accidentally dropped her packages, then neither requirement is met: A did not intentionally assist the conduct of P which, in fact, resulted in the death of a police officer; nor did she act with the intent that, by her conduct, a police officer be killed.<sup>539</sup>

Alternatively, if A was blocking the entrance to the building because P, posing as a janitor, had asked A to stop anyone from entering the building so that a damaged television could be quickly unhinged, the first requirement is met: A intentionally assisted the conduct of P which, in fact, resulted in the death of a police officer. But the second requirement is not met: A did not intend, through her conduct, to cause the death of anyone, let alone a police officer.

Lastly, if A was blocking the entrance to the building because P had approached her with an opportunity to seek retribution against the same officer responsible for disrupting a drug conspiracy A was involved with years ago, then A fulfills both

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<sup>536</sup> Robinson, *supra* note 125, at 864. See also Robinson & Grall, *supra* note 118, at 758 ("The verb aids . . . actually combines conduct and results elements; the actor must engage in conduct that provides aid. The significant culpability here is culpability as to that result."); Kadish, *supra* note 101, at 349 ("In addition to having the mens rea for the underlying crime, the accomplice must intend that the principal commit the acts that give rise to the principal's liability.").

<sup>537</sup> Robinson, *supra* note 125, at 864; see Kadish, *supra* note 101, at 349 ("[T]o be liable as an accomplice in the crime committed by the principal, the secondary party must act with the *mens rea* required by the definition of the principal's crime.").

<sup>538</sup> This scenario is a modified version of that offered in Kinports, *supra* note 79, at 135.

<sup>539</sup> It's also theoretically possible for the second, but not the first, requirement to exist. This would be the case, for example, if A, having just observed the undercover officer from afar (who had previously arrested her for her participation in a drug conspiracy a few years back), was overcome by the thought, "I should concoct a plan to kill that officer one day" at the moment she dropped the packages. Under these circumstances, A plausibly possessed the intent to kill a police officer, though she nevertheless lacked the intent to assist P's conduct of which she was unaware.

requirements: A acted with both the intent to facilitate D's conduct and the intent that, through such conduct, a police officer be killed.<sup>540</sup>

Unpacking these dual intent requirements provides the basis for more clearly analyzing the culpability-related policy issues at the heart of accomplice liability. With respect to the first intent requirement, for example, the central question is this: may an accomplice be held criminally liable if he or she is *merely aware* (i.e., knows) that, by providing assistance, he or she is promoting or facilitating conduct planned to culminate in an offense. Or, alternatively, must it be proven that the accomplice *desires* (i.e., has the purpose) to promote or facilitate such conduct?<sup>541</sup>

Resolution of this issue is crucial to determining whether and to what extent merchants who sell legal goods in the ordinary course of business that end up facilitating criminal acts may be subjected to criminal liability.<sup>542</sup> For example, imagine a car dealer who tries to convince a prospective purchaser to buy a car knowing that the vehicle will be used in a bank robbery. Or consider a motel operator who tries to rent a room to a man who is with a woman below the age of consent, knowing that it'll be used for sex.<sup>543</sup> In these kinds of cases, "the person furnishing goods or services is aware of the customer's criminal intentions, but may not care whether the crime is committed."<sup>544</sup>

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<sup>540</sup> Note that if A lacked awareness that V was a police officer on these facts, then the second intent requirement would probably not be met: although A intended to kill V, A did not intend to kill a *police officer*.

<sup>541</sup> Conceptually, this issue is a product of the fact that the concept of intent is, and "has always been, an ambiguous one." Wechsler et al., *supra* note 152, at 577. "[T]raditionally," for example, intent was "viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of a belief as to a practical certainty." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978); see *Tison v. Arizona*, 481 U.S. 137, 150 (1987). In specific contexts, however—such as, for example, in the context of inchoate crimes such as conspiracy and solicitation, "where a heightened mental state separates criminality itself from otherwise innocuous behavior"<sup>541</sup>—the common law employed the term intent as a synonym for purpose, thereby excluding knowledge as a viable basis for liability. *United States v. Bailey*, 444 U.S. 394, 405 (1980). It should be noted, however, "that purpose is rarely the required mens rea for the commission of a crime." Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1571 (2006). As the Model Penal Code drafters recognized, "[t]he distinction [between purpose and knowledge] is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient." Model Penal Code § 2.02 cmt., at 234.

<sup>542</sup> See Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1192 (1997); Model Penal Code § 5.03 cmt. at 403.

<sup>543</sup> Other illustrative situations include:

A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in commission of a crime. A doctor counsels against an abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist. A utility provides telephone or telegraph service, knowing it is used for bookmaking. An employee puts through a shipment in the course of his employment though he knows the shipment is illegal. A farm boy clears the ground for setting up a still, knowing that the venture is illicit.

Model Penal Code § 2.06, cmt. at 316.

<sup>544</sup> DRESSLER, *supra* note 79, at § 27.07 ("To be criminally liable, of course," this actor "must at least have knowledge of the use to which the materials are being put"; however, "the difficult issue presented is whether knowingly facilitating the commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end.").

What remains to be determined is whether this culpable mental state of knowing indifference provides a sufficient basis for imposing accomplice liability.

There are two different approaches American legal authorities apply to resolving the issue: the “true purpose view” and the “knowledge view.” Under a true purpose view, nothing short of a *conscious desire* to promote or facilitate criminal conduct by another will suffice for accomplice liability. As the “canonical formulation”<sup>545</sup> of this approach—originally articulated by Judge Learned Hand in *United States v. Peoni*,<sup>546</sup> but thereafter endorsed by the U.S. Supreme Court in *Nye & Nissen v. United States*<sup>547</sup>—phrases it: “To aid and abet a crime, a defendant must not just ‘in some sort associate himself with the venture,’ but also ‘participate in it as in something that he wishes to bring about’ and ‘seek by his action to make it succeed.’”<sup>548</sup>

The knowledge view, in contrast, accepts *mere awareness* that one is promoting or facilitating the commission of a crime by another as a sufficient basis for accomplice liability. Under this approach—as Judge Richard Parker famously reasoned in *Backun v. United States*—“[g]uilt as an accessory depends, not on ‘having a stake’ in the outcome of crime,” but rather, on consciously “aiding and assisting the perpetrators” of a criminal scheme in a more conventional sense.<sup>549</sup>

The choice between these two approaches implicates conflicting policy considerations, namely, “that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes.”<sup>550</sup> More specifically, underlying the true purpose view is the idea that:

[T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner. [I]n extending liability to merchants who know harm will occur from their activities, there is a risk that merchants who only suspect their customers’ criminal intentions (thus, are merely reckless in regard to their customers’ plans) will also be prosecuted, thereby seriously undermining lawful commerce.<sup>551</sup>

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<sup>545</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1248–49 (2014).

<sup>546</sup> 100 F.2d 401, 402 (2d Cir. 1938).

<sup>547</sup> 336 U.S. 613, 619 (1949) (quoting *Peoni*, 100 F.2d at 402).

<sup>548</sup> At issue in *Peoni* was whether the defendant, who had sold counterfeit bills to a purchaser who had then resold the counterfeit money to a third party, could be held criminally responsible for the possession of the counterfeit money by the third party on a complicity theory. 100 F.2d, at 402. On the facts presented, the prosecution could *not* show that the defendant desired for the subsequent transaction to occur, and, therefore, for the third party to possess the counterfeit money. *Id.* Instead, the government’s theory was that the subsequent transaction “was a natural consequence of Peoni’s original act, with which he might be charged.” *Id.* On appeal, the Second Circuit rejected this argument, holding that, in the absence of a desire to aid the third party’s possession, the defendant could not be deemed an accomplice. *Id.*

<sup>549</sup> 112 F.2d 635, 637 (4th Cir. 1940). The defendant in *Backun* knowingly sold stolen silverware to a third person, Zucker, in New York. *Id.* Zucker then transported the silverware to North Carolina to sell it. *Id.* The defendant wanted Zucker to sell the silverware and knew Zucker would go out of state to do so, but the defendant did not specifically desire that Zucker leave the state. *Id.* Judge Parker upheld his conviction of interstate transportation of stolen merchandise, finding that conviction of a defendant for knowingly facilitating the interstate transportation of stolen merchandise was appropriate under the circumstances. *Id.*

<sup>550</sup> Model Penal Code § 5.03 cmt. at 403.

<sup>551</sup> *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff’d*, 311 U.S. 205 (1940) (Hand, J.).

The knowledge view, in contrast, reflects the position that:

[S]ociety has a compelling interest in deterring people from furnishing their wares and skills to those whom they know are practically certain to use them unlawfully. Free enterprise should not immunize an actor from criminal responsibility in such circumstances; unmitigated desire for profits or simple moral indifference should not be rewarded at the expense of crime prevention.<sup>552</sup>

Historically, the choice between these two positions has been the subject of much legal debate and disagreement.<sup>553</sup> Today, however, a “majority of jurisdictions have adopted the Hand approach over Parker’s analysis in *Backun* and require a showing of purpose.”<sup>554</sup> The true purpose view has prevailed, in large part, due to the recommendations of the Model Penal Code.

Having considered the consequences of holding criminally liable those who knowingly provide goods or services to criminal schemes, the Model Penal Code drafters ultimately opted against it, siding “in the complicity provisions of the Code[] in favor of requiring a purpose to advance the criminal end.”<sup>555</sup> This is reflected in the Model Penal Code’s general complicity provision, § 2.06(3), which codifies a broad purpose requirement—similarly employed in the Code’s general definitions of conspiracy<sup>556</sup> and solicitation<sup>557</sup>—under which the requisite aid or encouragement must be accompanied by “the purpose of promoting or facilitating the commission of the crime.”<sup>558</sup>

Textually speaking, the scope of this broadly phrased purpose requirement is ambiguous.<sup>559</sup> Nevertheless, it’s clear from the Model Penal Code commentary that the

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<sup>552</sup> DRESSLER, *supra* note 79, at § 27.07; see Model Penal Code § 2.06 cmt. at 318 n.58 (“Conduct that knowingly facilitates the commission of crimes is by hypothesis a proper object of preventive effort by the penal law, unless, of course, it is affirmatively justifiable. It is important in that effort to safeguard the innocent, but the requirement of guilty knowledge adequately serves this end—knowledge both that there is a purpose to commit a crime and that one’s own behavior renders aid.”).

<sup>553</sup> Weisberg, *supra* note 79, at 236.

<sup>554</sup> *Id.* Note that the analysis of national legal trends here, as well as below with respect to the relationship between the accomplice’s state of mind and the results/circumstances of the target offense, excludes the natural and probable consequence rule, under which “accomplice liability extends to acts of the principal in the first degree which were a ‘natural and probable consequence’ of the criminal scheme the accomplice encouraged or aided.” LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.3. For analysis of the rule, as well as the policy considerations that support rejecting it, see *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (*en banc*) (rejecting application of the natural and probable consequence rule).

<sup>555</sup> Model Penal Code § 5.03 cmt. at 406.

<sup>556</sup> Model Penal Code § 5.03(1)

<sup>557</sup> Model Penal Code § 5.02(1).

<sup>558</sup> Model Penal Code § 2.06(1). In a tentative draft of the Model Penal Code, the drafters suggested that accomplice liability be permitted where one *knowingly* provided *substantial assistance*. See Model Penal Code § 2.04(3)(b) (Tent. Draft No. 1, 1953) (providing for accomplice liability if “acting with the knowledge that [another] person was committing or had the purpose of committing the crime, [the accomplice] knowingly, substantially facilitated its commission . . .”). However, after considering the various interests implicated by these alternatives, the drafters instead chose to require purpose. See Robinson & Grall, *supra* note 118, at 758.

<sup>559</sup> See *infra* notes 255-66 and accompanying text (discussing ambiguities).

drafter's intended for it to apply, at minimum, to the conduct culminating in an offense.<sup>560</sup> Explicitly endorsing Judge Hand's decision in *Peoni*, the Model Penal Code commentary states that § 2.06(3) was intended to import a requirement that the accomplice have "as his conscious objective the bringing about of conduct that the Code has declared to be criminal."<sup>561</sup> Absent this "purpose to promote or facilitate the particular conduct that forms the basis for the charge," the Model Penal Code would preclude liability as an accomplice.<sup>562</sup>

Since publication in 1962, "most states have followed the Model Penal Code's lead" by requiring proof that an accomplice acted with the "purpose" to facilitate the principal's conduct.<sup>563</sup> Legislative adoption of this true purpose approach is a particularly pervasive feature of modern criminal codes, which frequently incorporate

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<sup>560</sup> The drafters' decision to incorporate a purpose requirement of this nature serves two different rationales. The first is evidentiary: "because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent," a purpose requirement appropriately avoids the problem of false positives. Model Penal Code § 2.06 cmt. at 312 & n.42, 314-19; see Kinports, *supra* note 79, at 137. The second, and perhaps more import, rationale emphasizes culpability, namely, it ensures that those who may have committed minor or equivocal acts of assistance are not held responsible for crimes they did not purposely facilitate. Model Penal Code § 2.06 cmt. at 312 & n.42, 314-19; see Kinports, *supra* note 79, at 137.

<sup>561</sup> Model Penal Code § 2.06 cmt. at 310, 316.

<sup>562</sup> Model Penal Code § 2.06 cmt. at 311. Note, however, that this purpose requirement was not understood by the drafters to cover the means with which an offense is committed. As the Model Penal Code commentary phrases it:

This does not mean, of course, that the precise means used in the commission of the crime must have been fixed or contemplated or, when they have been, that liability is limited to their employment. One who solicits an end, or aids or agrees to aid in its achievement, is an accomplice in whatever means may be employed, insofar as they constitute or commit an offense fairly envisaged in the purposes of the association.

Model Penal Code § 2.06 cmt. at 310; see Kadish, *supra* note 101, at 350-51 ("The intention required is that the principal should commit the acts constituting the crime, not that he should use the means intended by the accomplice.").

<sup>563</sup> Robinson & Grall, *supra* note 118, at 739; see, e.g., Weisberg, *supra* note 79, at 239. Note, however, that some jurisdictions "have created an additional offense of criminal facilitation that imposes reduced punishment for knowing assistance of a substantive offense." Robinson & Grall, *supra* note 118, at 739.

One survey finds that "only four states codify facilitation." Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 116 (1989); see Ky. Rev. Stat. Ann. § 506.080 ("A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such a person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime."); Ariz. Rev. Stat. Ann. § 13-1004 ("A person commits facilitation if, acting with knowledge that another person is committing or intends to commit an offense, the person knowingly provides the other person with means or opportunity for the commission of the offense.").

The basis for these statutes is the National Commission on Reform of Federal Criminal Laws included a general facilitation provision in its proposed Federal Criminal Code." See Proposed Federal Criminal Code § 1002 ("A person is guilty of criminal facilitation if he knowingly provides substantial assistance to a person intending to commit a felony, and that person, in fact, commits the crime contemplated, or a like or related felony, employing the assistance so provided."); see also 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 160 (1970).

For application of these state facilitation statutes, see, for example, *State v. Politte*, 136 Ariz. 117, 121, 664 P.2d 661, 665 (1982); *Luttrell v. Commonwealth*, 554 S.W.2d 75, 79 (Ky. 1977).

general complicity provisions modeled on § 2.06(3) that—in substance if not form—seem to codify the true purpose view.<sup>564</sup> But even in those jurisdictions that have not undertaken comprehensive code reform efforts, the relevant legal authorities—namely, case law and jury instructions—have strongly “rejected, explicitly or implicitly, a standard that would permit the conviction of an accomplice without the requisite [criminal] purpose.”<sup>565</sup> The true purpose view is also “particularly popular in the academic community,”<sup>566</sup> where there is significant concern that drawing “the circle of criminal liability any wider” would cast a “pall on ordinary activity.”<sup>567</sup>

The second intent requirement of accomplice liability, in contrast to the first, is comprised of a far broader set of policy issues, which implicate the nature of the relationship between the accomplice’s state of mind and the culpability requirement applicable to the target offense.

Generally speaking, there is broad agreement that an accomplice “must not only have the purpose that someone else engage in the conduct which constitutes the particular crime charged, but the accomplice must also share in the *same intent* which is required

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<sup>564</sup> Modern criminal codes express this point in various ways. Some, for example, require that one assist or encourage a crime “with the intent to promote or facilitate such commission.” LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; *see* Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Colo. Rev. Stat. Ann. § 18-1-603; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; S.D. Cod. Laws § 22-33-3; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020. Others instead require that one “intentionally assist or encourage a crime.” LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; *see* Ga. Code Ann. § 16-2-20; Ind. Code Ann. § 35-41-2-4. For a comprehensive overview of legislative trends, *see* John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237 (2008).

<sup>565</sup> *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*) (collecting authorities); *see, e.g., People v. Beeman*, 674 P.2d 1318 (Cal. 1984)

<sup>566</sup> Decker, *supra* note 186, at 239. *See, e.g.,* DRESSLER, *supra* note 79, at §§ 29.05, 30.05; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; Robinson & Grall, *supra* note 118, at 758; Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 53 COLUM. L. REV. 228, 239 (1953); Allen R. Friedman, *Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Nonracketeer Under Rico Section 1962(a)*, 82 COLUM. L. REV. 574, 585 (1982). *See also* Alexander & Kessler, *supra* note 164, at 1192 (advocating for application of a general recklessness requirement but nevertheless endorsing a carve out, which establishes that “an actor who sells goods or services in the regular course of his trade shall not be deemed to have rendered aid or encouragement that is sufficient for solicitation liability”). *Cf.* Tyler B. Robinson, *A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under S 924(c)*, 96 MICH. L. REV. 783, 788 (1997) (analyzing ambiguity concerning the purpose requirement where multi-element crimes are at issue). For discussion of the ways in which the traditional purpose vs. knowledge debate misses important aspects of the culpability of accomplice liability, *see* Gideon Yaffe, *Intending to Aid*, 33 L. & PHIL. 1 (2014); Sarch, *supra* note 147, at 131; Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460 (2013).

<sup>567</sup> Kadish, *supra* note 101, at 353. More specifically, the commonly expressed concern is that if the criminal law prohibited conduct that knowingly facilitates the commission of crime, that would give us reason to “fear criminal liability for what others might do simply because our actions made their acts more probable.” *Id.* Such a phenomenon, it is argued, is particularly problematic in the commercial context, wherein “people otherwise lawfully conducting their affairs should not be constrained by fear of liability for what their customers will do.” *Id.*

for commission of the substantive offense.”<sup>568</sup> Less clear, and more controversial, however, is what to do about a substantive offense that does not require “intent” at all, but rather, is comprised of one or more objective elements subject to recklessness, negligence, or strict liability? In this situation, one must ask: should proof that an accomplice acted with the requisite non-intentional mental state (or none at all in the case of strict liability) be sufficient—or, alternatively, must a higher level of culpability be proven?

Generally speaking, there are two alternative approaches jurisdictions apply to resolving this question.<sup>569</sup> The first is a principle of *culpable mental state elevation*, under which any non-intentional mental state applicable to the target offense—for example, recklessness or negligence—must be elevated to a higher culpable mental state—for example, purpose or knowledge—when the government proceeds upon an accomplice theory of liability. The second, and alternative, principle is one of *culpable mental state equivalency*, under which proof of the culpable mental state requirement (if any) applicable to the target offense will suffice for purposes of accomplice liability.

The choice between these two principles is a consequential one, which American legal authorities separately address in the context of result elements and circumstance elements. Consider first the nature of, and legal trends relevant to, the decision in the context of result elements. The following scenario is illustrative of how the issue may often arise. Passenger A tells driver P to exceed the legal speed limit so that they can both get to a party on time, notwithstanding the fact that they’re currently on a narrow road near an elementary school. P is responsive to the request and quickly steps on the gas. Soon thereafter, P loses control of his car and fatally crashes into V, a nearby child leaving school for the day.

Assuming both A and P were aware that P’s speeding created a substantial risk of death to V, P is clearly guilty of reckless homicide for his own conduct. But can A be convicted of the same under an accomplice theory of liability? Under a principle of culpable mental state elevation, the answer is no: A is not liable for reckless homicide because—although A purposely encouraged the requisite criminal conduct—he lacked the intent to kill. Under a principle of culpable mental state equivalency, in contrast, the answer is yes: A is liable because he purposely encouraged P’s criminal conduct with the culpable mental state applicable to reckless homicide, consciously disregarding a substantial risk of death.

It’s important to note that accepting a principle of culpable mental state equivalency as to results opens the door to a corollary culpability-based grading issue, which arises where an accomplice and principal participate in a criminal scheme that involves causing a prohibited result with *differing states of mind*. If the accomplice is

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<sup>568</sup> *State v. Williams*, 718 A.2d 721, 723 (N.J. Super. Ct. Law Div. 1998) (citations omitted). For authority in support of the proposition that an accomplice may never be held liable absent proof of a mental state requirement that is *at least as demanding* as that applicable to the results and circumstances of the target offense, see, for example, DRESSLER, *supra* note 79, at § 30.05; *State v. White*, 622 S.W.2d 939, 945 (Mo. 1981); *Commonwealth v. Henderson*, 249 Pa. Super. 472, 482 (1977); *Morrison v. State*, 608 S.W.2d 233, 234 (Tex. Crim. App. 1980).

<sup>569</sup> For one jurisdiction that has applied both, compare *Echols v. State*, 818 P.2d 691 (Alaska Ct. App. 1991) (applying a principle of culpable mental state elevation to result element crimes) with *Riley v. State*, 60 P.3d 204 (Alaska Ct. App. 2002) (overruling *Echols*, and adopting a principle of culpable mental state equivalency to result element crimes).



subsequently prosecuted under a statute that grades based upon those distinctions, the court must then determine the legal relevance of the variance in culpability. To illustrate, consider two variations on the following fact pattern: A gives P a knife and encourages P to throw it at V from a distance; soon thereafter, P throws the knife, which causes V to suffer a fatal injury.

*Scenario One.* At the time A gave P the knife, A was in an intoxicated state and possessed only a minimal awareness of the possibility that V would be fatally injured. P, in contrast, was in a sober state, and threw the knife with the express desire of killing V.

*Scenario Two.* At the time A gave P the knife, A was in a sober state and possessed the express desire of killing V. P, in contrast, was in an intoxicated state and possessed only minimal awareness of the possibility that V would be fatally injured.

In the first scenario, A has acted with reckless as to causing V's death, the culpability of manslaughter, while P has acted with an intent to kill, the culpability of murder. In the second scenario, in contrast, the variance in culpability is flipped: A has acted with the culpability of murder, while P has acted with the culpability of manslaughter. In both scenarios, the following question presents itself: should A's liability as an accomplice be individualized (i.e., based upon his own culpable mental state), or, alternatively, linked in some way to the mental state of P?

Contemporary American legal authorities have resolved the above culpability issues relevant to result elements in a relatively uniform fashion, which is characterized by two basic principles. The first is a principle of culpable mental state equivocation, under which “[c]onviction of an accomplice in the commission of a crime of recklessness or negligence is permitted” based upon proof that he or she purposely assisted the principal party to engage in the conduct that forms the basis of the offense with “the mental state—intent, recklessness, or negligence, as the case may be—required for commission of the substantive offense.”<sup>570</sup> The second is a principle of individualized culpability, under which an accomplice prosecuted for an offense graded by distinctions in mental state as to result elements is subject to any grade for which he or she—rather than the principal—possesses the requisite form of culpability.<sup>571</sup>

The modern legislative basis for both of these principles is Model Penal Code § 2.06(4), which reads:

When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

This provision, as the accompanying explanatory note explains, was intended to serve two functions. The first was to establish that “complicity in conduct causing a particular criminal result entails accountability for that result so long as the accomplice is

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<sup>570</sup> DRESSLER, *supra* note 79, at § 30.05.

<sup>571</sup> *Id.*

personally culpable with respect to the result to the extent demanded by the definition of the crime.”<sup>572</sup> Beyond adopting a principle of culpable mental state equivalency, however, the drafters of the Model Penal Code also intended for § 2.06(4) to establish that, in those situations where two or more criminal actors jointly commit a crime that is divided into degrees based upon distinctions in culpability as to result elements, the liability of each participant in the criminal scheme should be “measured by his own degree of culpability toward the result.”<sup>573</sup>

Since completion of the Model Penal Code, the drafters recommended approach to dealing with the culpability of accomplice liability in the context of result elements has gone on to become “the overwhelming majority rule.”<sup>574</sup> Legislatively speaking, only a handful of modern criminal codes explicitly adopt statutory language based on Model Penal Code § 2.06(4).<sup>575</sup> Nevertheless, a few other reform jurisdictions communicate the same policies through other legislative means.<sup>576</sup> And case law from both inside<sup>577</sup> and outside<sup>578</sup> reform jurisdictions appears to be consistent with the

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<sup>572</sup> Model Penal Code § 2.06(4): Explanatory Note.

<sup>573</sup> *Id.* So, for example, “if the accomplice recklessly endangers life by rendering assistance to another, he can be convicted of manslaughter if a death results, even though the principal actor’s liability is at a different level.” Model Penal Code § 2.06 cmt. at 311.

<sup>574</sup> DRESSLER, *supra* note 79, at § 30.05.

<sup>575</sup> See Ariz. Rev. Stat. Ann. §13-303(B); Ark. Code Ann. §5-2-403(b); Haw. Rev. Stat. Ann. § 702-223; Ky. Rev. Stat. Ann. §502.020(2); N.H. Rev. Stat. Ann. §626:8(IV); 18 Pa. Cons. Stat. Ann. § 306(d).

<sup>576</sup> For example, a few reform jurisdictions incorporate prefatory language—“acting with the mental state required for commission of an offense”—into their accomplice liability statutes that appears to be indicative of a principal of culpable mental state equivalency applicable to results. See Conn. Gen. Stat. Ann. § 53a-8; N.Y. Penal Law § 20.00; Kan. Stat. Ann. § 21-5210(a). And a few other reform jurisdictions incorporate a grading provision indicative of the same. See, e.g., Del. Code Ann. tit. 11, § 274; N.Y. Penal Law § 20.15; Mo. Rev. Stat. § 562.051; Ark. Code Ann. § 5-2-406.

<sup>577</sup> For case law applying a principle of culpable mental state equivalency, see *Ex parte Simmons*, 649 So.2d 1282, 1284–85 (Ala. 1994) (A may be convicted of reckless murder if he purposely aided or encouraged D to fire a weapon on a public street, recklessly resulting in the death of a child); *State v. Garnica*, 98 P.3d 207, 209 (Ariz. Ct. App. 2004) (upholding homicide conviction based upon accomplice liability for recklessness as to causing death); *People v. Wheeler*, 772 P.2d 101, 103 (Colo. 1989) (upholding homicide conviction based upon accomplice liability for negligence as to causing death); *State v. Anthony*, 861 A.2d 773, 776 (N.H. 2004) (upholding cruelty conviction based upon accomplice liability for negligence as to causing harm); *but see People v. Mickel*, 73 Ill. App. 3d 16, 391 N.E.2d 558 (1979) (intention requirement precluded liability for aiding any homicide other than intentional homicide and implicitly held that the accomplice must act intentionally as to each offense element).

For case law applying an individualized approach to grading based upon culpability, see *State v. Ervin*, 835 S.W.2d 905, 923 (Mo. 1992) (“[T]wo murderous actors may have differing mental states, although they act together. A defendant, in a state of cool blood, may promote a murder by aiding a person who kills in the heat of passion. Such a defendant would be guilty of murder in the first degree though the other person is guilty of a lesser offense.”); *Bosnick v. State*, 248 Ark. 846, 454 S.W.2d 311 (1970); *People v. Castro*, 55 N.Y.2d 972, 449 N.Y.S.2d 184, 434 N.E.2d 253 (1982); *Chance v. State*, 685 A.2d 351, 360 (Del. 1996); see also *Maiorino v. Scully*, 746 F. Supp. 331 (S.D.N.Y. 1990).

<sup>578</sup> For case law applying a principle of culpable mental state equivalency, see *Perry v. United States*, 36 A.3d 799, 817–18 (D.C. 2011) (upholding assault conviction based upon accomplice liability for extreme recklessness as to causing serious bodily injury); *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008) (upholding homicide conviction based upon accomplice liability for extreme recklessness as to causing death); *Story v. United States*, 16 F.2d 342, 344 (D.C. Cir. 1926) (upholding homicide conviction based upon accomplice liability for negligence as to causing death); *State v. McVay*, 47 R.I. 292 (1926) (same).

For case law applying an individualized approach to grading based upon culpability, see *People v. McCoy*, 25 Cal. 4th 1111, 1119 (2001) (“An accomplice may be convicted of first-degree murder, even

relevant culpability principles.<sup>579</sup> Contemporary legal commentary is also in accordance, supporting both the general application of a principal of culpable mental state equivalency for results<sup>580</sup>; and, where a result element crime is graded by distinctions in culpability, assessing each actor's liability "according to his own *mens rea*," without regard to whether the principal's culpability "is greater or less than that of the primary party."<sup>581</sup>

The relatively uniform and well-developed state of national legal trends relevant to result elements is to be contrasted with national legal trends on the culpable mental state requirement applicable to circumstances, which are both less robust and more ambiguous.

This variance is, in one sense, surprising: the policy issues presented by circumstance elements are conceptually the same, namely, the choice is between applying a principle of culpable mental state elevation or one of culpable mental state equivalency. The following scenario is illustrative. A lets P borrow his bedroom to engage in sex with V, a fourteen year-old minor, who P mistakenly believes to be twenty-one and, crucially, who A has never met. Thereafter, P and V have sex in A's room.

Assuming the interaction occurs in a jurisdiction with a statutory rape offense that applies to a fourteen year-old, P can clearly be convicted for his conduct— notwithstanding his mistake of fact—since age is a matter of strict liability. But can A similarly be convicted as an accomplice? Under a principle of culpable mental state elevation, the answer is no: A is not liable for statutory rape because A—although purposely assisting P's criminal conduct—lacked the intent to facilitate sex *with a minor*. Under a principle of culpable mental state equivalency, in contrast, the answer is yes: A is liable for statutory rape because A purposely facilitated P's criminal conduct with the culpable mental state applicable to the circumstance of age—none at all.

Notwithstanding these conceptual symmetries, "[v]ery little attention has been paid in the courts and legislatures to the question of complicity's *mens rea* for circumstance elements."<sup>582</sup> On a legislative level, much of the problem stems from the

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though the primary party is convicted of second-degree murder or of voluntary manslaughter."); *United States v. Edmond*, 924 F.2d 261, 267 (D.C. Cir. 1991) ("In a joint trial, if a jury thought an aider and abettor carefully conceived a murder but enlisted an executioner only at the last possible moment, it could consistently convict the abettor of first-degree murder while finding the actual perpetrator guilty only of the lesser offense.").

<sup>579</sup> *But see, e.g., People v. Marshall*, 362 Mich. 170 (1961) (owner of car who gave keys to person who owner knew was drunk could not be held guilty of manslaughter where the person's operation of the car resulted in death).

<sup>580</sup> DRESSLER, *supra* note 79, at § 30.05 ("Because accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed, it would be illogical to impose liability on the perpetrator of the crime, while precluding liability for an accessory, where both possess the mental state required for the commission of the crime."); Robinson & Grall, *supra* note 118, at 741-43 (same); Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2190 (1988) (describing this position as the "modern scholarly view").

<sup>581</sup> DRESSLER, *supra* note 79, at § 30.6 ("It is fair to say, then, that when P commits the "offense" of criminal homicide, this "crime" is imputed to S, whose own liability for the homicide should be predicated on his own level of mens rea, whether it is greater or less than that of the primary party."); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 386-87 (1997); Robinson & Grall, *supra* note 118, at 741-43.

<sup>582</sup> Kinports, *supra* note 79, at 161.

fact that the Model Penal Code is intentionally silent on the issue,<sup>583</sup> with the hopes of delegating its “resolution [to] the courts.”<sup>584</sup> Since completion of the Model Penal Code, most American legislatures have followed suit in that they, too, do not explicitly address the relationship between the accomplice’s state of mind and the circumstance elements of the target offense.<sup>585</sup>

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<sup>583</sup> More specifically, Model Penal Code § 2.06(3)’s undifferentiated reference to “[a] purpose of promoting or facilitating the commission of the crime” provides no direction on how to approach the culpable mental state requirement applicable to circumstance elements, while the Code lacks a provision comparable to § 2.06(4) to fill in the gap. *See infra* notes 256-66 and accompanying text (explaining relevant ambiguities).

<sup>584</sup> Model Penal Code § 2.06 cmt. at 311 n.37 (“The result, therefore, is that the actor must have a purpose with respect to the proscribed conduct or the proscribed result, with his attitude towards the circumstances to be left to resolution by the courts.”). Note, however, that the Model Penal Code commentary also offers this:

[The purpose requirement does not entail that [the precise means used in the commission of the crime must have been fixed or contemplated or, when they have been, that liability is limited to their employment. One who solicits an end, or aids or agrees to aid in its achievement, is an accomplice in whatever means may be employed, insofar as they constitute or commit an offense fairly envisaged in the purposes of the association. But when a wholly different crime has been committed, thus involving conduct not within the conscious objectives of the accomplice, he is not liable for it unless the case falls within the specific terms of Subsection (4).

Model Penal Code § 2.06 cmt. at 311. *Compare id.* at 312 n.42 (“[I]f anything, the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.”).

<sup>585</sup> *See generally* Model Penal Code § 2.06 cmt. at 311-13; Kinports, *supra* note 79, at 161. Note that a few jurisdictions incorporate prefatory language—“acting with the mental state required for commission of an offense”—into their accomplice liability statutes, which appears to indicate that a principal of culpable mental state equivalency applies to circumstances. *See* Conn. Gen. Stat. Ann. § 53a-8; N.Y. Penal Law § 20.00; Kan. Stat. Ann. § 21-5210(a); *compare* Conn. Gen. Stat. Ann. § 53a-16b (“In any prosecution for [a while armed] offense . . . in which the defendant was not the only participant, it shall be an affirmative defense that the defendant: (1) Was not armed with a pistol, revolver, machine gun, shotgun, rifle or other firearm, and (2) had no reasonable ground to believe that any other participant was armed with such a weapon.”).

Likewise, a few other jurisdictions incorporate a grading provision indicative of the same. For example, the Delaware Criminal Code establishes that: “When, pursuant to § 271 of this title, 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person’s own culpable mental state and with that person’s own accountability for an aggravating fact or circumstance.” Del. Code Ann. tit. 11, § 274; *see* Mo. Rev. Stat. § 562.051; Ark. Code Ann. § 5-2-406; *but see* *Allen v. State*, 970 A.2d 203, 213 (Del. 2009) (“In Delaware, section 274 contemplates the possibility that an accomplice defendant, *who was wholly unaware of another participant’s intent to use a gun* in a robbery, could *not* be convicted of Robbery in the First Degree.”) (citing *State v. Hammock*, 214 N.J. Super. 320, 322 (App. Div. 1986)); *State v. Smith*, 229 S.W.3d 85, 95–96 (Mo. Ct. App. 2007), *as modified* (May 1, 2007) (construing Mo. Rev. Stat. § 562.051 to require the jury to determine whether the defendant “acted with the purpose of promoting [a robbery *while armed*]” in order to hold him liable as an accomplice to the most elevated grade of robbery offense).

Conversely, it has been observed that state accomplice liability statutes based on Model Penal Code § 2.06(3) seem to require proof of intent as to circumstances as a textual matter. *See* Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 193 (1981) (“Under [Colorado’s codification of the Model Penal Code] formulation, A’s unawareness of C’s age makes it impossible that he ‘intended to promote or facilitate’ the offense of patronizing a prostituted child.”). For case law consistent with this reading, *see*, for example, *State v. White*, 98 N.J. 122, 130 (1984); *State v. Rodriguez*, 164 N.H. 800, 811 (2013).

And yet, notwithstanding this explicit delegation of policy discretion to the judiciary, “[t]he issue here—whether the intent requirement of accomplice liability applies as well to attendant circumstances—is one that the courts have rarely considered,” at least historically speaking.<sup>586</sup> More recently, though, a handful of state and federal courts have confronted the issue, and the resulting case law indicates that a principle of culpable mental state elevation reflects the majority approach.

Illustrative is a body of case law requiring proof of intent as to the aggravating circumstance of whether a crime has been committed while armed when prosecuted under an accomplice theory of liability.<sup>587</sup> Most noteworthy is the U.S. Supreme Court’s decision in *Rosemond v. United States*, which deemed it well-established that accomplice liability requires proof that a “person actively participates in a criminal venture with *full knowledge* of the *circumstances* constituting the charged offense.”<sup>588</sup> Applying this principle to a complicity-based conviction for the federal crime of using a firearm during a crime of violence, 18 U.S.C.A. § 924(c),<sup>589</sup> the *Rosemond* court determined that: “An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when”—but only when—“he *knows* that one of his confederates will carry a gun.”<sup>590</sup>

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<sup>586</sup> DRESSLER, *supra* note 79, at § 30.6.

<sup>587</sup> For legal authorities exploring whether and to what extent commission of a crime “while armed” is a circumstance element, see Kinports, *supra* note 79, at 156-61; Stephen P. Garvey, *Reading Rosemond*, 12 OHIO ST. J. CRIM. L. 233, 239-45 (2014); Mueller, *supra* note 202, at 2178-79; *see also* *People v. Childress*, 2015 CO 65M, ¶ 29, 363 P.3d 155, 164, *as modified on denial of reh’g* (Jan. 11, 2016) (“By ‘circumstances attending the act or conduct,’ we intend those elements of the offense describing the prohibited act itself and the circumstances surrounding its commission . . .”).

<sup>588</sup> 134 S. Ct. 1240, 1248–49, 188 L. Ed. 2d 248 (2014) (collecting cases); *see id.* at 1249 (“So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme’s commission.”).

<sup>589</sup> 18 U.S.C.A. § 924(c) (“[A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . .”).

<sup>590</sup> *Id.* at 1249 (“In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one). More specifically, as the *Rosemond* court explained, the “defendant’s knowledge must be advance knowledge—or otherwise said, knowledge that enables him to make a relevant legal (and indeed, moral) choice.” *Id.* For other federal cases, *see*, for example, *United States v. Lawson*, 872 F.2d 179, 181 (6th Cir. 1989) (where defendant charged with aiding and abetting the receipt and possession of illegal machine guns in violation of 26 U.S.C. § 5861(c), “a strict liability offense,” necessary to prove defendant “knew that [principal’s] possession of the unregistered guns would be illegal”); *United States v. Jones*, 592 F.2d 1038 (9th Cir. 1979) (defendant, who by driving getaway car of bank robber was an accomplice to crime of bank robbery, was not also an accomplice to the crime of robbery of a bank with a deadly weapon, absent proof defendant “knew that [his accomplice] was armed and intended to use the weapon, and intended to aid him in that respect”); *see also* *United States v. Ford*, 821 F.3d 63 (1st Cir. 2016) (defendant’s conviction for aiding and abetting another’s unlawful possession of a firearm because she had “reason to know” facts making such possession criminal, i.e., that person’s prior felony conviction, overturned because defendant must be shown to have actually known such facts).

For a good recent collections of post-*Rosemond* case law at the federal level, *see* Alexander McIsaac, *A Square Peg in A Round Hole: The Illogical and Impractical Application of Rosemond to Strict*

Post-*Rosemond*, state courts have hued to this line of reasoning.<sup>591</sup> For example, in *Robinson v. United States*, the DCCA held that “[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved.”<sup>592</sup> The basis for such a determination is, as the *Robinson* court explains, the more general idea articulated in *Rosemond*, namely, in order for an accomplice to be deemed “guilty of a crime”—for example, “an offense committed while armed”—the defendant “must, *inter alia*, intend to facilitate the *entire offense*.”<sup>593</sup>

There also exists a complementary body of state and federal cases applying a principle of culpable mental state elevation to the circumstance of age in strict liability sex crimes. For example, in *State v. Bowman*, the Court of Appeals of North Carolina—relying on an older precedent from the California Supreme Court—determined that “[a]lthough statutory rape is a strict liability crime, aiding and abetting statutory rape is not.”<sup>594</sup> More specifically, the *Bowman* court concluded that the government, when bringing a statutory rape charge against an accomplice, must “present evidence tending to show that the defendant acted with *knowledge* that the [victims] were under the age of sixteen.”<sup>595</sup>

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*Liability Sex Crimes*, 50 SUFFOLK U. L. REV. 317, 336 (2017); Allen Thigpen, *Extending Rosemond*, 53 CRIM. LAW BULLETIN 4 (2017).

<sup>591</sup> Note that the *Rosemond* decision is not constitutionally-based, and, therefore, states remain free to determine the relationship between the culpable mental state requirement governing complicity and that applicable to the circumstance(s) of the target offense themselves. Cf. DRESSLER, *supra* note 79, at § 29.05 (making similar observation in the context of conspiracy).

<sup>592</sup> *Robinson*, 100 A.3d at 105–06.

<sup>593</sup> *Robinson*, 100 A.3d at 106 and n.17 (citing *Wilson–Bey*, 903 A.2d at 831). For other state cases, see, for example, *State v. Silva-Baltazar*, 886 P.2d 138, 144 (Wash. 1994) (“[A]lthough in most crimes involving deadly weapons, the coparticipants are aware that one or more of them is armed, that is no reason to impose strict liability on all coparticipants regardless of each participant’s knowledge that another is armed.”); *State v. Hammock*, 214 N.J. Super. 320, 322–24, 519 A.2d 364, 365–66 (App. Div. 1986) (“If the jury determines that the defendant shared his partner’s purpose to commit the robbery but not his purpose to use a deadly weapon, then the jury may find the defendant guilty of a second-degree robbery, but not a first-degree armed robbery.”); *State v. Rodriguez*, 164 N.H. 800, 812 (2013) (“[T]o affirm the defendant’s convictions for . . . accomplice to first degree assault, we must be able to conclude that the properly-admitted evidence overwhelmingly established that he had at least a tacit understanding that deadly weapons would be used in the commission of the assault.”); *State v. Doucet*, 638 So. 2d 246, 249 (La. Ct. App. 1994) (collecting Louisiana cases that support application of culpable mental state elevation to while armed element of robbery); see also *People v. Childress*, 2015 CO 65M, ¶ 29, 363 P.3d 155, 164, *as modified on denial of reh’g* (Jan. 11, 2016) (complicitor must have “an awareness of those circumstances attending the act or conduct he seeks to further that are necessary for commission of the offense in question.”); compare *Silva-Baltazar*, 886 P.2d at 144 (on charge of drug activity within a drug-free zone, awareness activity occurring in such place not required for “any of the participants,” including accomplices); *State v. McCalpine*, 190 Conn. 822, 832–33, 463 A.2d 545, 551 (1983) (determining that there is “no requirement that the accessory possess the intent to commit the specific degree of the robbery charged or the intent to possess a deadly weapon”); *State v. Gonzalez*, 15 A.3d 1049, 1053 (Conn. 2011) (government need not prove culpable mental state as to whether principal, in committing homicide, used, carried or threatened to use a firearm; however, court notes available affirmative defense to effectively preclude strict liability).

<sup>594</sup> 188 N.C. App. 635, 650 (N.C. 2008) (citing *People v. Wood*, 56 Cal.App. 431, 205 P. 698 (1922)).

<sup>595</sup> *Id.* at 651. The Court of Appeals of North Carolina understood this outcome to be dictated by the following principle: “[t]he defendant’s subjective knowledge that his actions would aid a criminal act is necessary to uphold a conviction based upon the theory of aiding and abetting.” *Id.* at 649 (“If the defendant mistakenly undertook his actions based upon the belief that he was assisting a lawful endeavor,

Similarly in accordance is the U.S. Court of Appeals for the First Circuit's decision in *United States v. Encarnacion-Ruiz* interpreting the federal statute prohibiting the production of child pornography.<sup>596</sup> More specifically, the *Encarnacion-Ruiz* court held that, although the circumstance of age for the production of child pornography is typically a matter of strict liability, when a charge is brought against an accomplice the government must nevertheless prove that the defendant *knew* the victim was a minor.<sup>597</sup>

The First Circuit supported this outcome, in part, because of the *Rosemond* decision, under which, “to establish the *mens rea* required to aid and abet a crime, the government must prove that the defendant participated with advance knowledge of the elements that constitute the charged offense.”<sup>598</sup> But the *Encarnacion-Ruiz* court also looked towards broader policy considerations, underscoring the fact that “the special circumstances which justify the imposition of liability without fault on certain persons who themselves engage in the proscribed conduct are not likely to exist as to those rendering aid.”<sup>599</sup>

Legal commentary on the culpable mental state requirement governing accomplice liability “is particularly sparse and conflicting for crimes requiring proof of some attendant circumstance.”<sup>600</sup> Nevertheless, it appears that the majority approach reflected in the scholarly literature supports a principle of culpable mental state elevation.<sup>601</sup>

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he can not be guilty of aiding and abetting a criminal act.”). *See also Com. v. Harris*, 74 Mass. App. Ct. 105, 111–15, 904 N.E.2d 478, 484–87 (2009) (“[I]f the Commonwealth proceeds on a “nonpresence” theory, avoidance of injustice may in some cases require proof that the joint venturer had more specific knowledge about the victim's age than would be required for conviction of the principal.”).

<sup>596</sup> 787 F.3d 581, 589 (1st Cir. 2015).

<sup>597</sup> *Id.*

<sup>598</sup> *Id.* at 649 (“[U]nder *Rosemond*, an aider and abettor of such an offense must have known the victim was a minor when it was still possible to decline to participate in the conduct.”); *see id.* (“If an individual charged as an aider and abettor is unaware that the victim was underage, he cannot ‘wish[ ] to bring about’ such criminal conduct and ‘seek . . . to make it succeed.’”) (quoting *Rosemond*, 134 S.Ct. at 1248).

<sup>599</sup> *Id.* at 649. More specifically, as the First Circuit explained, applying a principle of culpable mental state equivocation would mean that:

Individuals could be convicted of aiding and abetting the production of child pornography even when they had only a fleeting connection to the crime. For example, a set decorator who believes he is working on the production of a legal adult pornographic film could be held liable as an aider and abettor even if he had no knowledge that one of the participants in the film was underage . . . .

Principals, the argument goes, may be convicted [ ] without proof they had knowledge of [the victim's] age because they confront[ ] the underage victim personally and may reasonably be required to ascertain that victim's age . . . . The same justification would not apply to a set decorator or other similarly situated aider and abettor, who may never even see the victim, much less interact with him or her . . . .

*Id.* at 588–91. *But see id.* at 613 (discussing the “attendant circumstance” exception discussed in LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2).

<sup>600</sup> Kinports, *supra* note 79, at 134.

<sup>601</sup> *Compare, e.g., Alexander & Kessler, supra* note 164, at 1161 (collecting authorities in support, and arguing for a principle of culpable mental state elevation under which “[r]ecklessness is the universal solvent for circumstantial mens rea”); Kinports, *supra* note 79, at 134 (arguing for application of purpose requirement to circumstance elements); LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2 (supporting

In accordance with the above analysis of national legal trends, RCC § 210(a) incorporates the following culpability policies applicable to accomplice liability. First, the prefatory clause of RCC § 210(a) establishes that the culpability required for accomplice liability is, at minimum, that required by the target offense. Second, RCC §§ 210(a)(1) and (2) endorse the purpose view of accomplice liability, under which proof that the secondary party consciously desired to bring about conduct planned to culminate in the target offense is a necessary component of accomplice liability. Third, RCC § 210(b) applies a principle of culpable mental state elevation to circumstance elements, under which the accomplice must intend to bring about any circumstance required by the target offense.<sup>602</sup> Fourth, and finally, RCC § 210(c) establishes that where an offense is graded based upon distinctions in culpability as to results, an accomplice may be held liable for any grade for which he or she possesses the required culpability.

RCC § 210(d): Relation to National Legal Trends on Derivative Liability. Accomplice liability provides a basis for holding one person liable for the crimes committed by another.<sup>603</sup> As such, it does not constitute a freestanding form of criminal liability; rather, accomplice liability is derivative in nature.<sup>604</sup> Practically speaking, this means that holding someone liable as an accomplice actually requires proof that a crime was, in fact, committed by someone.<sup>605</sup> Determining what this derivative aspect of complicity specifically entails with respect to an accomplice can be difficult, however, given the various ways in which the principal's legal situation might be resolved.<sup>606</sup>

The most basic set of issues arise where the government prosecutes an accomplice in a situation where the principal has not been convicted of the charged offense. Under these circumstances, one can generally ask: should the fact that the principal has not been convicted preclude conviction of the accomplice? In answering this question, one might further differentiate between the varying reasons for which the principal has not been convicted. For example, the government may have declined to move forward with the prosecution—either because the principal died, fled from the jurisdiction, or had an immunity from prosecution. Alternatively, the government may have attempted to prosecute the principal, but ultimately lost at trial—by an acquittal in either the same proceeding in which the accomplice was being prosecuted or in a separate proceeding.

Yet another set of issues arise where the principal has been convicted of an offense, but that offense is of a different grade than that for which the government is seeking to hold the accomplice liable. For example, an accomplice might be charged with assisting a homicide with the mental state necessary for manslaughter (i.e., heat of

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principal of culpable mental state elevation as to circumstance elements at least where the offense is one of strict liability); *with* Robinson & Grall, *supra* note 118, at 742 (supporting principle of culpable mental state equivalency as to circumstances); DRESSLER, *supra* note 79, at § 30.6 (same). Note that scholarly support for a principal of culpable mental state equivalency as to circumstances may presuppose acceptance of a general recklessness default applicable to the circumstance elements of the completed offense.

<sup>602</sup> See Commentary on RCC § 302(a): National Legal Trends (solicitation); Commentary on RCC § 303(a): National Legal Trends (conspiracy).

<sup>603</sup> DRESSLER, *supra* note 79, at § 30.06; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. See, e.g., *McKnight v. State*, 658 N.E.2d 559, 561 (Ind. 1995).

<sup>604</sup> DRESSLER, *supra* note 79, at § 30.06; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2

<sup>605</sup> DRESSLER, *supra* note 79, at § 30.06; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. See, e.g., *People v. Vaughn*, 465 N.W.2d 365, 369 (Mich. Ct. App. 1990).

<sup>606</sup> The next two paragraphs draw on issues raised in DRESSLER, *supra* note 79, at § 30.06.



passion or recklessness), in a case where the principal has been convicted of acting with the mental state necessary for murder (i.e., intent/absence of mitigating circumstances). Alternatively, the converse is also possible: an accomplice might be charged with assisting a homicide with the mental state necessary for first-degree murder (i.e., intent/absence of mitigating circumstances), in a case where the principal has been convicted (or only can be convicted) of acting with the mental state necessary for manslaughter (i.e., heat of passion or recklessness). In this kind of situation, the question that arises is whether the accomplice may be convicted of a grade of an offense that is either *less serious* (the first scenario) or *more serious* (the second scenario) than that committed by the principal?

The early common law approach to the above issues was relatively restrictive: “[A]n accessory could not be convicted of the crime in which he assisted until the principal was convicted and, with the limited exception of criminal homicide, could not be convicted of a more serious offense or degree of offense than that of which the principal was convicted.”<sup>607</sup> More recently, though, “[n]early all states have abrogated these rigid common law rules.”<sup>608</sup> For example, it is now generally accepted that “[a]n aider and abettor may be convicted of an offense even though the principal has not been convicted,”<sup>609</sup> or even where the principal has been acquitted.<sup>610</sup> Likewise, it is also generally accepted that an “aider and abettor may be convicted of a lesser or greater offense than the principal.”<sup>611</sup>

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<sup>607</sup> *Id.*

<sup>608</sup> *Id.* For case law addressing whether the availability of a justification defense on behalf of the principal extends to an accomplice, see *United States v. Lopez*, 662 F.Supp. 1083 (N.D. Cal. 1987) (liability as an aider and abettor requires proof of a “criminal act,” for that reason a justification defense of a principal, because it is available where there is no wrongful act under the circumstances, precludes accomplice liability on the part of one who aids the justified conduct); *State v. Montanez*, 894 A.2d 928 (Conn. 2006) (alleged accomplice entitled to a jury instruction on the principal’s use of self-defense because when an act is justified by self-defense, a third party has the right to assist the principal in his lawful conduct); *U.S. v. Smith*, 478 F.2d 976 (D.C. Cir. 1973) (where principal charged in murder case was improperly deprived of evidence corroborating his claim of self-defense through actions of the government and his conviction therefore was reversed, conviction of second defendant as aider and abettor also reversed because if principal has been acquitted on grounds of self-defense, no crime to aid and abet would have been committed).

<sup>609</sup> *Mayfield v. United States*, 659 A.2d 1249, 1256 (D.C. 1995); *People v. Paige*, 131 Mich.App. 34 (1983) (conviction of principal is not a prerequisite to conviction of aider and abettor, relying on *People v. Mangiapane*, 219 Mich. 62, 188 N.W. 401 (1922)); *Murchison v. United States*, 486 A.2d 77, 81 (D.C. 1984) (“[N]o prerequisite that the principal perpetrator of the offense also be convicted”).

<sup>610</sup> *Standefer v. United States*, 447 U.S. 10, 14–20 (1980) (conviction of principal is not a prerequisite to an aiding and abetting conviction, even where principal is acquitted in a separate trial); *United States v. McCall*, 460 F.2d 952, 958 (D.C. Cir. 1972) (acquittal of principal in separate trial does not preclude conviction of aider and abettor); *Singletary v. State*, 509 S.W.2d 572 (Tex. Crim. App. 1974) (acquittal of principal for murder did not require reversal of accomplice’s conviction).

<sup>611</sup> *Branch v. United States*, 382 A.2d 1033, 1035 (D.C. 1978) (aider and abettor convicted of lesser offense); *State v. McAllister*, 366 So.2d 1340 (La. 1978) (aider and abettor can be convicted of first degree murder despite the fact that perpetrator was convicted of manslaughter); *State v. Wilder*, 25 Wash. App. 568 (1980) (aider and abettor may be convicted of first degree murder when the principal was only convicted of second degree murder); *Williams v. State*, 383 So.2d 547, 554 (Ala. Crim. App. 1979); *Pendry v. State*, 367 A.2d 627, 630 (Del. 1976); *Potts v. State*, 430 So.2d 900, 902–03 (Fla. 1982); *State v. Lopez*, 484 So.2d 217, 225 (La. Ct. App. 1986); *Handy v. State*, 326 A.2d 189, 196 (Md. 1974); *People v. Paige*, 345 N.W.2d 639, 641 (Mich. 1984); *State v. Cassell*, 211 S.E.2d 208, 210–12 (N.C. 1975); *State v.*

Abrogation of the early common law approach to implementing the derivative nature of accomplice liability is not a new phenomenon; many jurisdictions adopted these kinds of more expansive policies prior to completion of the Model Penal Code.<sup>612</sup> Nevertheless, it is the Model Penal Code approach to codifying them that provides the contemporary basis for their expression in modern criminal codes.<sup>613</sup> The relevant provision, Model Penal Code § 2.06(7), establishes that:

An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

The above language encapsulates a cluster of policies. Most fundamentally, it establishes the basic principle of derivative liability, namely, that accomplice liability requires proof that the offense for which the defendant is being held liable was, in fact, committed.<sup>614</sup> Beyond that, this provision also establishes four specific policies concerning the “relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense.”<sup>615</sup> First, it is immaterial that the “person claimed to have committed the offense has not been prosecuted or convicted.”<sup>616</sup> Second, it is immaterial that the “person claimed to have committed the offense . . . has been convicted of a different offense or degree of offense.”<sup>617</sup> Third, it is immaterial that the “person claimed to have committed the offense . . . has an immunity to prosecution.”<sup>618</sup> And fourth, it is immaterial that the “person claimed to have committed the offense . . . has been acquitted.”<sup>619</sup>

The above policies, as the accompanying Model Penal Code commentary explains, were understood by the drafters to accord with what were then “modern developments,”<sup>620</sup> i.e., previously existing “legislation that deprives the distinction between principals and accessories of its common law procedural significance.”<sup>621</sup> And they were also believed to “follow the consistent principle” reflected throughout Model Penal Code § 2.06, namely, “that it is only the conduct of the main actor that is attributed to the accomplice, with the degree of liability turning on the accomplice’s own culpability.”<sup>622</sup>

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*Tremblay*, 479 P.2d 507–511 (Or. 1971); *Commonwealth v. Strong*, 399 A.2d 88, 90 (Pa. 1979); *State v. Haines*, 192 S.E.2d 879, 881–82 (W. Va. 1972).

<sup>612</sup> See generally Model Penal Code § 2.06(7) cmt. at 327-28.

<sup>613</sup> *Id.*

<sup>614</sup> Model Penal Code § 2.06(7) (“An accomplice may be convicted on proof of the commission of the offense and of his complicity therein . . .”).

<sup>615</sup> Model Penal Code § 2.06(7): Explanatory Note.

<sup>616</sup> Model Penal Code § 2.06(7).

<sup>617</sup> *Id.*

<sup>618</sup> *Id.*

<sup>619</sup> *Id.*

<sup>620</sup> Model Penal Code § 2.06(7): Explanatory Note.

<sup>621</sup> Model Penal Code § 2.06(7) cmt. at 327-28.

<sup>622</sup> *Id.*

Since completion of the Model Penal Code, legislative adoption of a general provision based on § 2.06(7) has become a standard feature of comprehensive code reform efforts.<sup>623</sup> This is reflected in the following trends. First, nearly all reform codes incorporate a provision declaring that an accomplice may be convicted even if the principal has not been prosecuted<sup>624</sup> or convicted.<sup>625</sup> Second, a strong majority of reform codes incorporate a provision declaring that an accomplice may be convicted even if the principal has been acquitted,<sup>626</sup> or has been convicted of a different offense or degree of offense.<sup>627</sup> And third, a simple majority of reform codes incorporate a provision declaring that an accomplice may be convicted even if the principal has immunity to prosecution or conviction.<sup>628</sup>

Consistent with national legal trends, the RCC incorporates a general provision that is broadly consistent with the Model Penal Code approach to addressing the derivative nature of accomplice liability. The relevant provision, RCC § 210(d), does so

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<sup>623</sup> *Id.* (noting that a “great majority of recently enacted codes and proposals” incorporate “a provision comparable to subsection (7)”).

<sup>624</sup> Ala. Code § 13A-2-25; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Colo. Rev. Stat. Ann. § 18-1-605; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Haw. Rev. Stat. § 702-225; Ill. Comp. Stat. Ann. ch. 720, § 5/5-3; Ind. Code Ann. § 35-41-2-4; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.Y. Penal Law § 20.05; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.160; Pa. Cons. Stat. Ann. tit. 18, § 306; S.D. Cod. Laws § 22-3-5.1; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201.

<sup>625</sup> Ala. Code § 13A-2-25; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Colo. Rev. Stat. Ann. § 18-1-605; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Haw. Rev. Stat. § 702-225; Ill. Comp. Stat. Ann. ch. 720, § 5/5-3; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.046; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.Y. Penal Law § 20.05; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Or. Rev. Stat. § 161.160; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Va. Code Ann. § 18.2-21; Wash. Rev. Code § 9A.08.020; Wis. Stat. Ann. § 939.05; Wyo. Stat. § 6-1-201.

<sup>626</sup> Ala. Code § 13A-2-25; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Ill. Comp. Stat. Ann. ch. 720, § 5/5-3; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Md. Code Ann. Crim. Proc. § 4-204; Mo. Ann. Stat. § 562.046; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.Y. Penal Law § 20.05; Pa. Cons. Stat. Ann. tit. 18, § 306; S.D. Cod. Laws § 22-3-5.1; Tenn. Code Ann. § 39-11-407; Wash. Rev. Code § 9A.08.020.

<sup>627</sup> Ala. Code § 13A-2-25; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Colo. Rev. Stat. Ann. § 18-1-605; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Haw. Rev. Stat. § 702-225; Iowa Code Ann. § 703.1; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Md. Code Ann. Crim. Proc. § 4-204; Mo. Ann. Stat. § 562.046; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.160; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Wash. Rev. Code § 9A.08.020; Wis. Stat. Ann. § 939.05.

<sup>628</sup> Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Haw. Rev. Stat. § 702-225; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.046; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.Y. Penal Law § 20.05; N.D. Cent. Code § 12.1-03-01; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Wash. Rev. Code § 9A.08.020.

by codifying two basic principles. The first is that accomplice liability entails “proof of the commission of the offense” that was, in fact, committed by another person.<sup>629</sup> The second is that, assuming the government can meet this standard of proof, the legal disposition of the principal actor’s situation—for example, non-prosecution, the absence of a conviction, or an acquittal—is generally immaterial to that of the accomplice.<sup>630</sup>

RCC § 210(a), (b), (c), & (d): Relation to National Trends on Codification. There is wide variance between jurisdictions insofar as the codification of a general definition of accomplice liability is concerned.<sup>631</sup> Generally speaking, though, the Model Penal Code’s general provision, § 2.06,<sup>632</sup> provides the basis for most contemporary reform efforts. The general definition of accomplice liability incorporated into RCC § 210 incorporates aspects of the Model Penal Code approach to drafting while, at the same time, utilizing a few techniques, which depart from it. These departures are consistent with the interests of clarity, consistency, and accessibility.

The most noteworthy drafting decision reflected in the Model Penal Code’s general definition of accomplice liability is the manner in which the culpable mental state requirement is codified. Notwithstanding the Model Penal Code drafters’ general commitment to element analysis, the culpability language utilized in § 2.06(3) reflects

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<sup>629</sup> RCC § 210(d) (“An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein . . .”).

<sup>630</sup> RCC § 210(d) (rendering immaterial the fact that “the other person claimed to have committed the offense: (1) Has not been prosecuted or convicted; or (2) Has been convicted of a different offense or degree of an offense; or (3) Has been acquitted.”).

<sup>631</sup> Decker, *supra* note 186, at 239 (noting that “inconsistency between the plain language of states’ accomplice liability legislation and its respective interpretation in the state courts”).

<sup>632</sup> The relevant subsections, Model Penal Code §§ 2.06(3), (4), and (7), read:

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity . . . .

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense . . . .

(7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

offense analysis, and, therefore, leaves the culpable mental state requirements applicable to accomplice liability ambiguous.<sup>633</sup>

Illustrative is the prefatory clause of Model Penal Code § 2.06(3), which entails proof that the defendant act “with the purpose of promoting or facilitating” the commission of the offense that is the object of the defendant’s assistance or encouragement. Viewed from the perspective of element analysis, the import of this language is less than clear. On the one hand, the purpose requirement is framed in terms of commission of the *target offense*. On the other hand, all (target) offenses are comprised of different elements (namely, conduct, results, and circumstances).<sup>634</sup> Based solely on consideration of Model Penal Code § 2.06(3), then, it is unclear to which of the elements of the target offense this purpose requirement should be understood to apply.<sup>635</sup>

It is only through commentary that the drafters of the Model Penal Code clarify their intent for the general purpose requirement set forth in § 2.06(3) to apply, at minimum, to the “bringing about of conduct that the Code has declared to be criminal.”<sup>636</sup> This implicit adoption of the true purpose approach to conduct is thereafter accompanied by a further textual clarification that the purpose requirement *does not* apply to results. More specifically, Model Penal Code § 2.06(4) establishes that result elements are subject to a principle of culpable mental state equivalency, under which:

When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.<sup>637</sup>

Importantly, Model Penal Code § 2.06 does not incorporate an analogous provision addressing the culpability required for circumstances.<sup>638</sup> Instead, the drafters of the Model Penal Code opted for “deliberate ambiguity as to whether the purpose requirement extends to circumstance elements of the contemplated offense or whether . . . the policy of the substantive offense on this point should control.”<sup>639</sup> Through such silence the drafters intended to delegate the issue “to resolution by the courts.”<sup>640</sup> This is the same approach reflecting in the Model Penal Code’s general solicitation<sup>641</sup> and conspiracy provisions,<sup>642</sup> both of which also “deliberately le[ave] open” the “matter” of whether the circumstances of the target offense are subject to a principle of culpable

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<sup>633</sup> See Robinson & Grall, *supra* note 118, at 733-34.

<sup>634</sup> See also *id.* at 758 (“One could be even more precise by distinguishing the accomplice’s culpability as to his conduct, generally not an issue, from his culpability as to whether his conduct will assist the perpetrator in committing the offense, the primary issue here.”).

<sup>635</sup> See *id.*

<sup>636</sup> Model Penal Code § 2.06 cmt. at 310.

<sup>637</sup> Model Penal Code § 2.06(4).

<sup>638</sup> Robinson & Grall, *supra* note 118, at 739.

<sup>639</sup> Model Penal Code § 2.06 cmt. at 311 n.37.

<sup>640</sup> *Id.*

<sup>641</sup> Model Penal Code § 5.02(1).

<sup>642</sup> Model Penal Code § 5.03(1).

mental state elevation or equivalency,<sup>643</sup> with the goal of “affording courts sufficient flexibility for satisfactory decision as such cases may arise.”<sup>644</sup>

While consistent with the Model Penal Code’s solicitation and conspiracy provisions, this grant of policy discretion to the courts is no less problematic. The codification virtues of clarity, consistency, and fair notice all point towards providing comprehensive legislative guidance concerning the culpable mental state requirement accomplice liability,<sup>645</sup> “rather than the type of ad hoc, fact-specific, case-by-case development that would result from an attempt to solve [related policy issues through] continued reliance on common law.”<sup>646</sup> Comprehensive legislation of this nature also serves the interests of due process: “[c]riminal statutes are,” after all, “constitutionally required to be clear in their designation of the elements of crimes, including mental elements.”<sup>647</sup>

With this in mind, the RCC approach to codifying the culpable mental state of accomplice liability strives to provide the clarity lacking from the Model Penal Code, while at the same time avoiding unnecessary complexity to the extent feasible. This is accomplished in three steps.

To start, the prefatory clause of RCC § 210(a) establishes that the culpability requirement applicable to accomplice liability necessarily incorporates “the culpability required by [the target] offense.” This language is modeled on the prefatory clauses employed in various modern accomplice liability statutes.<sup>648</sup> It effectively communicates that accomplice liability requires, at minimum, proof of the culpable mental states (if any) governing the results and circumstances of the target offense.<sup>649</sup>

Next, RCC § 210(a)(1) and (2) clearly and directly articulate that accomplice liability’s distinctive purpose requirement governs the conduct which constitutes the object of the assistance or encouragement. More specifically, RCC § 210(a)(1) states that the defendant must “[p]urposely assist[] another person with the planning or commission of conduct constituting that offense.” Likewise, RCC § 210(a)(2) states that the defendant must “[p]urposely encourage[] another person to engage in conduct constituting that offense.” This language is modeled on the approach in a few modern accomplice liability provisions, which clarify that proof of a conscious desire as to the conduct constituting the target offense is necessary where the government’s theory of

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<sup>643</sup> Model Penal Code § 5.02(1) cmt. at 371 n.23.

<sup>644</sup> Model Penal Code § 5.03(1) cmt. at 113.

<sup>645</sup> See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 332-366 (2005).

<sup>646</sup> *Com. v. Barsell*, 424 Mass. 737, 741 (1997); see also Robinson & Grall, *supra* note 118, at 754 (“The ambiguous language of the conspiracy provision coupled with the ambivalent language of the commentary indicates a need for clarification.”). For discussion of the problems this delegation has created, see Mueller, *supra* note 202, at 2179.

<sup>647</sup> Wesson, *supra* note 207, at 209.

<sup>648</sup> See Conn. Gen. Stat. Ann. § 53a-8 (“acting with the mental state required for commission of an offense . . .”); N.Y. Penal Law § 20.00 (“acting with the mental culpability required for the commission thereof”); Kan. Stat. Ann. § 21-5210(a) (“acting with the mental culpability required for the commission thereof”).

<sup>649</sup> The term “culpability” includes, but also goes beyond, the culpable mental state requirement governing an offense. See RCC § 201(d) (culpability requirement defined). This clause also addresses broader aspects of culpability such as, for example, premeditation, deliberation, or the absence of any mitigating circumstances, which the target offense might likewise require. Being an accomplice to such an offense would, pursuant to the prefatory clause of § 210(a), require proof of the same.

liability is based on *assistance*.<sup>650</sup> Notably, however, these statutes are silent on the relationship between the actor's state of mind and the conduct elements of the target where the government's theory of liability is based on *encouragement*.<sup>651</sup> The latter approach is unnecessarily ambiguous—whereas the drafting technique employed in the RCC allows for a more succinct general statement of the culpable mental state requirement governing accomplice liability.

Thereafter, RCC § 210(b) provides explicit statutory detail concerning the relationship between an accomplice's state of mind and the circumstances of the target offense. More specifically, RCC § 210(b) establishes that: "Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist." This language incorporates a principle of culpable mental state elevation governing circumstances applicable whenever the target offense is comprised of a circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). For these offenses, proof of intent on behalf of the accomplice is required as to the requisite circumstance elements.

Finally, RCC § 210(c) provides additional clarity concerning the disposition of cases involving the commission of an offense that is divided into degrees based upon distinctions in culpability as to results, where an accomplice and the principal act with different states of mind.

The Model Penal Code approach to addressing this issue is *apparently* reflected § 2.06(4), under which "an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."<sup>652</sup> The drafters intended for this language to be read as attributing the relevant criminal conduct "to both participants, with the liability of each measured by his own degree of culpability toward the result."<sup>653</sup> However, the envisioned legal proposition (i.e., that an accomplice may be convicted of a different grade of an offense than that which is committed by the principal where there are variations in culpable mental state<sup>654</sup>) is far from clear based upon the text of § 2.06(4).<sup>655</sup>

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<sup>650</sup> See Conn. Gen. Stat. Ann. § 53a-8 ("solicits, requests, commands, importunes or *intentionally aids* another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender"); N.Y. Penal Law § 20.00 ("solicits, requests, commands, importunes, or *intentionally aids* such person to engage in such conduct"); Kan. Stat. Ann. § 21-5210(a) ("advises, hires, counsels or procures the other to commit the crime or *intentionally aids* the other in committing the conduct constituting the crime.").

<sup>651</sup> See sources cited *id.*

<sup>652</sup> Model Penal Code § 2.06(4).

<sup>653</sup> *Id.*; see also Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1386 (1998) ("A fair interpretation of the relationship between subsections (3) and (4) is that once the state can establish that the secondary actor had the purpose to promote or facilitate the commission of one particular offense, as required under subsection (3), that actor will also be liable for additional, unplanned, result-oriented crimes the principal commits as long as that actor possesses the mens rea required by the crime for that result.").

<sup>654</sup> Model Penal Code § 2.06 cmt. at 311.

<sup>655</sup> For a critique along these lines, see Rogers, *supra* note 275, at 1375; see also *State v. Etzweiler*, 480 A.2d 870, 875 (N.H. 1984) (providing similar critique).

With that in mind, and in the interests and clarity and consistency, the RCC incorporates a clearer and more direct approach to communicating this principle of individualized liability. More specifically, RCC § 210(c) states that: “An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.” This language is premised upon the modern accomplice liability statutes employed in a handful of reform jurisdictions.<sup>656</sup> It explicitly addresses by statute an important culpability issue upon which the Model Penal Code is ambiguous (and ultimately relies upon commentary to clarify).

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the culpable mental state requirement governing accomplice liability, which avoids the flaws and ambiguities reflected in Model Penal Code § 2.06(3)-(4).<sup>657</sup>

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<sup>656</sup> See, e.g., Del. Code Ann. tit. 11, § 274 (“When, pursuant to § 271 of this title, 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person’s own culpable mental state and with that person’s own accountability for an aggravating fact or circumstance.”).

<sup>657</sup> One other revision worth noting is that RCC § 210(d) omits reference to “immunity to prosecution or conviction” under Model Penal Code § 2.06(7) in the interests of brevity and simplicity. Any actor who has an immunity to prosecution or conviction necessarily “has not been prosecuted or convicted” under RCC § 210(d)(1) and, therefore, is covered by this broader language. As a result, the immunity clause is superfluous. See generally *supra* note 250 and accompanying text (observing that the immunity clause is less frequently codified than all other clauses contained in Model Penal Code § 2.06(7)).



**§ 22A-211 LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON**

(a) USING ANOTHER PERSON TO COMMIT AN OFFENSE. A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense.

(b) INNOCENT OR IRRESPONSIBLE PERSON DEFINED. An “innocent or irresponsible person” within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense:

- (1) Lacks the culpable mental state requirement for that offense; or
- (2) Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.

**Relation to National Legal Trends.** There are two primary means by which one person can be held accountable for the conduct of another. The first, and most common, is that of accomplice liability; it applies where one party intentionally assists or encourages the commission of an offense committed by another party.<sup>658</sup> There is, however, one important limitation confronting accomplice liability, namely, the requirement that the other party *actually commit an offense*.<sup>659</sup>

Consider the following illustration: a drug dealer asks his sister—who is unaware of her brother’s means of employment—to pick up a package for him at the post office. He credibly tells his sister that the package is filled with cooking spices; however, it is actually filled with heroin. If the sister is subsequently arrested by the police in transit from the post office, the drug dealer cannot be deemed an accomplice to the possession of narcotics by the sister since the sister cannot herself be convicted of that offense.<sup>660</sup> Although she has engaged in conduct that satisfies the *objective elements* of an offense, the sister nevertheless does not act with the required *culpable mental state*, i.e., knowledge (or even negligence) as to the nature of the substance in her possession.<sup>661</sup>

Under these circumstances, the drug dealer can, however, be held criminally responsible for possession as a principal under a different theory of liability: the “innocent instrumentality rule.”<sup>662</sup> This rule posits that, where the defendant manipulates an innocent person to commit what would be a crime if the innocent person

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<sup>658</sup> See generally WAYNE R. LAFAVE, 2 SUBST. CRIM. L. §§ 13.2 (3d ed. Westlaw 2018); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.04 (6th ed. 2012).

<sup>659</sup> See generally LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 27, at § 30.04.

<sup>660</sup> See generally LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 27, at § 30.04.

<sup>661</sup> See generally LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 27, at § 30.04.

<sup>662</sup> See, e.g., DRESSLER, *supra* note 27, at § 30.03 (“The term ‘accomplice’ does not include one who coerces or manipulates an innocent person to commit an offense. Such an actor is considered the perpetrator of the offense, the ‘principal in the first degree’ in traditional common law parlance, based on the ‘innocent instrumentality’ doctrine.”); LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1; *Morrissey v. State*, 620 A.2d 207 (Del. 1993); *State v. Williams*, 916 A.2d 294 (Md. 2007).

were not legally excused or justified, the innocent person's conduct may be imputed to the defendant.<sup>663</sup>

The innocent instrumentality rule is based on, but also departs from, normal principles of causation. The rule treats an actor who uses an innocent person as the means of committing a crime as having caused that person's act in the same way he would be seen to cause a physical event (e.g., firing a gun to injure another person).<sup>664</sup> This kind of treatment constitutes a departure from the standard approach to causation doctrine, under which other people's 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."<sup>665</sup> Where, however, one party, P, induces another party, X, to engage in generally prohibited conduct that is either excusable or justifiable, the analysis materially changes. This is because, "[f]or purposes of causation doctrine, excusable and justifiable actions are not seen as completely freely chosen."<sup>666</sup> Under such circumstances, the law regards P as a principal and X as a tool—an innocent agent—that P uses to commit the crime.<sup>667</sup>

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<sup>663</sup> For an illustrative example of the distinct role that each of these two theories of liability play, consider the difference between aiding and abetting a theft (via solicitation) and using another person to commit a theft, drawn from DRESSLER, *supra* note 27, at § 28.01.

If D1 suggests to X1 that the latter steal V1's television set, and X1 thereafter does as requested, X1 is the perpetrator of the offense and D1 is an accomplice to the theft based upon the solicitation. In contrast, suppose that D2 fraudulently says to X2: "My television set is at V2's house. He asked me to pick it up. Would you do me a favor and get it for me?" If X2 does as requested, D2 is not guilty of solicitation to commit larceny, and therefore would not be X2's accomplice, because D2 is not requesting X2 to engage in conduct that would constitute a crime by X2. Instead, D2 is attempting to perpetrate the offense himself, by using X2 as his dupe. Which is to say: X2 is D2's "innocent instrumentality" because, if X2 believes D2's representations and takes V2's property, X2 is not guilty of larceny since he lacks the specific intent to steal.

<sup>664</sup> Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 369-70 (1985).

<sup>665</sup> *Id.*; see 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."). Note that where an animal is employed, no such issues arise:

For example, suppose that D trains his dog to pick up his neighbor's newspaper every morning from the front lawn and bring it to D, who keeps the newspaper as his own. D is guilty of petty larceny—he is the principal in the first degree of the theft. Because the dog is not a human being and, therefore, does not have the capacity to form a culpable mental state, the animal is D's innocent instrumentality. We no more treat the dog as the perpetrator of the theft than we would say that a gun is the "perpetrator" of a murder and that the person pulling the trigger is the gun's "accomplice."

DRESSLER, *supra* note 27, at § 28.01.

<sup>666</sup> Kadish, *supra* note 33, at 369-70. See 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.").

<sup>667</sup> Kadish, *supra* note 33, at 369-70.

The innocent instrumentality rule is a well-established common law doctrine.<sup>668</sup> Historically, American legal authorities have long viewed the act of an innocent agent induced by another to commit a crime to be “as much the act of the procurer as if he were present and did the act himself.”<sup>669</sup> And this is still true today: the idea that “one is no less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent” remains a “universally acknowledged principle” reflected across an array of contemporary common law authorities.<sup>670</sup>

The innocent instrumentality rule, as construed by these authorities, is generally comprised of three main requirements.<sup>671</sup> The first, and most fundamental, is that a human intermediary, in order to be deemed an instrumentality, must have *non-culpably* engaged in criminal conduct.<sup>672</sup> There are a variety of circumstances that will support this essential finding of blamelessness.<sup>673</sup>

The most common fact patterns involve an intermediary who has been induced by the principal to engage in criminal conduct by misleading or incomplete information. Where the principal’s deceptive practices preclude the intermediary from acting with the culpable mental state requirement applicable to an offense, the intermediary is treated as an instrumentality whose conduct may be imputed to the principal.<sup>674</sup>

Even where an intermediary acts with the culpable mental state requirement applicable to an offense (e.g., intentionally commits an offense’s objective elements), the innocent instrumentality rule may still apply if the conditions for an excuse defense are met. For example, where P induces X, a child, to intentionally engage in criminal conduct, P is nevertheless accountable for such conduct if X possesses an immaturity

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<sup>668</sup> Commentary on Ky. Rev. Stat. Ann. § 502.010 (“That an individual may incur criminal liability by procuring a prohibited harm through an act of an innocent or irresponsible agent is a principle of long standing.”); see, e.g., LAFAVE, *supra* note 27, at § 13.1 *Gallimore v. Com.*, 436 S.E.2d 421, 427 (Va. 1993); *State v. Thomas*, 619 S.W.2d 513, 514 (Tenn. 1981); Gabriel Hallevy, *The Criminal Liability of Artificial Intelligence Entities—from Science Fiction to Legal Social Control*, 4 AKRON INTELL. PROP. J. 171, 179 (2010).

<sup>669</sup> J. Turner, 1 RUSSELL ON CRIME 129 (12th ed. 1964); see *United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966) *cert. denied* 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967) (“This doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as *Regina v. Saunders*, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per alium facit per se*, at least as early as the 14th century”) (citing *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 6 L.Ed. 693 (1827)); see also F.B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930).

<sup>670</sup> Model Penal Code § 2.06 cmt. at 300.

<sup>671</sup> LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1.

<sup>672</sup> Note that the innocent instrumentality rule can be applied to impute some, but not all, of the objective elements of an offense. See *Morrissey v. State*, 620 A.2d 207, 210 (Del. 1993) (“Consequently, in this case, although the innocent persons who Morrissey forced to engage in sexual intercourse were unarmed, the aggravating element of displaying what appeared to be a deadly weapon was provided by Morrissey’s own conduct.”).

<sup>673</sup> Kadish, *supra* note 33, at 369–70 (“The doctrine of causation through an innocent agent has been widely applied in a great variety of situations.”).

<sup>674</sup> See, e.g., *United States v. Bryan*, 483 F.2d 88 (3d Cir. 1973) (innocent party induced to ship whiskey); *Boushea v. United States*, 173 F.2d 131 (8th Cir. 1949) (innocent party induced to submit false claim); *People v. Mutchler*, 140 N.E. 820 (Ill. 1923) (fraudulent check cashed by innocent agent); *State v. Bourgeois*, 148 So.3d 561 (La. 2013); *State v. Runkles*, 605 A.2d 111 (Md. 1992); *McAlevy v. Commonwealth*, 620 S.E.2d 758 (Va. 2005); *Jones v. State*, 256 P.3d 527 (Wyo. 2011).

defense.<sup>675</sup> Similarly, where P coerces X by threat of physical violence to intentionally engage in criminal conduct, P is nevertheless accountable for such conduct if P possesses a duress defense.<sup>676</sup> And where P induces X, a mentally ill individual, to intentionally engage in criminal conduct, P is nevertheless accountable for such conduct if X possesses an insanity defense.<sup>677</sup>

One other important situation in which the innocent instrumentality rule applies is where the intermediary makes a reasonable mistake as to a justification, i.e., mistakenly causes harm in a situation where the justifying conditions were culpably created by the principal. Illustrative situations include: (1) where P orchestrates the fatal shooting of his enemy, V, by a police officer, X, based on a fraudulent 911 call indicating that V is standing outside his home armed, dangerous, and prepared to shoot any member of law enforcement upon arrival<sup>678</sup>; and (2) where P, a robber, provokes his victim, X, to mistakenly kill an innocent bystander, V, in reasonable self-defense.<sup>679</sup> Under these circumstances, the innocent instrumentality rule provides the basis for imputing X's lethal yet mistakenly justified conduct to P based upon his or her having culpably created the conditions that gave rise to it.<sup>680</sup>

Once it has been determined that an intermediary who engages in statutorily prohibited conduct qualifies as an instrumentality, the next issue to be addressed is whether a sufficient causal nexus between the defendant's conduct and that of the intermediary exists.<sup>681</sup> The innocent instrumentality rule is subject to a causation

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<sup>675</sup> LAFAYE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1 (“[I]f A, with intent to bring about B’s death, causes C (a child) to take B’s life, A is guilty of intent-to-kill murder.”); *see, e.g., State v. Bobenhouse*, 166 Wash.2d 881 (2009) (defendant forced his two minor children to have sex with one another); *Maxey v. United States*, 30 App.D.C. 63 (D.C. Cir. 1907) (child given funds and directed to obtain abortion); *Commonwealth v. Hill*, 11 Mass. 136 (1841) (child used to pass counterfeit check).

<sup>676</sup> DRESSLER, *supra* note 27, at § 30.06 (“If D coerces X to commit a theft by threatening X’s life, X will be acquitted of larceny on the basis of duress. Today, and according to common law principles, D may be convicted of larceny. X was D’s innocent instrumentality.”); *see, e.g., Parnell v. State*, 912 S.W.2d 422 (Ark. 1996) (defendant was guilty of rape where he forced his adopted children to have sexual relations, even though the son would have a duress defense to a rape charge); *State v. Thomas*, 619 S.W.2d 513 (Tenn. 1981) (defendant was guilty of criminal sexual conduct where he forced wife at gunpoint to perform sexual acts on her husband); *Morrisey v. State*, 620 A.2d 207 (Del. 1993).

<sup>677</sup> *Jones v. State*, 19 So. 2d 81, 83 (Ala. Ct. App. 1944) (“One may or could use an insane person as the agent of destruction . . . just as guiltily as with a person of sound mind.”); *see, e.g., Johnson v. State*, 38 So. 182 (Ala. 1904) (incompetent person incited to kill); *People v. Monks*, 24 P.2d 508 (Cal. 1933) (incompetent person induced to draw check against insufficient funds).

<sup>678</sup> On similar facts, the Supreme Court of Virginia in *Bailey v. Commonwealth* rejected the defendant’s contention that he could not be convicted of manslaughter because the actual perpetrators of the offense, the police, were innocent of any wrongdoing. 329 S.E.2d 37 (Va. 1985). The court explained that the defendant, who orchestrated a scenario that resulted in the victim’s being shot by the police, could be convicted because, as one who employed an innocent agent, he was guilty as a principal in the first degree. *Id.* at 40.

<sup>679</sup> Model Penal Code § 2.06 cmt. at 303; *see also Taylor v. Superior Court*, 477 P.2d 131 (Cal. 1970) (court would not hold the defendant directly liable under the felony-murder rule for the justifiable killing of a co-felon by the owner of the store the defendant and his co-felons were robbing; the court was willing, however, to permit an imputation of liability under a theory of vicarious liability focusing upon a co-felon’s earlier conduct, initiating the gun battle, that caused the justifying circumstances).

<sup>680</sup> *See* PAUL H. ROBINSON, 2 CRIM. L. DEF. § 123 (Westlaw 2018).

<sup>681</sup> *See, e.g.,* Commentary on Ky. Rev. Stat. Ann. § 502.010 (“His act or omission to act must be shown to have caused the conduct of the innocent or irresponsible person which resulted in the crime.”); DRESSLER, *supra* note 27, at § 30.09.

requirement comprised of the same basic principles of factual causation and legal causation applicable throughout the criminal law. In this context, factual causation entails an empirical evaluation of whether the P was the logical, but-for cause of X's conduct, i.e., the question is whether "P did something to manipulate or otherwise use X, so that it may be said that, but for P's conduct, X would not have engaged in the conduct for which P is being held accountable."<sup>682</sup> Legal causation, in contrast, imports a normative evaluation of whether the chain of events following P's attempt at inducing X to engage in criminal conduct were "reasonably foreseeable,"<sup>683</sup> or not too "attenuated,"<sup>684</sup> to justify holding the defendant liable under the circumstances.<sup>685</sup>

The third, and final, requirement is that the defendant must have committed the *actus reus* of the innocent instrumentality rule "with whatever *mens rea* or mental state is needed for the crime."<sup>686</sup> More specifically, the government must prove that the defendant caused an innocent or irresponsible person to engage in conduct constituting an offense with the state of mind—purpose, knowledge, intent, recklessness, negligence, or none at all (i.e., strict liability)—applicable to each of the objective elements that comprise the offense. So, for example, in a jurisdiction where rape requires proof of *intentionally* engaging in sexual intercourse, with *negligence* as to the absence of consent, P may be held liable for coercing X to rape V if (but only if) it can be proven that: (1) P *intentionally* caused X to engage in sexual intercourse with V; and (2) P did so *failing to perceive a substantial risk* that V was not consenting to the episode.<sup>687</sup>

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<sup>682</sup> DRESSLER, *supra* note 27, at § 30.09; *see, e.g., United States v. Kegler*, 724 F.2d 190, 200 (D.C. Cir. 1983) ("'Cause' means 'bringing about'") *United States v. Keats*, 937 F.2d 58, 64 (2d Cir. 1991) ("physical consequence"); *United States v. Levine*, 457 F.2d 1186, 1188 (10th Cir. 1972) ("procures or brings about"). Sometimes this is framed in terms of whether the defendant is the "cause in fact." *United States v. Nelson*, Nos. 98-1231, 98-1437, 2002 WL 14171, at \*35 (2d Cir. Jan. 7, 2002) ("cause in fact" (emphasis omitted) (quoting *United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992)); *United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir. 1970) ("cause-in-fact").

<sup>683</sup> *Pereira v. United States*, 347 U.S. 1 (1954) (reasonably foreseeable consequences are "caused" for purposes of innocent instrumentality rule); *see United States v. Alexander*, 135 F.3d 470, 474-75 (7th Cir. 1998) (observing that the *Pereira* decision is the foundation upon which an entire line of cases holds that a defendant "causes" a third party to mail or wire transmission for purposes of mail fraud when the defendant acts with the knowledge that use of the mails or wire facilities will occur in the ordinary course of business or where such use can reasonably be foreseen).

<sup>684</sup> *United States v. Hsia*, 176 F.3d 517, 522-23 (D.C. Cir. 1999).

<sup>685</sup> Note that there is clearly a spectrum of cases along which the strength of the causal relation varies with the actor's degree of control over the other person or, in other words, with the other person's degree of independent action. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 631-32 (1984). *See Fritz v. State*, 130 N.W.2d 279 (Wis. 1964) (X persuaded Y, who had a history of mental illness, to kill X's husband, where such persuasive powers derived from emotional manipulation of Y); *United States v. Nelson*, 277 F.3d 164, 213 (2d Cir. 2002) (causal link was between X's speech at the scene of the accident which led to the rioting and violence and the eventual attack by Y on victim).

<sup>686</sup> *See, e.g.,* Commentary on Ky. Rev. Stat. Ann. § 502.010 (under the innocent instrumentality rule a defendant must be "shown to have acted with a culpable mental state sufficient for commission of the offense charged," which "is established if it is shown that a defendant intended to accomplish the resulting criminal objective through a non-culpable agent"); DRESSLER, *supra* note 27, at § 30.09; *cf. Joshua Dressler, Reforming Complicity Law: Trivial Assistance As A Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 448 (2008) ("[S]uppose that S, unaware that P is insane, provides a gun to P at the latter's request so that P can murder V. If P is later acquitted on insanity grounds, the law should not treat S as the perpetrator of the crime through "innocent instrumentality" P. P was not manipulated by S; he was not S's instrument.").

<sup>687</sup> *See Morrissey v. State*, 620 A.2d 207, 210 (Del. 1993).

This general principle of culpable mental state equivalency has three main implications. First, the innocent instrumentality rule does not require proof of intent; rather, “a defendant may be held liable for causing the acts of an innocent agent even if he does so recklessly or negligently, so long as no greater *mens rea* is required for the underlying offense.”<sup>688</sup> For example, P may be held liable for reckless manslaughter if he *recklessly* leaves his car keys with X, an irresponsible agent known to have a penchant for mad driving, if X subsequently kills V on the road, provided that P *consciously disregarded a substantial risk* that such a fatal outcome could transpire, and such disregard was a gross deviation from a reasonable standard of care.<sup>689</sup>

Second, and conversely, the innocent instrumentality rule precludes holding an actor criminally liable for causing an innocent or irresponsible person to engage in statutorily prohibited conduct absent proof of a culpable mental state that is *at least as demanding* as that governing the target offense. For example, if “obtaining property by false pretenses is a crime only if the false pretenses are made purposely, one does not commit it by negligently causing an innocent agent to make statements that are false; one must do so purposely.”<sup>690</sup>

Third, and relatedly, where an offense is divided into degrees based upon distinctions in culpability as to results, the principal’s “liability shall extend only as far as his mental state will permit.”<sup>691</sup> For example, where a defendant recklessly “cause[s] a child to kill intentionally, the child’s intent to kill is not imputed to him; he may be guilty of manslaughter for his recklessness but he is accountable for nothing more.”<sup>692</sup>

The contemporary basis for codifying the innocent instrumentality rule is the Model Penal Code’s general complicity provision, § 2.06.<sup>693</sup> At “the time of the drafting of the Model Penal Code,” criminal codes rarely incorporated a “legislative formulation” of the rule, and even those that did were ambiguous about its basic contours.<sup>694</sup> The

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<sup>688</sup> Kadish, *supra* note 33, at 410; *see* Commentary on Ala. Code § 13A-2-22 (observing that innocent instrumentality rule may “impose a broader liability on a defendant than” accomplice liability, such that, “when an innocent or irresponsible person’s conduct is caused by a mental state such as recklessness or criminal negligence, the defendant is held accountable for the behavior of the acting party to the extent that the defendant’s mental state would permit”).

<sup>689</sup> Commentary on Ky. Rev. Stat. Ann. § 502.010 (“For example, if a defendant permits an incompetent or immature person to drive his vehicle, with an awareness of the risk involved, he may be convicted of manslaughter in the second degree [] for a homicide caused by the incompetent or immature person.”); *see, e.g., Berness v. State*, 38 Ala. App. 1, 5, 83 So. 2d 607, 611 (Ala. Ct. App. 1953), *aff’d*, 263 Ala. 641, 83 So. 2d 613 (1955) (owner in control of car liable for manslaughter for knowingly permitting intoxicated person to drive in such manner that death results). Note that federal courts have upheld convictions based on proof of what amounts to negligence. *See, e.g., Pereira*, 347 U.S. at 8-9 (1954). *But see United States v. Berlin*, 472 F.2d 13, 14 (9th Cir. 1973) (“Section 2(b) does, as appellants contend, have overtones of agency, and, in our judgment, the *willful causation to which it refers must be purposeful rather than be based simply upon reasonable foreseeability.*”) (emphasis added).

<sup>690</sup> Model Penal Code § 2.06 cmt. at 303; *see* LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1.

<sup>691</sup> Commentary on Ala. Code § 13A-2-22; *see* LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1.

<sup>692</sup> Model Penal Code § 2.06 cmt. at 302-03.

<sup>693</sup> LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1.

<sup>694</sup> Model Penal Code § 2.06 cmt. at 301 (“In a few states, statutory treatment of the subject provided for the liability of a person who counsels, advises, or encourages a child or lunatic to commit a crime . . . [But it] is paradoxical to speak of counseling or encouraging irresponsible persons to commit a crime, since by hypothesis their conduct is not criminal, and this is even clearer in the case of innocent, responsible agents.”) (citing Cal. Penal Code § 31).

drafters of the Model Penal Code sought to fill this gap by offering a clear statutory approach. What they ultimately produced states that: “A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct.”<sup>695</sup>

This formulation is composed of two main components. With respect to considerations of *actus reus*, the language utilized by the drafters clarifies that the innocent instrumentality rule “applies only if P causes X”—an innocent or irresponsible person—“to engage in the conduct in question.”<sup>696</sup> And, with respect to considerations of *mens rea*, such language delineates that an actor may only be held “accountable for the behavior of an innocent or irresponsible person when he has caused it with the purpose, knowledge, recklessness, or negligence that the law requires for commission of the crime with which he has been charged.”<sup>697</sup>

Since completion of the Model Penal Code, the drafters’ recommended approach to codifying the innocent instrumentality rule has gone on to become quite influential. For example, the commentary accompanying the Code highlights that, as of 1980, “most of the recent revisions” had either incorporated or proposed a comparable provision.<sup>698</sup> And this remains true today: nineteen of the twenty-nine jurisdictions that have undertaken comprehensive criminal code reform efforts codify the innocent instrumentality rule in a manner that corresponds with Model Penal Code § 2.06(2)(a).<sup>699</sup>

While the Model Penal Code approach to codification has had a broad influence on modern criminal codes, legislatures in reform jurisdictions also routinely modify it.

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One prominent early example is Section 2(b) of Title 18 of the United States Code. Section 2(b), enacted in 1948 as part of a consolidation and reorganization of federal criminal statutes, was amended in 1981 to read: “Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.” The federal courts have held this statute “adopts the general principal of causation in criminal law that an individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is achieved through the actions of . . . intermediaries.” *United States v. Concepcion*, 983 F.2d 369, 383–84 (2d Cir. 1992) (internal quotation marks omitted). For an overview of the confusing and conflicting case law surrounding the meaning of “willfully” in the federal statute, see 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, 1448–49 (2002).

<sup>695</sup> Model Penal Code § 2.06(2)(a).

<sup>696</sup> DRESSLER, *supra* note 27, at § 30.09; see Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 *STAN. L. REV.* 681, 733 (1983) (“The objective elements for causing crime by an innocent are relatively straightforward. The defendant need not satisfy the objective elements of the substantive offense; the point of the provision is to hold him legally accountable when he engages in conduct that causes an innocent or irresponsible person to satisfy the objective requirements.”).

<sup>697</sup> Model Penal Code § 2.06 cmt. at 302.

<sup>698</sup> Model Penal Code § 2.06 cmt. at 303 n.15.

<sup>699</sup> See Ala. Code § 13A-2-22; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-303; Ark. Code Ann. § 5-2-402; Colo. Rev. Stat. Ann. § 18-1-602; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-221; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.010; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Ohio Rev. Code Ann. § 2923.03; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-401; Tex. Penal Code Ann. § 7.02; Wash. Rev. Code § 9A.08.020; see also John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 *S.C. L. REV.* 237, 255–56 (2008) (noting relevant legislative trends).

Many of these revisions are minor or organizational; however, some are substantive.<sup>700</sup> Most significant are those reform jurisdictions that incorporate a definition of an “innocent or irresponsible person” (the importance of which is discussed below).<sup>701</sup> Revisions aside, there is little question that Model Penal Code § 2.06(2)(a) broadly reflects the modern legislative approach to the issue, which has also generally been embraced by the scholarly commentary.<sup>702</sup>

Consistent with the above legal authorities, the RCC incorporates a broadly applicable general provision codifying the innocent instrumentality rule. The RCC’s recognition of a broadly applicable doctrine for imputing the conduct of an innocent or irresponsible agent based upon causal principles accords with Model Penal Code § 2.06(2)(a). At the same time, the manner in which the RCC codifies the relevant policies in a manner that departs from the Model Penal Code approach in two notable ways.

First, RCC § 211 remedies a key ambiguity in Model Penal Code § 2.06(2)(a), which vaguely states that the defendant must cause an innocent or irresponsible person to “engage in *such* conduct.”<sup>703</sup> As a textual matter, this language does not expressly require that the conduct that the defendant causes the intermediary to engage in actually be the conduct constituting the offense, “that is, the conduct under the circumstances and causing the results proscribed by the offense definition.”<sup>704</sup> That being said, there is little doubt “that the drafters intended to require this” construction.<sup>705</sup> With that in mind, and in furtherance of the interests of clarity and consistency, RCC § 211 explicitly states that

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<sup>700</sup> For an overview of legislative trends, see Model Penal Code § 2.06 cmt. at 303 n.15.

<sup>701</sup> Illustrative is the Kentucky Criminal Code, which clarifies that the phrase:

[I]ncludes anyone who is not guilty of the offense in question, despite his participation, because of:

(a) Criminal irresponsibility or other legal incapacity or exemption; or

(b) Unawareness of the criminal nature of the conduct in question or the defendant’s criminal purpose; or

(c) Any other factor precluding the mental state sufficient for the commission of the offense in question.

Ky. Rev. Stat. Ann. § 502.010; *see, e.g.*, Ala. § 13A-2-22(2)(b) (“[I]ncludes any person who is not guilty of the offense in question, despite his behavior, because of: (1) Criminal irresponsibility or other legal incapacity or exemption; (2) Unawareness of the criminal nature of the conduct in question or of the defendant’s criminal purpose; or (3) Any other factor precluding the mental state sufficient for the commission of the offense in question.”); Colo. Rev. Stat. Ann. § 18-1-602 (“[I]ncludes any person who is not guilty of the offense in question, despite his behavior, because of duress, legal incapacity or exemption, or unawareness of the criminal nature of the conduct in question or of the defendant’s criminal purpose, or any other factor precluding the mental state sufficient for the commission of the offense in question.”).

<sup>702</sup> *See, e.g.*, Robinson & Grall, *supra* note 65, at 733; Kadish, *supra* note 33, at 384–85.

<sup>703</sup> Model Penal Code § 2.06(2)(a) (“A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct . . .”).

<sup>704</sup> *See* Robinson and Grall, *supra* note 65, at 733.

<sup>705</sup> *See id.* (discussing those aspects of the Model Penal Code commentary that support this view).



the defendant must cause “an innocent or irresponsible person to *engage in conduct constituting an offense.*”<sup>706</sup>

Second, RCC § 211(b) fills an important gap in Model Penal Code § 2.06(2)(a), which fails to define an “innocent or irresponsible person.” Absent a statutory definition of this phrase, the text of Model Penal Code § 2.06(2)(a) “gives no hint as to what kinds of defenses offered by the perpetrator will render him ‘innocent or irresponsible.’”<sup>707</sup>

To be sure, the commentary accompanying the Model Penal Code offers illustrative examples, such as those who lack the necessary intent, the mentally ill, children, and one who mistakenly kills an innocent bystander while responding to a defendant’s attack.<sup>708</sup> Viewed collectively, these illustrations indicate that the absence of an offense’s culpable mental state requirement or the presence of an excuse defense provide the basis for viewing someone as innocent or irresponsible.<sup>709</sup> Commentary aside, the failure to expressly communicate this point through the Code’s text remains a significant oversight given its importance to application of the rule.<sup>710</sup>

With that in mind, and in furtherance of the interests of clarity and consistency, RCC § 211(b) explicitly defines an “innocent or irresponsible person” to include “a person who, having engaged in conduct constituting an offense” either “[l]acks the culpable mental state requirement for that offense,” or, alternatively, “[a]cts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to justification.”

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the innocent instrumentality rule, which avoids the flaws and ambiguities reflected in Model Penal Code § 2.06(2)(a).

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<sup>706</sup> See, e.g., Alaska Stat. Ann. § 11.16.110 (3) (“[A]cting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct”).

<sup>707</sup> ROBINSON, *supra* note 49, at 1 CRIM. L. DEF. § 82.

<sup>708</sup> Model Penal Code § 2.06 cmt. at 301-04.

<sup>709</sup> ROBINSON, *supra* note 49, at 1 CRIM. L. DEF. § 82.

<sup>710</sup> See *id.*

## RCC § 212. EXCEPTIONS TO LEGAL ACCOUNTABILITY.

(a) *Exceptions to General Principles of Legal Accountability.* A person is not legally accountable for the conduct of another under RCC § 210 or RCC § 211 when:

- (1) The person is a victim of the offense; or
- (2) The person's conduct is inevitably incident to commission of the offense as defined by statute.

(b) *Exceptions Inapplicable Where Liability Expressly Provided by Offense.* The exceptions established in subsection (a) do not limit the criminal liability expressly provided for by an individual offense.

***Relation to National Legal Trends.*** Within American criminal law, there are a range of situations where “an actor may technically satisfy the requirements of an offense definition, yet be of a class of persons that was not in fact intended to be included within the scope of the offense.”<sup>711</sup> Two such situations arise in the context of accomplice liability where: (1) the would-be accomplice is also a victim of the offense; and (2) the conduct of the would-be accomplice is inevitably incident to commission of the offense.<sup>712</sup>

With respect to the first situation, the common law rule is that—absent legislative intent to the contrary—“the victim of the crime may not be held as an accomplice even though his conduct in a significant sense has assisted in the commission of the crime.”<sup>713</sup> This rule *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of the offense perpetrated against themselves.<sup>714</sup>

The paradigm case is presented by a minor who willingly participates in a sexual relationship with an adult that is considered by law to constitute statutory rape.<sup>715</sup> Under these circumstances, the minor may technically satisfy the requirements of accomplice liability as to the statutory rape in the sense of having purposefully assisted and encouraged its perpetration.<sup>716</sup> Nevertheless, “in the absence of express legislative authority to the contrary, [the minor] may not be convicted as an accomplice in her own

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<sup>711</sup> PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (2d. Westlaw 2018).

<sup>712</sup> See, e.g., WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 13.3 (2d ed., Westlaw 2018) (“One may be an accomplice in a crime which, by its definition, he could not commit personally. However, one is not an accomplice to a crime if (a) he is a victim of the crime; [or] (b) the offense is defined so as to make his conduct inevitably incident thereto . . .”); *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (noting these “exceptions to the general rule that aiding and abetting goes hand-in-glove with the commission of a substantive crime”); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09 (6th ed. 2012).

<sup>713</sup> LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; *Southard*, 700 F.2d at 19.

<sup>714</sup> See Ky. Rev. Stat. § 502.040 cmt. (noting victim “exemption[] to the general doctrine of imputed liability for conduct which aids in the perpetration of crime”); ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83 (same).

<sup>715</sup> See, e.g., LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; *Regina v. Tyrell*, 17 Cox Crim.Cas. 716 (1893).

<sup>716</sup> See generally, e.g., LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 36, at § 30.04.

victimization.”<sup>717</sup> The same has also been said about the “[t]he businessman who yields to the extortion of a racketeer, [or] the parent who pays ransom to the kidnapper.”<sup>718</sup> Although those “who pay extortion, blackmail, or ransom monies” can be understood to have “significantly assisted in the commission of the crime,” the fact they are the “victim of a crime” means that they “may not be indicted as an aider or abettor.”<sup>719</sup>

With respect to the second situation, the common law rule is that—again, absent legislative intent to the contrary—accomplice liability does not apply “where the crime is so defined that participation by another is inevitably incident to its commission.”<sup>720</sup> This rule *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of an offense for which their participation was logically required as a matter of law.<sup>721</sup>

The paradigm case is a two-party transaction involving the purchase of controlled substances acquired by the buyer for individual use.<sup>722</sup> Under these circumstances, the buyer may technically satisfy the requirements of accomplice liability as to the distribution of controlled substances in the sense of having purposefully assisted and encouraged it.<sup>723</sup> Nevertheless, it is well-established that “a purchaser of a controlled substance is not an aider and abettor in the controlled substance’s delivery or

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<sup>717</sup> DRESSLER, *supra* note 36, at § 29.09[D]; *see, e.g., In re Meagan R.*, 42 Cal. App. 4th 17, 21–22, 49 Cal. Rptr. 2d 325 (1996) (minor “cannot be liable as either an aider or abettor or coconspirator to the crime of her own statutory rape,” and, as such, cannot be guilty of burglary based on a building entry for the purpose of engaging in consensual sexual intercourse”); *Application of Balucan*, 44 Haw. 271, 353 P.2d 631, 632 (1960) (“A girl under sixteen years of age, the victim of [ ]sexual intercourse with a female under sixteen, a felony, cannot be charged as a principal aiding in the commission of, or as an accessory to, the felony.”); *United States v. Blankenship*, No. 2:15-CR-00241, 2016 WL 4030943, at \*6–7 (S.D.W. Va. July 26, 2016) (“[A] fourteen-year old who consents to sex with a forty-year old cannot be charged with aiding or abetting statutory rape[.]”); *see also, e.g., Whitaker v. Commonwealth*, 95 Ky. 632, 27 S.W. 83, 84 (1894) (consenting victim of incestuous conduct of her father could not be convicted as an accomplice to his offense); *Ex parte Cooper*, 162 Cal. 81, 85, 121 P. 318 (1912) (rejecting argument that an unmarried woman, although not guilty herself of adultery, was nevertheless a principal in that crime by her participation in the illicit intercourse when she willfully and knowingly aided and abetted her married codefendant in the commission of the offense); *State v. Hayes*, 351 N.W.2d 654 (Minn. App. 1984) (minor who was furnished liquor not an accomplice to crime of furnishing liquor to minor).

<sup>718</sup> DRESSLER, *supra* note 36, at § 29.09[D]; LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3.

<sup>719</sup> *Southard*, 700 F.2d at 19; Haw. Rev. Stat. § 702-224 cmt. (“For example, the business person who yields to extortion ought not be regarded as an accomplice of the extortionist. Similarly it would be unwise to regard parents who yield to the threat of kidnappers and clandestinely pay a ransom as accomplices in the commission of the crime.”)

<sup>720</sup> LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; *see, e.g., Wegg*, 919 F. Supp. at 907 (“[O]ne cannot be an accomplice if one’s conduct is ‘inevitably incident’ to the commission of the offense.”); *United States v. Jefferson*, 13 M.J. 779, 781 (A.C.M.R. 1982) (“[A] person is not an aider and abettor of an offense committed by another if his conduct is ‘inevitably incident to its commission,’ unless there is a criminal statute which provides otherwise.”); *United States v. Carney*, 387 F.3d 436, 455 (6th Cir. 2004) (Guy, J., dissenting) (noting the well-established common law exception to accomplice liability for crimes in which “it takes two to tango”); *Southard*, 700 F.2d at 20.

<sup>721</sup> *See, e.g., Ky. Rev. Stat. Ann. § 502.040 cmt.* (stating that conduct inevitably incident rule is an “exemption[] to the general doctrine of imputed liability for conduct which aids in the perpetration of crime,” applicable to “a person who joins another in a two-party transaction that constitutes a crime for which criminal sanctions are imposed only on the other party”).

<sup>722</sup> *See, e.g., LAFAVE, supra* note 36, at 2 SUBST. CRIM. L. § 13.3.

<sup>723</sup> *See generally, e.g., LAFAVE, supra* note 36, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 36, at § 30.04.

distribution.”<sup>724</sup> The reason? The buyer’s “conduct is necessarily incident to the other crime.”<sup>725</sup> Which is to say: because the distribution of narcotics necessarily requires two parties, a seller and a purchaser, the purchaser may not be held criminally responsible as an accomplice to that distribution under the conduct inevitably incident exception.

For similar reasons, American legal authorities frequently bar both “prosecution of the bribe giver for the crime of bribe receiving” (and vice versa).<sup>726</sup> Here again, general principles of accomplice liability would seem to support criminal responsibility given the likelihood that a bribe giver will have purposely assisted and encouraged the bribe receiver’s conduct (and vice versa).<sup>727</sup> Nevertheless, courts preclude this kind of reciprocal liability premised on the “the mutual participation” inherent in bribery.<sup>728</sup> That is, because bribery necessarily requires two parties, the bribe-giver and the bribe-receiver, one of those parties may not be held criminally responsible for the other’s conduct as an accomplice under the conduct inevitably incident exception.<sup>729</sup>

It’s important to point out that, in applying the conduct inevitably incident exception, “the question is whether the crime charged is so defined that the crime could not have been committed without a third party’s involvement, not whether the crime ‘as charged actually involved a third party whose ‘conduct was useful or conducive to’ the

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<sup>724</sup> *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760, 770 (1992); *see, e.g., State v. Berg*, 613 P.2d 1125, 1126 (Utah 1980) (“A purchaser of a controlled substance commits the offense of ‘possession.’ One guilty of that offense . . . is not an accomplice to the crime committed by the seller.”); *Wheeler v. State*, 691 P.2d 599, 602 (Wyo. 1984) (“The purchaser of controlled substances commits the crime of ‘possession’ and not ‘delivery,’ and, thus, is not an accomplice to a defendant charged with unlawful distribution.”); *United States v. Harold*, 531 F.2d 704, 705 (5th Cir.1976) (“It is not necessary to ‘sell’ contraband to aid and abet its distribution . . . but to participate actively in the distribution [of a controlled substance] to others one must do more than receive it as a user.”); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) (“The general rule in Alabama is that the purchaser of an illicit substance is not an accomplice of the seller because the purchaser is guilty of an offense independent from the sale.”); *Leigh v. State*, 34 Okla. Crim. 338, 246 P. 667 (1926) (“The purchaser of intoxicating liquor at an illegal sale is not an accomplice of the seller.”); *State v. Celestine*, 671 So. 2d 896, 897–98 (La. 1996) (same); *Robinson v. State*, 815 S.W.2d 361, 363–64 (Tex. App. 1991) (collecting legal commentary and citations).

<sup>725</sup> *State v. Pinson*, 895 P.2d 274, 277 (N.M. Ct. App.1995) (“When an illegal drug sale is completed, there are two separate crimes committed, trafficking by the seller and possession by the purchaser. Each conduct is necessarily incident to the other crime.”).

<sup>726</sup> *People v. Manini*, 79 N.Y.2d 561, 571 (1992). (citing N.Y. Penal Law § 20.00 cmt.) (“[T]he crime of bribe giving by A to B is necessarily incidental to the crime of bribe receiving by B . . . [Therefore] A is not guilty of bribe receiving [as an accomplice]. But, A is criminally liable for his own conduct which constituted the related but separate offense of bribe giving.”); *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 (Ky. 2016) (Kentucky law prohibits charging corrupt sports official with “sports bribery as an accomplice of the briber”).

<sup>727</sup> *See generally, e.g., LAFAVE, supra note 36, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, supra note 36, at § 30.04.*

<sup>728</sup> *Jennings*, 490 S.W.3d at 344.

<sup>729</sup> *See, e.g., People v. Manini*, 79 N.Y.2d 561, 571 (1992) (code precludes “prosecution of the bribe giver for the crime of bribe receiving”) (citing Commentary to N.Y. Penal Law § 20.00 (“[T]he crime of bribe giving by A to B is necessarily incidental to the crime of bribe receiving by B . . . [Therefore] A is not guilty of bribe receiving [as an accomplice]. But, A is criminally liable for his own conduct which constituted the related but separate offense of bribe giving.”)); *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 (Ky. 2016) (Kentucky law prohibits charging corrupt sports official with “sports bribery as an accomplice of the briber”); *but see May v. United States*, 175 F.2d 994, 1005 (D.C. Cir. 1949) (extending general complicity principles to hold offeror of bribe criminally responsible for aiding and abetting public official’s violation of federal statute prohibiting receipt of unlawful compensation).

crime.”<sup>730</sup> To take just one example, consider “the role of a doorman for a [drug]house, which is to prevent ‘ripoffs’ or robberies by individuals entering the premises.”<sup>731</sup> That role may in a general sense be “incidental to the main business of the house—the sale and purchase of [controlled substances].”<sup>732</sup> Nevertheless, because it is entirely possible (as a matter of law) to distribute drugs without the assistance of a doorman, the doorman’s conduct, unlike that of the purchaser, is not “inevitably incidental to the commission of the crime” of drug distribution.<sup>733</sup>

Both of these exceptions to the general rules of accomplice liability are typically justified on the basis of legislative intent. With respect to the victim exception, for example, it has been observed that “[w]here the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose accomplice liability upon such a person.”<sup>734</sup> And, with respect to the conduct inevitably incident exception, the standard “justification is that ‘the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by the others in the offense as a crime.’”<sup>735</sup>

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<sup>730</sup> LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3 (citing *State v. Duffy*, 8 S.W.3d 197 (Mo. App. 1999)).

<sup>731</sup> *Wagers v. State*, 810 P.2d 172, 175 (Alaska Ct. App. 1991).

<sup>732</sup> *Id.*

<sup>733</sup> *Id.*; *see, e.g., Commonwealth v. Jennings*, 490 S.W.3d 339, 345 (Ky. 2016) (holding that, “as a matter of law,” defendant’s conduct was not “inevitably incident” to the crime of assault” because that offense “does not as defined require one person to identify the victim and another to strike the blow”).

<sup>734</sup> *United States v. Blankenship*, No. 2:15-CR-00241, 2016 WL 4030943, at \*6–7 (S.D.W. Va. July 26, 2016); (quoting LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3); *see* Ky. Rev. Stat. § 502.04 cmt. (noting that this exception “is for individuals whose protection is the very purpose of a criminal prohibition”). As for the rationale behind the legislative purpose, it seems to rest upon basic intuitions. Consider, for example, the commentary to the Hawaii criminal code:

Even though a victim of an offense in a limited sense assists its commission, it *seems clear* that the victim ought not to be regarded as an accomplice. For example, the business person who yields to extortion ought not be regarded as an accomplice of the extortionist. Similarly it would be *unwise* to regard parents who yield to the threat of kidnappers and clandestinely pay a ransom as accomplices in the commission of the crime.

Haw. Rev. Stat. § 702-224 cmt.

<sup>735</sup> *Blankenship*, 2016 WL 4030943, at \*6–7 (quoting *Southard*, 700 F.2d at 19); *Ex parte Cooper*, 162 Cal. 81, 86, 121 P. 318 (1912); *see Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) (“The traditional law is that where a statute treats one side of a bilateral transaction more leniently;” therefore, “adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature.”); Commentary on Haw. Rev. Stat. Ann. § 702-224 (“In those cases where the commission of an offense necessarily involves the conduct of two persons, it is questionable wisdom to push the concept of complicity to its outer limits.”); *see also* LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3 (“A secondary consideration, equally applicable to the victim exception, is that if the law were otherwise convictions would be more difficult to obtain in those jurisdictions requiring corroboration of an accomplice’s testimony.”); *compare United States v. Hogan*, 886 F.2d 1497, 1504 (7th Cir. 1989) (“Where the statute covers the incidental conduct, the “inevitably incident” defense does not apply.”)

Because these exceptions are understood to be an outgrowth of legislative intent, it is also understood that they should not apply when the legislature clearly manifests a desire to criminalize the relevant conduct.<sup>736</sup> For example, it has been argued that where the legislature excludes customers from the definition of prostitution, criminal liability premised on an aiding and abetting theory should be barred by the conduct inevitably incident exception.<sup>737</sup> With that in mind, however, many legislatures “have specifically provided for the liability of [customers] by either redefining the offense of prostitution or by enacting a ‘patronizing a prostitute’ offense.”<sup>738</sup> And where the legislature has made an offense-specific determination of this nature, it is generally agreed that the courts should implement it.<sup>739</sup> In this way, these exceptions from general principles of legal accountability constitute default rules of construction, to be applied in the absence of an explicit, offense-by-offense specification of liability.<sup>740</sup>

The Model Penal Code provides the basis for most legislative efforts at codifying the victim and conduct inevitably incident exceptions.<sup>741</sup> The relevant code language is contained in Model Penal Code § 2.06(6)(a) and (b), which provide:

(6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(a) he is a victim of that offense; or

(b) the offense is so defined that his conduct is inevitably incident to its commission . . . .

This language, as the explanatory note highlights, was intended to codify two different “special defenses to a charge that one is an accomplice.”<sup>742</sup> The first is applicable “when the actor is himself a victim of the offense”<sup>743</sup>; it reflects the drafters’ belief that—as the accompanying commentary phrases it—“the victim of a crime should not be held as an accomplice in its perpetration, even though his conduct in a sense may have assisted in the commission of the crime and the elements of complicity previously defined may technically exist.”<sup>744</sup> The drafters viewed this first exemption in terms of legislative intent:

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<sup>736</sup> See, e.g., ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83 (“The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction.”).

<sup>737</sup> See, e.g., *People v. Anonymous*, 161 Misc. 379, 292 N.Y.S. 282 (N.Y. Crim. Ct. 1936).

<sup>738</sup> ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83 (collecting statutory citations).

<sup>739</sup> See, e.g., Haw. Rev. Stat. § 702-224 cmt.; Ky. Rev. Stat. § 502.040 cmt.

<sup>740</sup> See, e.g., Haw. Rev. Stat. § 702-224 cmt.; Ky. Rev. Stat. § 502.040 cmt.

<sup>741</sup> See generally Model Penal Code § 2.06(6) cmt. at 323-24.

<sup>742</sup> Model Penal Code § 2.06(6): Explanatory Note.

<sup>743</sup> Model Penal Code § 2.06(6): Explanatory Note.

<sup>744</sup> Model Penal Code § 2.06(6) cmt. at 323-24.

The businessman who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or may even be thought immoral; to view them as involved in the commission of the crime confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection. So, too, to hold the female an accomplice in a statutory rape upon her person would be inconsistent with the legislative purpose to protect her against her own weakness in consenting, the very theory of the crime.<sup>745</sup>

Apart from the issue of victims addressed by Model Penal Code § 2.06(6)(a) is that of conduct inevitably incident, which is governed by Model Penal Code § 2.06(6)(b).<sup>746</sup> The latter provision creates a second (and distinct) exception applicable “when the offense is so defined that the actor’s conduct is inevitably incident to the commission of the offense.”<sup>747</sup>

The Model Penal Code drafters intended this provision to speak to difficult questions, such as whether someone who “has intercourse with a prostitute [should] be viewed as an accomplice in the act of prostitution, the purchaser an accomplice in the unlawful sale, the unmarried party to a bigamous marriage an accomplice of the bigamist, the bribe giver an accomplice of the taker?”<sup>748</sup> The drafters believed that “a systematic legislative resolution of these issues” to be a “hopeless effort,” and that instead, “the problem must be faced and weighed as it arises in each situation.”<sup>749</sup> That said, the drafters also believed that a default rule *against* accomplice liability best accounted for the commonality between them, namely, “that the question is before the legislature when it defines the individual offense involved.”<sup>750</sup> “The provision, therefore, is that the

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<sup>745</sup> Model Penal Code § 2.06(6) cmt. at 323-24.

<sup>746</sup> See Model Penal Code § 2.06(6) cmt. at 323-24 (“Exclusion of the victim does not wholly meet the problems that arise.”).

<sup>747</sup> Model Penal Code § 2.06(6): Explanatory Note.

<sup>748</sup> Model Penal Code § 2.06(6) cmt. at 323-24. The commentary goes on to observe that:

These are typical situations where conflicting policies and strategies, or both, are involved in determining whether the normal principles of accessorial accountability ought to apply. One factor that has weighed with some state courts is that affirming liability makes applicable the requirements that testimony of accomplices be corroborated; the consequence may therefore be to diminish rather than enhance the law’s effectiveness by making prosecutions unduly difficult. More than this, however, is involved. In situations like prostitution, prohibition, and even late abortion, there is an ambivalence in public attitudes that makes enforcement very difficult at best; if liability is pressed to its logical extent, public support may be wholly lost. Yet to trust only to the discretion of prosecutors makes for anarchical diversity and elicits sympathy for those against whom prosecution may be launched.

*Id.* Note that the Model Penal Code has codified several of the crimes noted above in a way that makes conduct that was previously only “inevitably incident” to an offense, now liable for a separate offense. See Model Penal Code §§ 230.3(4) (prohibiting a woman from aborting after the 26th week of pregnancy), 251.2(5) (prohibiting patronizing a prostitute), 230.1(3) (prohibiting contracting or proposing to contract marriage with another knowing the other would thereby commit bigamy), 223.6(1) (prohibiting receipt of stolen property knowing it to be stolen).

<sup>749</sup> Model Penal Code § 2.06(6) cmt. at 323-24.

<sup>750</sup> *Id.*

general section on complicity is inapplicable, leaving to the definition of the crime itself the selective judgment that must be made.”<sup>751</sup>

Since completion of the Model Penal Code, the drafters’ recommendations concerning codification of broadly applicable exceptions to accomplice liability have been quite influential. A substantial majority of modern criminal codes incorporate a general provision based on Model Penal Code § 2.06(6)(a), which excludes victims from the scope of accomplice liability.<sup>752</sup> Likewise, a substantial majority of modern criminal codes also incorporate a general provision based on Model Penal Code § 2.06(6)(b), which excludes inevitably incident conduct from accomplice liability.<sup>753</sup>

While the exceptions reflected in the Model Penal Code § 2.06(6)(a) and (b) have had a broad influence on modern criminal codes, it’s also important to note that legislatures in reform jurisdictions frequently modify them. Many of these revisions are stylistic and/or organizational; however, at least one is potentially substantive. This modification is reflected in those reform jurisdictions that address a noted textual “inconsistency” in the Model Penal Code’s treatment of accomplices and those who cause crime to occur.<sup>754</sup>

The relevant inconsistency is a product of the fact that the Model Penal Code exceptions for victims and conduct inevitably incident are framed in terms of when “a person is not an accomplice in an offense committed by another person.”<sup>755</sup> However, accomplice liability is only one of two bases for holding one person legally accountable for the conduct of another under the Model Penal Code.<sup>756</sup> The other basis, often referred

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<sup>751</sup> Model Penal Code § 2.06(6) cmt. at 323-24 (“If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to conduct “inevitably incident to” the commission of the crime, the problem inescapably presents itself in defining the crime.”); *compare id.* (“This method of treatment might be unacceptable in legislating on accomplices for an established system, where the legislature may or may not have dealt with the issue in particular definitions and will not have been consistent in its practice. But in a model code or general revision, former legislative practice appears immaterial; the problem may be faced as each branch of the work proceeds.”).

<sup>752</sup> Ala. Code § 13A-2-24; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-1005; Ark. Code Ann. § 5-2-404; Colo. Rev. Stat. Ann. § 18-1-604; Conn. Gen. Stat. Ann. § 53a-10; Del. Code Ann. tit. 11, § 273; Haw. Rev. Stat. § 702-224; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ind. Code Ann. § 35-41-3-10; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Ohio Rev. Code Ann. § 2923.03; Or. Rev. Stat. § 161.165; Pa. Cons. Stat. Ann. tit. 18, § 306; Utah Code Ann. § 76-2-307; Wis. Stat. Ann. § 939.05; Mont. Code Ann. § 45-2-302 (victim only); N.D. Cent. Code § 12.1-03-01 (victim only); Wash. Rev. Code § 9A.08.020 (victim only).

<sup>753</sup> Ala. Code § 13A-2-24; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-1005; Ark. Code Ann. § 5-2-404; Colo. Rev. Stat. Ann. § 18-1-604; Conn. Gen. Stat. Ann. § 53a-10; Del. Code Ann. tit. 11, § 273; Haw. Rev. Stat. § 702-224; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ind. Code Ann. § 35-41-3-10; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Ohio Rev. Code Ann. § 2923.03; Or. Rev. Stat. § 161.165; Pa. Cons. Stat. Ann. tit. 18, § 306; Utah Code Ann. § 76-2-307; Wis. Stat. Ann. § 939.05; Ky. Rev. Stat. Ann. § 502.040 (only conduct inevitably incident); N.Y. Penal Law § 20.10 (only conduct inevitably incident).

<sup>754</sup> ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83.

<sup>755</sup> Model Penal Code § 2.06(6).

<sup>756</sup> *Compare* Model Penal Code § 2.06(2)(c) (“A person is legally accountable for the conduct of another person when . . . (c) he is an accomplice of such other person in the commission of the offense”) *with* Model Penal Code § 2.06(2)(a) (“A person is legally accountable for the conduct of another person when . .



to as the innocent instrumentality doctrine, attaches legal accountability where one person, “acting with the kind of culpability that is sufficient for the commission of the offense, [] causes an innocent or irresponsible person to engage in such conduct.”<sup>757</sup> Textually speaking, therefore, the Model Penal Code would appear to *preclude* applying the victim and conduct inevitably incident exceptions to those held criminally liable for causing crime to occur.<sup>758</sup>

Various state criminal codes, in contrast, clearly establish that the relevant exceptions apply equally to their general accomplice and causing crime by an innocent provisions. Illustrative is Section 20.10 of the New York criminal code, which establishes that “a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind that is necessarily incidental thereto.”<sup>759</sup> Similarly, Section 13A-2-24 of Alabama’s criminal code provides that, “[u]nless otherwise provided by the statute defining the offense, a person shall not be legally accountable for behavior of another constituting a criminal offense if: (1) He is a victim of that offense; or (2) The offense is so defined that his conduct is inevitably incidental to its commission.”<sup>760</sup>

This revision, it’s worth noting, also finds support in legal commentary.<sup>761</sup> It has been observed, for example, that the disparate treatment of accomplices and those who cause crime by an innocent may simply have been “the result of careless drafting” given the different time periods in which the relevant Model Penal Code provisions were compiled.<sup>762</sup> Drafting concerns aside, moreover, it has been argued that there exists “little justification for providing or barring these special exemption defenses to one theory of liability for the conduct of another, but not to the other.”<sup>763</sup> For example, barring such defenses in the context of the innocent instrumentality doctrine would make it possible to hold X, an underage minor willingly engaged in a sexual relationship with adult Y, criminally responsible for statutory rape provided that Y possesses a mental illness sufficient to constitute an insanity defense.<sup>764</sup> Likewise, it would also authorize holding X, the purchaser in a drug sale by Y, criminally responsible for distribution merely because Y possesses a mental illness sufficient to constitute an insanity defense.<sup>765</sup>

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. acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct”).

<sup>757</sup> Model Penal Code § 2.06(2)(a).

<sup>758</sup> ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83.

<sup>759</sup> N.Y. Penal Law § 20.10.

<sup>760</sup> Ala. 13A-2-24; Ky. Rev. Stat. Ann. § 502.040 (“A person is not guilty under [statutory provisions governing accomplice liability and causing crime by an innocent] for an offense committed by another person when . . . The offense is so defined that his conduct is inevitably incident to its commission.”).

<sup>761</sup> For legal commentary more generally in support of the Model Penal Code’s approach to dealing with the intersection between accomplice liability, victims and conduct inevitably incident, see, for example, LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; DRESSLER, *supra* note 36, at § 29.09.

<sup>762</sup> ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83.

<sup>763</sup> *Id.* (“For example, if the victim of an assault has purposely aided another in beating him by providing a whip, the victim nonetheless would receive a specially exempted person defense to complicity under § 2.06(6)(a). The result would be different, however, if the assisted assaulter has an insanity defense and the victim is charged with causing crime by an innocent; § 2.06(6)(a) provides the “victim” defense only to complicity liability.”).

<sup>764</sup> *See id.*

<sup>765</sup> *See id.*

Consistent with the above considerations, the RCC creates two generally applicable exceptions to legal accountability for another person's conduct. The first exception, RCC § 212(a), excludes the "victim of [the] offense" from the general principles of accomplice liability and liability for causing crime by an innocent respectively set forth in RCC §§ 210 and 211. The second exception, RCC § 212(a)(2), excludes actors whose "conduct is inevitably incident to commission of the offense as defined by statute" from the general principles of accomplice liability and liability for causing crime by an innocent respectively set forth in RCC §§ 210 and 211. Thereafter, subsection (b) establishes an important limitation on these two exceptions, namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that RCC § 212 *is not* intended to constitute a universal bar on criminal liability for victims or those who engage in conduct inevitably incident to commission of an offense, but rather, constitutes a default rule of construction applicable in the absence of legislative specification to the contrary.

The RCC's recognition of victim and conduct inevitably incident exceptions generally accords with the substantive policies reflected in Model Penal Code § 2.06(6). At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in one notable way, namely, it clarifies that these exceptions apply equally across forms of legal accountability. This departure finds support in state legislative practice<sup>766</sup> and scholarly commentary.<sup>767</sup>

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<sup>766</sup> See *supra* notes 83-84 and accompanying text.

<sup>767</sup> See *supra* notes 85-87 and accompanying text.

### **RCC § 213. WITHDRAWAL DEFENSE TO LEGAL ACCOUNTABILITY.**

(a) *Withdrawal Defense.* It is an affirmative defense to a prosecution under RCC § 210 and RCC § 211 that the defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:

- (1) Wholly deprives his or her prior efforts of their effectiveness;
- (2) Gives timely warning to the appropriate law enforcement authorities; or
- (3) Otherwise makes proper efforts to prevent the commission of the offense.

(b) *Burden of Proof for Withdrawal Defense.* The defendant has the burden of proof for this affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

***Relation to National Legal Trends.*** Typically, “an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense.”<sup>768</sup> There is, however, an important exception applicable to both the general inchoate crimes of attempt, solicitation, and conspiracy, as well as criminal liability based on complicity. In these contexts, the criminal justice system affords an “offender the opportunity to escape liability, even after he has satisfied the elements of these offenses, by renouncing, abandoning, or withdrawing from the criminal enterprise.”<sup>769</sup> As it arises in the complicity context, the relevant defense is typically referred to as “withdrawal.”<sup>770</sup>

The withdrawal defense to complicity both “originated and has persisted as a judicially-developed concept.”<sup>771</sup> This concept embodies the idea that “a person who provides assistance to another for the purpose of promoting or facilitating the offense, but who subsequently abandons the criminal endeavor, can avoid accountability for the subsequent criminal acts of the primary party.”<sup>772</sup> Importantly, though, not just any

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<sup>768</sup> ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.

<sup>769</sup> ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.

<sup>770</sup> *Id.*

<sup>771</sup> Buscemi, *supra* note 8, at 1178; *see, e.g.*, CHARLES E. TORCIA, 1 WHARTON’S CRIMINAL LAW § 37 (15th ed. 2018) (“At common law, a party could withdraw from a criminal transaction and avoid criminal liability by communicating his withdrawal to the other parties in sufficient time for them to consider terminating their criminal plan and refraining from committing the contemplated crime.”); *State v. Allen*, 47 Conn. 121 (1879); *State v. Peterson*, 213 Minn. 56, 4 N.W.2d 826 (1942); *Galan v. State*, 44 Ohio App. 192, 184 N.E. 40 (1932).

<sup>772</sup> DRESSLER, *supra* note \_\_, at § 30.07; *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) (“Withdrawal is traditionally a defense to crimes of complicity: conspiracy and aiding and abetting.”); *see also* ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 (“A majority of jurisdictions recognize some form of withdrawal or abandonment defense to complicity liability.”); *cf.* Buscemi, *supra* note 8, at 1178 (“Withdrawal originated and has persisted as a judicially-developed concept. No evidence has been uncovered to indicate that its application will be discontinued under the new Federal Criminal Code, whichever form is ultimately adopted.”).

On the federal level, “it is unsettled if a defendant can withdraw from aiding and abetting a crime,” for “[u]nlike a conspiracy, which by its very nature involves an agreement that can be refuted, accomplice liability can arise from merely encouraging the principal.” *United States v. Burks*, 678 F.3d

abandonment will provide the basis for a withdrawal defense. For example, it is well established among common law authorities that a “spontaneous and unannounced withdrawal will not do.”<sup>773</sup> Nor will proof that the defendant merely regretted his or her participation,<sup>774</sup> fled from the scene of a crime,<sup>775</sup> or was apprehended by the police before the crime aided or abetted was committed.<sup>776</sup> Rather, the contemporary common law rule is that the defendant must terminate his or her participation in a criminal scheme and: “(1) repudiate his prior aid, or (2) do all that is possible to countermand his prior aid or counsel, and (3) do so before the chain of events has become unstoppable.”<sup>777</sup>

This is generally understood to be a flexible standard, the satisfaction of which is contingent upon the nature of the conduct that establishes the defendant’s complicity in

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1190 (10th Cir. 2012) (“declin[ing] the government’s suggestion to categorically hold that withdrawal can never be a valid defense to aiding and abetting a federal crime.”). Note, however, that the U.S. Supreme Court’s recent decision in *Rosemond v. United States*, 572 U.S. 65, 78 (2014) “explained that an accomplice must know of the substantive offense beforehand in order to be shown to have embraced its commission . . . in a manner suggesting an accomplice might be able to withdraw and escape liability prior to the commission of the substantive offense, even if he had contributed to the crime’s ultimate success.” Charles Doyle, *Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2*, CONGRESSIONAL RESEARCH SERVICE REPORT, at 10-11 (Oct. 24, 2014).

<sup>773</sup> DRESSLER, *supra* note 7, at § 30.07 (citing *State v. Thomas*, 356 A.2d 433, 442 (N.J. Super. Ct. App. Div. 1976), *rev’d on other grounds*, 387 A.2d 1187 (N.J. 1978)); *see, e.g., Karnes v. State*, 159 Ark. 240, 252 S.W. 1 (1923); *People v. Rybka*, 16 Ill.2d 394, 158 N.E.2d 17 (1959); *State v. Guptill*, 481 A.2d 772 (Me. 1984).

<sup>774</sup> LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing *In re D.N.*, 65 A.3d 88 (D.C. 2013); *People v. Rybka*, 16 Ill.2d 394, 158 N.E.2d 17 (1959)).

<sup>775</sup> LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing *Plater v. United States*, 745 A.2d 953 (D.C. 2000); *State v. Forsha*, 190 Mo. 296, 88 S.W. 746 (1905)); *see People v. Lacey*, 49 Ill.App.2d 301, 200 N.E.2d 11, 14 (1964) (“A person who encourages the commission of an unlawful act cannot escape responsibility by quietly withdrawing from the scene.”).

<sup>776</sup> LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing *Sheppard v. State*, 312 Md. 118, 538 A.2d 773 (1988)); *see State v. Amaro*, 436 So.2d 1056 (Fla. Dist. Ct. App. 1983); *Commonwealth v. Doris*, 287 Pa. 547, 135 A. 313 (1926)).

<sup>777</sup> LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d); *see, e.g., Smith v. State*, 424 So. 2d 726, 732 (Fla. 1982) (“To establish the common-law defense of withdrawal from the crime of premeditated murder, a defendant must show that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the criminal plan.”); DRESSLER, *supra* note 7, at § 30.07 (“[T]he accomplice must communicate his withdrawal to the principal and make bona fide efforts to neutralize the effect of his prior assistance.”); Ky. Rev. Stat. § 502.040 cmt. (observing the “prevailing doctrine which allows an aider or abettor or an accessory before the fact to relieve himself of liability by countermanding his counsel, command or encouragement through a communication delivered in time to allow his principal to govern his actions accordingly”).

The common law rule has similarly been described as follows:

Where the perpetration of a felony has been entered on, one who had aided and encouraged its commission may nevertheless, before its completion, withdraw all his aid and encouragement and escape criminal liability for the completed felony; but his withdrawal must be evidenced by acts or words showing to his confederates that he disapproves or opposes the contemplated crime. Moreover, it is essential that he withdraw in due time, that the one seeking to avoid liability do everything practicable to detach himself from the criminal enterprise and to prevent the consummation of the crime, and that, if committed, it be imputable to some independent cause.

*Blevins v. Com.*, 209 Va. 622, 626, 166 S.E.2d 325, 328–29 (1969) (quoting 22 C.J.S. CRIMINAL LAW § 89).

the first place.<sup>778</sup> Which is to say: the greater the defendant's contribution to a criminal scheme, the stronger the evidence needed to prove that the defendant withdrew from it.<sup>779</sup> For example, a defendant who contributes a weapon to a criminal scheme to be used by the principal actor in the commission of an offense cannot avoid legal accountability by merely asking for the gun to be returned.<sup>780</sup> Rather, conduct such as actual retrieval is needed.<sup>781</sup> This is to be contrasted with the situation of a defendant whose contribution to a criminal scheme merely involved verbal encouragement.<sup>782</sup> In that case, an oral communication indicating one's intentions to withdraw may be sufficient.<sup>783</sup> And it is also well established that, as an alternative in either of the above situations, a defendant can avoid legal accountability by providing the police with reasonable notice or by engaging in some other "proper effort" directed toward prevention of the target offense.<sup>784</sup>

While the nature of the conduct that will provide the basis for a withdrawal defense is varied, one limiting principle is uniform: the withdrawal must be timely.<sup>785</sup> For example, where the withdrawal is based on oral repudiation by the defendant, that repudiation must "be communicated far enough in advance to allow the others involved in the crime to follow suit."<sup>786</sup> Similarly, in the situation of a defendant who opts to withdraw by notifying law enforcement, that notification must be early enough to provide the police with a reasonable opportunity to disrupt the criminal scheme.<sup>787</sup> In practice, then, it must "be possible for the trier of fact to say that the accused had wholly and effectively detached himself from the criminal enterprise *before* the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed."<sup>788</sup>

None of which is to say that the defendant's conduct "must *actually prevent* the crime from occurring."<sup>789</sup> Indeed, just the opposite is true: the common law rule is that "[i]t is *not necessary* that the crime actually have been prevented" in order to successfully

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<sup>778</sup> Haw. Rev. Stat. Ann. § 702-224 cmt ("What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary depending on the conduct that establishes the accomplice's complicity.").

<sup>779</sup> Haw. Rev. Stat. Ann. § 702-224 cmt ("More will be required of one who distributes arms than one who offers verbal encouragement.").

<sup>780</sup> Ala. Code § 13A-2-24 cmt.; DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

<sup>781</sup> Ala. Code § 13A-2-24 cmt.; DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d); *see, e.g., State v. Adams*, 225 Conn. 270, 623 A.2d 42 (1993) ("Depriving this act of its effectiveness would have required a further step, such as taking back the weapon"); *State v. Miller*, 204 W.Va. 374, 513 S.E.2d 147 (W.Va.1998) (where defendant gave her son gun and drove him to where his father was, after which son shot and killed father, her abandonment defense rejected because she "did not do everything practicable to abandon the enterprise," such as taking back the gun or driving her son from where the father was located).

<sup>782</sup> DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

<sup>783</sup> DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

<sup>784</sup> DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

<sup>785</sup> Haw. Rev. Stat. Ann. § 702-224 cmt ("What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary depending on the conduct that establishes the accomplice's complicity.").

<sup>786</sup> *State v. Formella*, 158 N.H. 114, 116–19, 960 A.2d 722, 724–26 (2008); *see, e.g., People v. Brown*, 26 Ill.2d 308, 186 N.E.2d 321 (1962); *Commonwealth v. Chhim*, 447 Mass. 370, 851 N.E.2d 422 (2006).

<sup>787</sup> DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

<sup>788</sup> *Id.* (quoting *People v. Lacey*, 49 Ill. App. 2d 301, 307, 200 N.E.2d 11, 14 (Ill. App. Ct. 1964)).

<sup>789</sup> *Id.*

raise a withdrawal defense.<sup>790</sup> What matters is that the defendant’s conduct was reasonably calculated towards negating—whether directly or indirectly—his or her initial contribution to a criminal scheme, thereby ameliorating the justification for imposing legal accountability in the first place.<sup>791</sup>

The Model Penal Code provides the basis for most efforts at codifying a withdrawal defense to accomplice liability.<sup>792</sup> The relevant code language is contained in Model Penal Code § 2.06(6)(c), which provides:

(6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

....

(c) he terminates his complicity prior to the commission of the offense and

(i) wholly deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

This language, as the explanatory note highlights, was intended to codify a “special defense[] to a charge that one is an accomplice,” which “relates to a termination of the actor’s complicity prior to the commission of the offense.”<sup>793</sup> More specifically, the specified defense “requires that the actor wholly deprive his conduct of its effectiveness in the commission of the offense or that he give timely warning to law enforcement authorities or otherwise make a proper effort to prevent the commission of the offense.”<sup>794</sup>

With respect to the requirement in subsection (6)(c)(i) that “the accomplice must deprive his prior action of its effectiveness,” the Model Penal Code commentary explains that “[t]he action needed for that purpose will, of course, vary with the accessorial behavior.”<sup>795</sup> So, for example, “[i]f the behavior consisted of aid, as by providing arms, a statement of withdrawal ought not to be sufficient; what is important is that he get back

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<sup>790</sup> *Id.*; see, e.g., Ky. Rev. Stat. Ann. § 502.040 cmt. (Withdrawal defense “allows an accomplice to avert liability through appropriate withdrawal, even though the offense which he aids is ultimately committed”); *State v. Allen*, 47 Conn. 121 (1879).

<sup>791</sup> In this sense, the withdrawal defense to accomplice liability “is clearly more lenient” than the renunciation defense to general inchoate crimes, which is typically comprised of an “actual prevention” standard.” ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. Another way the withdrawal defense to accomplice liability is more lenient is that it generally has no subjective renunciation requirement (i.e., any motive underlying the withdrawal will suffice), whereas for general inchoate crimes the renunciation must be voluntary. See *id.*

<sup>792</sup> See generally Model Penal Code § 2.06(6) cmt. at 323-24.

<sup>793</sup> Model Penal Code § 2.06(6): Explanatory Note.

<sup>794</sup> *Id.*

<sup>795</sup> Model Penal Code § 2.06(6) cmt. at 326.

the arms, and thus wholly deprive his aid of its effectiveness in the commission of the offense.”<sup>796</sup> Conversely, if “complicity inhered in request or encouragement, countermanding disapproval may suffice to nullify its influence, providing it is heard in time to allow reconsideration by those planning to commit the crime.”<sup>797</sup>

Thereafter, the Model Penal Code commentary explains that subsection (6)(c)(ii) speaks to the fact that “[t]here will also be cases where the only way that the accomplice can deprive his conduct of effectiveness is to make independent efforts to prevent the crime.”<sup>798</sup> Even under these circumstances, the drafters of the Model Penal Code believed that “the law should nonetheless accord the possibility of gaining an immunity, provided there is timely warning to the law enforcement authorities or there otherwise is proper effort to prevent commission of the crime.”<sup>799</sup> That said, the drafters also believed that “[t]he sort of effort that should be demanded turns so largely on the circumstances that it does not seem advisable to attempt formulation of a more specific rule.”<sup>800</sup> To that end, “Subsection (6)(c)(ii) accordingly provides that the actor must make ‘proper effort’ to prevent the commission of the offense.”<sup>801</sup>

The Model Penal Code treatment of withdrawal in the complicity context is to be distinguished from its treatment of renunciation in the context of the general inchoate crimes. For example, with respect to criminal solicitations, Model Penal Code § 5.02(3) provides that “[i]t is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.” And with respect to criminal conspiracies, Model Penal Code § 5.03(6) establishes that “[i]t is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.”<sup>802</sup>

The key phrase in these formulations—“complete and voluntary”—is defined in Model Penal Code § 5.01(4). This provision provides, first, that “renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor’s course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose.”<sup>803</sup> Then this provision adds that “[r]enunciation is not *complete* if it is motivated by a decision to postpone the criminal conduct until a more

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<sup>796</sup> *Id.*

<sup>797</sup> *Id.*

<sup>798</sup> *Id.*

<sup>799</sup> *Id.*

<sup>800</sup> *Id.*

<sup>801</sup> *Id.*

<sup>802</sup> The commentary to the Model Penal Code is careful to explain that the issue of renunciation “should be distinguished from abandonment or withdrawal from the conspiracy (1) as a means of commencing the running of time limitations with respect to the actor, or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (3) as a defense to substantive crimes subsequently committed by the other conspirators.” Model Penal Code § 5.03 cmt. at 456.

<sup>803</sup> *Id.* In specifying this motive of increased risk, the Model Penal Code drafters intended to distinguish between fear of the law reflected in a general “reappraisal by the actor of the criminal sanctions hanging over his conduct,” which satisfies the requirement, and “fear of the law [that] is . . . related to a particular threat of apprehension or detection,” which does not. Model Penal Code § 5.01 cmt. at 356.

advantageous time or to transfer the criminal effort to another but similar objective or victim.”<sup>804</sup>

Overall, the Model Penal Code’s renunciation defense to general inchoate crimes departs from—and is ultimately narrower than—its withdrawal defense in two primary ways.<sup>805</sup> First, Model Penal Code’s renunciation defense incorporates an “actual prevention” standard, which entails that the defendant successfully prevent the target of the solicitation or conspiracy from being consummated—whereas a “proper effort” on behalf of the defendant will suffice to establish a withdrawal defense to complicity.<sup>806</sup> Second, the Model Penal Code’s renunciation defense incorporates a voluntariness requirement, which requires that the abandonment of criminal purpose have been motivated by something other than a desire to avoid getting caught—whereas the Model Penal Code’s approach to withdrawal does not incorporate any subjective requirement (i.e., any motive underlying the withdrawal will suffice).<sup>807</sup>

Practically speaking, these differences mean that it is possible for a defendant to avoid legal accountability for another person’s conduct yet still incur general inchoate liability for his or her own conduct under the Model Penal Code.<sup>808</sup> The following example is illustrative. V personally insults Y. Y is predisposed to let the insult slide, but X firmly persuades Y over the phone that he must respond with lethal violence to protect Y’s reputation. X later has a change of heart (motivated, in part, by being alerted to the fact that the police were monitoring the phone call), and firmly communicates to Y his view that violence is the wrong path. However, X’s proper effort at dissuading Y is unsuccessful; Y goes on to kill V anyways. On these facts, X would presumably satisfy the Model Penal Code’s withdrawal standard, and, therefore, could not be deemed an accomplice to Y’s murder of V. X would not, however, satisfy the Model Penal Code’s narrower renunciation standard, and, therefore, could be held liable for the general inchoate crime(s) of solicitation and/or conspiracy to commit murder.

Since completion of the Model Penal Code, the drafters’ recommendations concerning recognition of a withdrawal defense to complicity liability have been quite influential. It has been observed, for example, that “most of the recent recodifications”

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<sup>804</sup> Model Penal Code § 5.01(4).

<sup>805</sup> See ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.

<sup>806</sup> See *id.*

<sup>807</sup> See *id.*

<sup>808</sup> Distinguishing renunciation from withdrawal, one commentator observes that:

A different rule is applied where the actor’s liability is predicated upon the conduct of another. In such cases the actor may achieve immunity if he or she terminates complicity and makes a ‘proper effort’ to prevent companions from committing the crime. The failure of such an actor to prevent the offense is not an absolute bar to the defense if he or she has made a reasonable effort to do so. The former associates, of course, are liable for the crimes the subsequently they go on to complete. While avoiding liability for later offenses, the former accomplice would still seem to retain liability for any inchoate offenses, such as attempt or conspiracy, which he or she may have committed prior to abandonment. As to these offenses, the actor will be subject to the ordinary application of the law and will retain criminal liability unless he or she has succeeded in preventing the offense attempted or in thwarting the success of any conspiracy he or she may have joined.



incorporate general provisions addressing when “withdrawal is a bar to accomplice liability” that are based on Model Penal Code § 2.06(6)(c).<sup>809</sup> And courts in jurisdictions that have not undertaken comprehensive code reform efforts have relied on Model Penal Code § 2.06(6)(c) through case law.<sup>810</sup>

While the Model Penal Code approach to withdrawal has had a broad influence on American criminal codes, legislatures in reform jurisdictions also routinely modify it. Many of these revisions are clarificatory or organizational; however, some are substantive.<sup>811</sup> Among these varied substantive revisions, two are particularly noteworthy.<sup>812</sup>

First, various states narrow the scope of a withdrawal defense to accomplice liability by demanding that “the withdrawal must not be motivated by a belief that the circumstances increase the probability of detection or apprehension or render accomplishment of the crime more difficult, or by a decision to postpone the crime to another time or transfer the effort to another victim or objective.”<sup>813</sup> Practically speaking, this imports the “voluntariness” and “completeness” requirements applicable to the renunciation defense provided by the Model Penal Code to general inchoate crimes.

Second, various states *potentially expand* the applicability of a withdrawal defense by explicitly applying it to those who cause crime to occur.<sup>814</sup> This revision addresses a noted “inconsistency” in Model Penal Code § 2.06(6),<sup>815</sup> which, as drafted, only addresses when “a person is not an accomplice in an offense committed by another person.”<sup>816</sup> Importantly, accomplice liability is only one of two bases for holding one person legally accountable for the conduct of another under the Model Penal Code.<sup>817</sup>

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<sup>809</sup> Model Penal Code § 2.06(6) cmt. at 325 (“Termination defenses have been provided by most, though not all, of the recently revised and proposed codes.”); *see, e.g.*, Ark. Code Ann. § 5-2-404; Del. Code Ann. tit. 11, § 273; Haw. Rev. Stat. § 702-224; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; Pa. Cons. Stat. Ann. tit. 18, § 306.

<sup>810</sup> *See, e.g., United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) (citing Model Penal Code § 2.06(6)(c)); *compare Kaiser v. Hannigan*, No. CIV. 97-3239-DES, 1999 WL 1289470, at \*6 (D. Kan. Dec. 16, 1999), *aff’d sub nom. Kaiser v. Nelson*, 229 F.3d 1163 (10th Cir. 2000) (discussing Kansas case law).

<sup>811</sup> *See, e.g.*, Ala. Code § 13A-2-24 (adding third alternative of giving timely warning to intended victim); Colo. Rev. Stat. Ann. § 18-1-604 (must give timely warning to victim or police); Mo. Ann. Stat. § 562.041 (only alternative (i)); Utah Code Ann. § 76-2-307 (alternative (i) or timely warning to police or victim); Ind. Code Ann. § 35-41-3-10 (voluntarily abandoned his efforts to commit it and voluntarily prevented its commission); Me. Rev. Stat. Ann. tit 17-A, § 57 (informs accomplice of his abandonment and leaves the scene); Minn. Stat. Ann. § 609.05 (abandons purpose and makes a reasonable effort to prevent); Ohio Rev. Code § 2923.03 (terminates complicity, manifesting a complete and voluntary renunciation); Wis. Stat. Ann. § 939.05 (voluntarily changes his mind and notifies other parties within a reasonable time to allow them to withdraw).

<sup>812</sup> Note that the Model Penal Code formulation requires that the defendant “wholly deprive it of effectiveness.” “It seems clear that this is meant to refer back to ‘his complicity.’” ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 (and observing that “[s]ome codes make this clear by repeating the phrase.”)

<sup>813</sup> LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing Conn. Gen. Stat. Ann. § 53a-10; N.Y. Penal Law § 40.10; *see, e.g.*, Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-1005; Ky. Rev. Stat. Ann. § 502.040; N.J. Stat. Ann. § 2C:2-6;

<sup>814</sup> *See, e.g.*, Ky. Rev. Stat. Ann. § 502.040; Ala. Code § 13A-2-24.

<sup>815</sup> ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 83.

<sup>816</sup> Model Penal Code § 2.06(6).

<sup>817</sup> *Compare* Model Penal Code § 2.06(2)(c) (“A person is legally accountable for the conduct of another person when . . . (c) he is an accomplice of such other person in the commission of the offense”) *with* Model Penal Code § 2.06(2)(a) (“A person is legally accountable for the conduct of another person when . . .

The other basis, often referred to as the innocent instrumentality doctrine, attaches legal accountability where one person, “acting with the kind of culpability that is sufficient for the commission of the offense, [] causes an innocent or irresponsible person to engage in such conduct.”<sup>818</sup> Textually speaking, then, the Model Penal Code suggests that a withdrawal defense is not available to those held criminally liable for causing crime to occur<sup>819</sup> —whereas these reform states explicitly clarify that it is.<sup>820</sup>

Modifications aside, it is nevertheless clear that the Model Penal Code approach to withdrawal has robust support in American legal practice. And it is also supported by American legal commentary.<sup>821</sup> This commentary clarifies that at the heart of both the withdrawal defense and renunciation defense is the basic principle that:

[T]hose that commit some harm should be encouraged to commit less rather than more. Just as the degree structure of criminal law threatens greater punishment for more aggravated forms of a given crime, thereby providing greater deterrence for the higher degrees of crime, so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage than they have already.<sup>822</sup>

Consistent with this principle, Wayne R. LaFave argues that:

Permitting withdrawal under the circumstances [specified by Model Penal Code § 2.06(6)] so as to avert criminal liability is certainly appropriate. One of the objectives of the criminal law is to prevent crime, and thus it is desirable to provide an inducement to those who have counseled and aided a criminal scheme to take steps to deprive their complicity of effectiveness.<sup>823</sup>

With that in mind, LaFave goes on to observe that “[w]hether the added requirements imposed by some statutes concerning the person’s motives are desirable is debatable.”<sup>824</sup> True, “one who withdraws merely because of a belief that the chances of

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. acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct”).

<sup>818</sup> Model Penal Code § 2.06(2)(a).

<sup>819</sup> ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 83.

<sup>820</sup> Ky. Rev. Stat. Ann. § 502.040; Ala. Code § 13A-2-24.

<sup>821</sup> See, e.g., LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d); ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. For an argument that a person who withdraws lacks the *mens rea* of accomplice liability, see Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 484–85 (2013).

<sup>822</sup> Moriarty, *supra* note 65, at 5; see also LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 11.1(d) (“The avoidance-of-harm rationale for such a defense is very strong. The person who solicits an offense is commonly in the best position to, and sometimes is the only person who can, avoid the commission of the offense. In addition, the possibility of effecting such avoidance is generally high; since the solicitor had the means to provide the motivation for the commission of the offense, he is also likely to have the means to effectively undercut that motivation.”).

<sup>823</sup> LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

<sup>824</sup> *Id.*

apprehension have increased has not truly reformed.”<sup>825</sup> That said, it “may be argued that even one acting under such a motive should be induced to take action directed toward prevention of the crime.”<sup>826</sup>

This is particularly true give that—as Paul Robinson observes—a person who makes a “proper effort” at withdrawing from a crime that is *not voluntary or complete* will “nonetheless be eligible for liability for an inchoate offense.”<sup>827</sup> As Robinson proceeds to argue:

Where the defendant abandons his complicity in a way that generally neutralizes the assistance he provided—as is generally assured by the “proper effort” requirements described above—he no longer merits liability for the full substantive offense. His culpability is more akin to that of an attemptor: while he has not in fact caused or contributed to the offense, he did try to do so. In other words, where the “proper effort” standard is met, the defendant ought to escape complicity liability for the full offense, but ought nonetheless be eligible for liability for an inchoate offense, unless he also satisfies the more demanding complete and voluntary renunciation defense for inchoate offenses.<sup>828</sup>

It’s important to point out that the broad support for the substantive policies that comprise the Model Penal Code’s withdrawal provisions does not extend to the Code’s recommended evidentiary policies. Whereas the Model Penal Code ultimately places the burden of disproving the existence of a withdrawal defense on the government beyond a reasonable doubt,<sup>829</sup> the majority approach is to require the defendant to persuade the

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<sup>825</sup> *Id.*

<sup>826</sup> *Id.*

<sup>827</sup> ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81; *see* LAFAVE, 2 SUBST. CRIM. L. § 13.3(d) (“One who has participated in a criminal scheme to a degree sufficient for accomplice liability may also have engaged in conduct which brings him within the definition of conspiracy or solicitation. Whether his withdrawal is a defense to those crimes is a separate matter.”).

<sup>828</sup> ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81; *see also* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981) (“Retributively oriented commentators note that abandonment makes us reassess our vision of the defendant’s blameworthiness or deviance.”); LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 11.4 (“All of us, or most of us, at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens.”) (quoting Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937)); *see Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011), *as amended* (Aug. 31, 2011) (quoting LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.4).

<sup>829</sup> *See, e.g.*, Model Penal Code § 1.12(2)(b) (defendant bears the burden of persuasion only where the statute specifically requires him to prove the matter by a preponderance); Model Penal Code § 2.06(6) (withdrawal defense to accomplice liability does not require defendant to prove by a preponderance); ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. Practically speaking, this means that once the defendant has met his or her burden of raising the issue of withdrawal, the prosecution is then required to *disprove* the presence of a withdrawal defense beyond a reasonable doubt. Absent this showing by the government, the defendant cannot be held legally accountable for a crime committed by another person.

factfinder of the presence of a withdrawal defense beyond a preponderance of the evidence.<sup>830</sup>

Scholarly commentary emphasizes a range of policy rationales, which help to explain this departure from the Model Penal Code. First, “as an accurate reflection of reality, the defense will be relatively rare.”<sup>831</sup> Second, the absence of a withdrawal defense will be difficult for a prosecutor to prove” given that (among other reasons) “the defense will frequently involve information peculiarly within the knowledge of the defendant which he is best qualified to present.”<sup>832</sup> Third, and perhaps most important, presenting a withdrawal defense is “tantamount to an admission that [the] defendant did participate in a criminal [scheme].”<sup>833</sup> As a result, “one’s sense of fairness is not as likely to be offended if the defendant is given the burden of demonstrating that it is more likely than not that he should be exculpated.”<sup>834</sup>

An illustrative example of these policy considerations at work is the U.S. Supreme Court’s recent decision in *Smith v. United States*, which held that the burden of persuasion for withdrawal from a conspiracy under federal law rests with the defendant, subject to a preponderance of the evidence standard.<sup>835</sup> “Where,” as the *Smith* Court

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<sup>830</sup> See LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (“The prevailing view is that the defendant has the burden of proof with respect to such withdrawal.”); ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 (“The burden of production for the defenses of renunciation, abandonment, and withdrawal is always on the defendant . . . . The burden of persuasion is generally on the defendant, by a preponderance of the evidence.”); *United States v. Burks*, 678 F.3d 1190, 1196 (10th Cir. 2012) (“The burden of proving withdrawal in the conspiracy context unequivocally rests with the defendant, and we see no basis for distinguishing situations when accomplice liability is at issue.”); compare *State v. Currie*, 267 Minn. 294, 306–08, 126 N.W.2d 389, 398–99 (1964) (“We think the rule ought to be that, once the state has established a prima facie case, the burden rests on the defendant of going forward with the evidence of withdrawal to a point where it can be said a reasonable doubt exists and that, having reached that point, the burden rests on the state of proving beyond a reasonable doubt that the defendant remained as a participant in the consummation of the crime.”); Ala. Code § 13A-2-24 (“The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.”).

<sup>831</sup> Buscemi, *supra* note 8, at 1173.

<sup>832</sup> *Id.*

<sup>833</sup> *Id.*

<sup>834</sup> ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 171. As various legal commentators have observed, this reflects a:

[S]ubtle balance which acknowledges that a defendant ought not to be required to defend until some solid substance is presented to support the accusation, but beyond this perceives a point where need for narrowing the issues coupled with the relative accessibility of evidence to the defendant warrants calling upon him to present his defensive claim.

LAFAVE, *supra* note 7, at 1 SUBST. CRIM. L. § 1.8 (quoting Model Penal Code § 1.12, cmt. at 194).

<sup>835</sup> *Smith v. United States*, 568 U.S. 106 (2013); see ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. In determining that the burden of persuasion for withdrawal from a conspiracy under federal law lies with the defense, the *Smith* held that doing so does not violate the Due Process Clause. *Id.* at 110. The *Smith* Court’s reasoning can be summarized as follows:

While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged proof of the nonexistence of all affirmative defenses has never been constitutionally required. The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense does

explained, “the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof.”<sup>836</sup> This is particularly true in the context of repudiating a criminal enterprise, where “the informational asymmetry heavily favors the defendant.”<sup>837</sup> Whereas “[t]he defendant knows what steps, if any, he took to dissociate” himself from the criminal enterprise,<sup>838</sup> it may be “nearly impossible for the Government to prove the negative that an act of withdrawal never happened.”<sup>839</sup> And, perhaps most importantly, “[f]ar from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense.”<sup>840</sup> As a result, the *Smith* Court concluded, requiring the defendant to establish a withdrawal defense beyond a preponderance of the evidence is both “practical and fair.”<sup>841</sup>

Consistent with the above considerations, the RCC incorporates a broadly applicable withdrawal defense to legal accountability, subject to proof by the defendant beyond a preponderance of the evidence. The RCC’s recognition of a broadly applicable withdrawal defense comprised of broad “proper efforts” standard accords with the substantive policies reflected in the relevant Model Penal Code provisions. At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in two notable ways.<sup>842</sup> First, RCC § 213(a) clarifies that these

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negate an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but “does not controvert any of the elements of the offense itself,” the Government has no constitutional duty to overcome the defense beyond a reasonable doubt. Withdrawal does not negate an element of the conspiracy crimes charged . . . .

ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. For a state appellate decision applying the same constitutional reasoning in the renunciation context, see *Harriman v. State*, 174 So. 3d 1044, 1050 (Fla. Dist. Ct. App. 2015); *see also Cowart v. State*, 136 Ga. App. 528 (1975); *People v. Vera*, 153 Mich. App. 411 (1986)).

<sup>836</sup> *Smith*, 568 U.S. at 111 (quoting *Dixon v. United States*, 548 U.S. 1, 9 (2006)).

<sup>837</sup> *Smith*, 568 U.S. at 111.

<sup>838</sup> *Id.* at 113. For example, “[h]e can testify to his act of withdrawal or direct the court to other evidence substantiating his claim.” *Id.*

<sup>839</sup> *Id.* at 113 (“Witnesses with the primary power to refute a withdrawal defense will often be beyond the Government’s reach: The defendant’s co-conspirators are likely to invoke their right against self-incrimination rather than explain their unlawful association with him.”).

<sup>840</sup> *Id.* at 110-11.

<sup>841</sup> *Id.*

<sup>842</sup> RCC § 213 is based on, but not identical to, general withdrawal provision incorporated into the Delaware Reform Code. More specifically, that provision reads as follows:

(b) EXCEPTION TO ACCOUNTABILITY. Unless the statute defining the offense provides otherwise, a person is not so accountable for the conduct of another, notwithstanding Subsection (a), if . . . .

(3) before commission of the offense, the person terminates his or her efforts to promote or facilitate its commission, and

(A) wholly deprives his or her prior efforts of their effectiveness; or

(B) gives timely warning to the proper law enforcement authorities;

or

exceptions apply equally across forms of legal accountability. Second, RCC § 213(b) establishes that the burdens of production and persuasion with respect to a withdrawal defense rests upon the defendant. These departures are supported by legislation, case law, and commentary.<sup>843</sup>

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(C) otherwise makes proper efforts to prevent the commission of the offense . . . .

Proposed Del. Crim. Code § 211 (2017).

<sup>843</sup> See *supra* notes 68-98 and accompanying text. RCC § 213 also departs from Model Penal Code formulation, which ambiguously requires that the defendant “wholly deprive *it* of effectiveness.” However, “[i]t seems clear that this is meant to refer back to ‘his complicity.’” ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 (and observing that “[s]ome codes make this clear by repeating the phrase.”) For this reason, RCC § 213 replaces “it” with “his or her prior efforts.”



**APPENDIX C:**

**ADVISORY GROUP WRITTEN COMMENTS ON  
CCRC DRAFT CODE REFORM RECOMMENDATIONS  
AS OF 3-1-19**



**Comments of U.S. Attorney's Office for the District of Columbia  
on D.C. Criminal Code Commission Recommendations  
for Chapter 2 of the Revised Criminal Code: Basic Requirements of Offense Liability  
Submitted Feb. 22, 2017**

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on the Recommendations for Chapter 2 of the Revised Criminal Code (Basic Requirements of Offense Liability) provided for Advisory Group review:

- Temporal Aspect of Possession (pages 15-17)
  - Section 22A-202(d) requires that the government prove that the defendant exercised control over property for period of time sufficient to provide an opportunity to terminate the defendant's control over the property.
  - Commission staff authors acknowledge that this approach takes a component of the "innocent or momentary possession" affirmative defense (the momentary possession component) and makes it an element that the government must now prove (versus an affirmative defense that the defendant must prove).
  - The Advisory Group should discuss this change further inasmuch as it is a substantive to D.C. law.
  
- Causation Requirement: § 22A-204
  - Factual Cause
    - Page 29: The Advisory Group should consider the "factual cause" definition in light of gun-battle liability, which is predicated upon "substantial factor" causation.

- Page 31 re: § 22A-204(b) (Definition of Factual Cause)
    - Commission staff authors appropriately concede that the proposed definition for “factual cause” would be a substantive change from current D.C. law. Specifically, the proposed rule would eliminate the “substantial factor” test, and would thereby appear to eliminate the basis for urban gun-battle causation as a theory of factual causation.
    - However, in cases such as *Roy* and *Fleming*, factual cause includes situations where the defendant’s actions were a “substantial factor” in bringing about the harm. The D.C. Court of Appeals has stated that “[i]n this jurisdiction[,] we have held findings of homicide liability permissible where: (1) a defendant's actions contribute substantially to or are a substantial factor in a fatal injury . . . and (2) the death is a reasonably foreseeable consequence of the defendant's actions.” *Fleming v. United States*, 148 A.3d 1175, 1180 (D.C. 2016) (quoting *Roy v. United States*, 871 A.2d 498 (D.C. 2005) (**petition for rehearing en banc pending**))
    - Concerns regarding an “unnecessarily complex analysis” required by a “substantial factor” test in all cases can be addressed easily by a jury instruction (*e.g.*, if the jury finds “but for” causation, the analysis ends; where there is no “but for” causation, the jury would consider whether defendant’s conduct was a “substantial factor” – and this would be unnecessary in most cases, where causation is not meaningfully at issue).
    - Of course, as noted above, the *Roy* petition for rehearing is pending and the decision of the D.C. Court of Appeals *en banc* would be decisive on this point.
  - Legal Cause
    - Page 29: Delete the “or otherwise dependent upon an intervening force or act” language. An intervening force or act does not negate legal causation if that intervening force or act is reasonably foreseeable.
    - Similar/conforming revisions should be made at page 35 (to the text that immediately precedes footnote 31) and at page 38 (to the text that immediately precedes footnote 49).

- Culpable Mental State Requirement: § 22A-205
  - Regarding mens rea as to results and circumstances (the last sentence of page 42), USAO-DC notes that, more recently, the D.C. Court of Appeals has held in *Vines* that “it is clear that a conviction for ADW can be sustained by proof of reckless conduct alone. If reckless conduct is sufficient to establish the requisite intent to convict a defendant of ADW, it necessarily follows that it is enough to establish the intent to convict him of simple assault.” *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), as amended (Sept. 19, 2013). By “reckless conduct,” the D.C. Court of Appeals meant that the defendant was reckless as to the possibility of causing injury, *i.e.*, the defendant was reckless as to the result.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** February 22, 2017

**SUBJECT:** Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**§ 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt**

On page 1, the Report begins with § 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt. Subparagraph (c)(2) defines a result element. It states that a "Result element" means any consequence that must have been caused by a person's conduct in order to establish liability for an offense." The problem is that while "Conduct element" is defined on page 1 in 22A-201

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(c)(1)<sup>2</sup> and “Conduct Requirement” is defined on page 9 in 22A-202 (a), the word “conduct,” itself, is not defined. It appears that the interpreter is left to assume that the word takes on the meanings associated with their usage in those separate definitions (or at least the one in 22A-201 (c)(1)). The need for the word “conduct” to be replaced, or defined, is highlighted by the Report’s observations on page 6. There it recognizes that conduct includes an action or omission. To make § 22A-201 (c) (2) clearer, we propose incorporating the concepts from pages 6 and substituting them for the word “conduct” in 22A-201(c)(2) The definition would then read “Result element” means any consequence that must have been caused by a person’s act or omission in order to establish liability for an offense.” The advantage of this definition is that the terms “act” and “omission” are defined in 22A-202.

### **§ 22A-202, Conduct Requirement**

On page 9, in paragraph (c) the term “Omission” is defined. It states ““Omission” means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists...” Neither the text of the proposed Code nor the Commentary explains what is meant by the term “culpably unaware.” The Code should define this term, or at least, the Commentary should focus on this term and give examples of when a person is “culpably unaware” that a legal duty to act exists as opposed to merely being unaware that there is a legal duty to act.

In § 22A-202 (d) the term “Possession” is defined. Included in that definition is a requirement that the person exercise control over the property “for a period of time sufficient to allow the actor to terminate his or her control of the property.” As noted in the Report, this is a departure from current District law. On page 15 of the Report it states “The latter temporal limitation dictates that a person who picks up a small plastic bag on the floor in a public space, notices that it contains drug residue, and then immediately disposes of it in a nearby trash can has not “possessed” the bag for purposes of the Revised Criminal Code....” What this definition of possession misses, or at least what the Commentary does not address, is that there are times when a person may be culpable for possession even in less time than it would take to “immediately dispose[] of it in a nearby trash.” Consider the following hypothetical. Two people walk over to a person who is selling heroin. One of them hands the seller money in exchange for the drug. As soon as the transaction is completed, the other person, who is an undercover police officer, arrests both the buyer and the seller. In that case, though the buyer literally had possession of the heroin for a fraction of a second, there is no question that the buyer knew that he or she possessed illegal drugs and intended to do so. In this situation, there is

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<sup>2</sup> Subparagraph (1) states that a “Conduct element” means any act or omission, as defined in § 22A-202, that is required to establish liability for an offense.”

no reason why there should be a temporal limitation on how long the heroin must have been in the buyer's possession before a law violation would have occurred.

### **§ 22A-203, Voluntariness Requirement**

On page 20, the Report defines the scope of the voluntariness requirement. Subsection (b)(1) states that an act is voluntary if the “act was the product of conscious effort or determination” or was “otherwise subject to the person’s control.” Based on the associated Commentary, it seems to be designed to capture circumstances, such as intoxication or epilepsy, when someone with a condition that can cause dangerous involuntary acts knowingly enters circumstances in which that condition may endanger others. The theory seems to be that, for example, driving while intoxicated is “subject to [a] person’s control” because the person can prevent it by not drinking and driving in the first instance. The same analysis applies to an accident that could arise due to an epileptic seizure. This makes sense; a person cannot willfully expose others to a risk at point X, and when the actual act that would constitute the offense takes place, insist that the act was not voluntary so that they cannot be held responsible for it. The question is whether there is some threshold of risk to trigger voluntariness here; otherwise, any involuntary act that was brought about in circumstances that were voluntarily chosen would be considered to be voluntary. Is this what was intended? If not, what is the threshold of risk that would “trigger” voluntariness here – and how would a court make that determination? Take the epilepsy example. Suppose a person knows that there is a .05% (or .005%) chance that he or she will experience an epileptic seizure if they don’t take their medication, but drives that way anyway. If a crash occurs, will driving the vehicle have been enough to trigger the “otherwise subject to the person’s control” prong of voluntariness or is it too remote? The Commentary should address this issue.

### **§ 22A-204, Causation Requirement**

On page 29, the Report defines the “Causation Requirement.” In paragraph (a) it states “No person may be convicted of an offense that contains a result element unless the person’s conduct was the factual cause and legal cause of the result.” Paragraphs (b) and (c) then define the terms “Factual cause” and “Legal cause.” Section 22A-204 (b) states ““Factual cause” means:

- (1) The result would not have occurred but for the person’s conduct; or
- (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.”

On pages 30 and 31, the Commentary addresses “Factual cause.” It states:

In the vast majority of cases, factual causation will be proven under § 22A-204(b)(1) by showing that the defendant was the logical, but-for cause of a result. The inquiry required by subsection 22A-204(b)(1) is essentially empirical, though also

hypothetical: it asks what the world would have been like if the accused had not performed his or her conduct. In rare cases, however, where the defendant is one of multiple actors that independently contribute to producing a particular result, factual causation may also be proven under § 22A-204(b)(2) by showing that the defendant's conduct was sufficient—even if not necessary—to produce the prohibited result. 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 a sufficient basis for treating the defendant's conduct as a factual cause.

While much of this explanation is intuitive, what may be more difficult for people to understand is how factual causation works when the result element is satisfied by a person's omission to act. Consider the following hypothetical. A father takes his toddler to the pool. He sees the child crawl to the deep end of the pool and fall in. The father sits there, doesn't move, and watches the child drown. In this situation it is awkward to think about the father's lack of movement as "performing" conduct, as opposed to doing nothing. The Commission should review whether there needs to be a third definition of "factual cause" that addresses acts of omission or whether merely an explanation and example in the Commentary about how to apply factual causation in cases of omission is sufficient. Clearly in this example, the father had a duty to perform the omitted act of saving his child. See § 22A-202 (c)(2).

### **§ 22A-206, Hierarchy of Culpable Mental States**

On page 49, the Report defines the Hierarchy of Culpable Mental States. In paragraph (c) Recklessness is defined. It states

RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:

- (1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result.
- (2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists.
- (3) In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation.
- (4) In order to act recklessly as to a result or circumstance "under circumstances manifesting extreme indifference" to the interests protected by an offense, the

person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.<sup>3</sup>

While it is meaningful to say that recklessly means ... "With respect to a result, being aware of a substantial risk that one's conduct will cause a result, it is not meaningful to say that recklessly means "In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation." The formulation of paragraphs (3) and (4) do not flow from the lead in language. It lacks symmetry. While it appears that paragraph (3) relates in a meaningful way to paragraph (1), as paragraph (4) relates in a meaningful way to paragraph (2), the text does not explain how each of these sets of definitions relate to each other internally. A tenant of a well written definition for use in a Code provision is that, niceties of grammar aside, the definition should be able to be substituted for the defined term in the substantive offense and the sentence should retain its meaning. One cannot do that with the definition of recklessness.<sup>4</sup> We propose that the definition of recklessness be redrafted so that the terms have more exacting meanings within the context of an offense.<sup>5</sup> One way to accomplish this is to redraft the definition as follows:

RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:

(1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result and that either the person's conduct *viewed as a whole* grossly deviates from the standard of care that a reasonable person would observe in the person's situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.<sup>6</sup>

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<sup>3</sup> It is unclear why the term "under circumstances manifesting extreme indifference" is in quotes in paragraph 4.

<sup>4</sup> Similarly, it is unclear at this time whether the definition of "Factual Cause" in § 22A-204 suffers from the same infirmity. After seeing how this term is actually used in the revised Code it may need to be amended. At this time, the definition appears not to define "factual cause" as such, rather it appears to operate more like an if-then ("A person's is a factual cause of a result if the result would not have occurred without the conduct"). We will be able to evaluate this definition when we are able to take the phrase "the result would not have occurred but for the person's conduct" and substitute it for the term "factual cause" in the text of the Code. If the sentence has meaning than the definition works.

<sup>5</sup> The same issues concerning the definition of Recklessness exists in the definition of Negligence.

<sup>6</sup> In the proposed text we added, in italics the phrase "viewed as a whole." Italics was used to show that the phrase was not in the original Code text. This language is taken from the explanation of the gross deviation analysis on page 68 of the Report. Given the importance of this statement, we propose that it be added to the actual definition of Recklessness.



(2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists and that either the person’s conduct *viewed as a whole* must grossly deviate from the standard of care that a reasonable person would observe in the person’s situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person’s conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person’s situation.

On page 58, in regard to § 22A-206(c)(3) it states “In many cases where a person consciously disregarded a substantial risk of prohibited harm, it is likely to be obvious whether the person’s conduct constituted a “gross deviation” from a reasonable standard of care under § (c)(3). In these situations, further elucidation of this broad phrase to the factfinder is unnecessary. Where, however, it is a closer call, the discretionary determination reflected in § 22A-206(c)(3) is intended to be guided by the following framework.”<sup>7</sup> If this definition is to remain, the comment should be expanded to explain which part of (c)(3) the Commission believes is discretionary or otherwise explain this point. Paragraph (c)(3) does not contain the word “discretionary” nor does it use a term that would lead the reader to believe that any part of it could be discretionary.

Of perhaps greater concern is that the Commentary elucidates a precise three-factor test to determine whether something is a “gross deviation” but does not actually incorporate that test into the codified text. The Commission should consider whether a legal standard of that nature should be codified.

The definition of recklessness states that in order for someone to act recklessly, his or her conduct must “grossly deviate from the standard of care that a reasonable person would observe in the person’s situation,” and in order for that conduct to take place “under circumstances manifesting extreme indifference” to the interests protected by a particular offense, the conduct must be an “extreme deviation from the standard of care that a reasonable person would observe in the person’s situation.” The difference between “grossly deviating” and an “extreme deviation” is not clear, and the Report does not clarify it. On page 58 the Report states that “[t]he difference between enhanced recklessness [requiring extreme deviation] and normal recklessness [requiring gross deviation] is . . . one of degree.” This does not sufficiently illuminate the distinction. Whether through additional explanations, examples, or a combination of the two, the Commentary should make clear the distinction between a gross deviation and an extreme deviation.

There is another aspect of the recklessness definition: being “aware of a substantial risk” which should be further explained. The Report maintains that “recklessness entails awareness of a

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<sup>7</sup> While we suspect the word “discretionary” means not that a court can choose whether to apply it, but rather that its application in any particular case requires significant case-specific judgment, the Report does not actually say that.

risk’s substantiality, but not its unjustifiability.” The language, however, is not altogether clear in that respect. Being aware of a substantial risk doesn’t necessarily mean being aware that the risk is substantial – the very same kind of ambiguity that inspired element analysis to begin with. Take the following hypothetical. Suppose a person drives down a little used street at 150 miles an hour at 3:00 am. In order to be considered reckless, does the person have to be aware that there is a substantial risk that he will hit and kill someone or that if he hits someone they will be killed.

### **§ 22A-207 Rules of Interpretation Applicable to Culpable Mental State Requirement**

On page 73, in § 22A-207 (b)(2), the proposed text states one of two ways that the Council can indicate that an element is subject to strict liability. It states that a person is strictly liable for any result or circumstance in an offense “[t]o which legislative intent explicitly indicates strict liability applies.” This language is subject to multiple interpretations. If the phrase “legislative intent ” is meant to include indicia from legislative history, it’s not clear what it means for the legislative history to “explicitly indicate” something (leaving aside the tension in the phrase “explicitly indicate”). Does this provision mean that if a committee report explicitly says “strict liability should apply to X,” that’s good enough? What if there are contrary statements at the hearing, by a witness or a councilmember? If, alternatively, the phrase was meant to simply mean “when another statutory provision can fairly be read to indicate that strict liability should apply” the language should be modified to refer to other statutory provisions explicitly indicating that strict liability applies, rather than the “legislative intent explicitly” so indicated.

In the Commentary following the Rules of Interpretation Applicable to Culpable Mental State Requirement there are a few examples that demonstrate how the “rule of distribution” works. We believe that two additional examples are needed to fully explain how it works in situations of strict liability.

The first example in the Commentary explains how to interpret “knowingly causing bodily injury to a child” and the second, in the footnote, contrasts that explanation with the explanation for how to interpret “knowingly causing injury to a person, negligent as to whether the person is a child. Given the rule that strict liability only applies to the element specified (and does not follow through to subsequent elements), we suggest that the Commentary add two additional examples. The first would be where there is a mental state provided for the first element, the second element is modified by the phrase “in fact”, and where there is no mental state associated with the third element. The purpose of that example would be to show that the mental state associated with the first element would also apply to the third element. The second example would contrast the previous examples with one where there is a mental state stated for the first element, the second element is modified by the phrase “in fact”, and the third element is also modified with the phrase “in fact.”

The following examples could be used, “Knowingly causing injury to a person, who is, in fact, a child, with a knife. Under the rules of interpretation the mental state of “knowingly” would apply not only to the causing injury to a person, but would also apply to the circumstance of the knife. This illustration could be contrasted with “Knowingly causing injury to a person, who is, in fact, a child, with what is, in fact, a knife.” We leave it to the Commission to decide where in the presentation of the Commentary it would be most informative to place these additional examples.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** April 24, 2017

**SUBJECT:** Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Mistake, Deliberate Ignorance, and Intoxication

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication (the Report). OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**§ 22A-208, Principles of Liability Governing Accident, Mistake, and Ignorance.**

On page 3, the Report discusses § 22A-208, Principles of Liability Governing Accident, Mistake, and Ignorance. We believe that the Commentary, if not the provision itself, should clarify the types of mistakes or ignorance of law, if any, to which this applies.<sup>2</sup> For example, it is our

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

<sup>2</sup> While the Commentary, at the top of page 5 of the Report does have a brief discussion concerning mistake of fact or non-penal law, we do not believe that that explanation is sufficient to address the issues raised here. Similarly while, footnote 20, on page 8, quotes LaFave that

understanding from the meetings that this provision does not mean that the government would have to prove that the defendant was aware that the act itself was illegal or the exact parameters of the prohibition. Two examples may be helpful. First, a person would be guilty of distribution of a controlled substance even if what the government proved was that the defendant thought that she was selling heroin, but she was really selling cocaine. Second, the government would not need to prove that a person knew that he was a mandatory reporter and that mandatory reporters must report child abuse in order to secure a conviction for failing to report child abuse.<sup>3</sup>

Section 22A-208 (b) is entitled “Correspondence between mistake and culpable mental state requirements. Subparagraph (3) states, “Recklessness. Any reasonable mistake as to a circumstance negates the recklessness applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the recklessness applicable to that element if the person did not recklessly make that mistake.” [Emphasis added] Subparagraph (4) states, “Negligence. Any reasonable mistake as to a circumstance negates the existence of the negligence applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the negligence applicable to that element if the person did not recklessly or negligently make that mistake.” [Emphasis added] At the meeting the Commission staff explained why these two subparagraphs are not parallel and why the inclusion of the word “recklessly” logically follows from the rules of construction already agreed upon. To be parallel, subparagraph (b)(4) on “Negligence” would not include the phrase “recklessly or.” If the Commission is going to keep this nonparallel structure then the Commentary should explain the reason why a reference to “recklessness” is included in the statement on “negligence.” This is not a concept that may be intuitive to persons who will be called upon to litigate this matter.

## § 22A-209, Principles of Liability Governing Intoxication

On page 25, the Report discusses § 22A-209, Principles of Liability Governing Intoxication. Paragraph (b) is entitled “Correspondence between intoxication and culpable mental state requirements.” The subparagraphs explain the relationship between a person’s intoxication and the culpable mental states of purpose, knowledge, and recklessness. However, there is a fourth mental state. Section 22A-205, Culpable mental state definitions, in addition to defining purpose, knowledge, and recklessness, also defines the culpable mental state of “negligently.”<sup>4</sup> To avoid needless arguments in litigation over the relationship between intoxication and the culpable mental state of negligently, § 22A-209 should include a statement that explicitly states

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“mistakes or ignorance as to a matter of penal law typically was not, nor is currently, recognized as a viable defense since such issues rarely negate the mens rea of an offense...” this provision is speaking in terms of the current law and not what the law would be if § 22A-208 were enacted. The Commentary should make it clear that no change in the law is intended.

<sup>3</sup> See D.C. Code §§ 4-1321.01 through 4-1321.07.

<sup>4</sup> On page 26 of the Report there is a statement that says, “Notably absent from these rules, however, is any reference to negligence, the existence of which generally cannot be negated by intoxication.”

that a person's intoxication does not negate the culpable mental state of negligence. A litigator should not have to go to the Commentary to find the applicable law.

On page 28 of the report it states, "Subsections (a) and (b) collectively establish that evidence of self-induced (or any other form of) intoxication may be adduced to disprove purpose or knowledge, while § (c) precludes exculpation based on self-induced intoxication for recklessness or negligence." However, § (c) is entitled "Imputation of recklessness for self-Induced intoxication." While referring to a person being "negligent" as a factor in determining if there should be imputation of recklessness for self-induced intoxication, that paragraph does not, as written, appear to actually preclude exculpation of negligence (probably because it is not needed for the reasons stated above). This portion of the Commentary should be rephrased.

Section 22A-209 was clearly drafted to explain the relationship between intoxication and culpable mental states in general and not when the offense itself includes the requirement that the government prove – as an element of the offense - that the person was intoxicated at the time that the offense was committed.<sup>5</sup> The Commentary should note this.

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<sup>5</sup> For example, it would be an ineffectual offense statute that permitted a person's self-induced intoxication to negate the mental state necessary to prove driving while impaired (intoxicated).

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** April 24, 2017

**SUBJECT:** Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 4, Recommendations for Chapter 1 of the Revised Criminal Code: Preliminary Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission’s First Draft of Report No. 4, Recommendations for Chapter 1 of the Revised Criminal Code: Preliminary Provisions<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**§ 22A-102, Rules of Interpretation**

On page 3, the Report discusses § 22A-102, Rules of Interpretation. Paragraph (a) states, “(a) GENERALLY. To interpret a statutory provision of this title, the plain meaning of that provision shall be examined first. If necessary, the structure, purpose, and history of the provision also may be examined.” [Emphasis added]. The provision does not state “necessary for what.” The Commentary, does include the statement that “However, in addition to its plain meaning, a provision also may be interpreted based on its structure, purpose, and history when necessary to determine the legislative intent.” To make the Code clearer, we suggest that the phrase “to determine the legislative intent” be added to the text of § 22A-102 (a). The amended provision would read “(a) GENERALLY. To interpret a statutory provision of this title, the

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

plain meaning of that provision shall be examined first. If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined.”

### § 22A-102, Interaction of Title 22A with other District Laws

On page 7, the Report discusses § 22A-103, Interaction of Title 22A with civil provisions in other laws. Paragraph (b) states, “The provisions of this title do not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action.”. The Commentary says that this is intended to mean, for instance, that “the conviction or acquittal of a defendant for a crime will not affect subsequent civil litigation arising from the same incident, unless otherwise specified by law.” [Emphasis added] We have two concerns about that statement, both of which suggest that the language needs to be clarified or changed. First, it is unclear if paragraph (b) means what the Commentary says that it does. Paragraph (b) says simply that the “provisions of this title” – i.e., the existence and interpretation of the criminal offenses listed in this title – does not alter any right or liability to damages. However, that statement is different from saying that being convicted of any one of those crimes will not alter someone’s right or liability to damages. Despite the statement in the Commentary that “Relation to Current District Law. None,” saying that conviction of a crime will not “affect” any civil action for the same conduct seems to be a significant change to existing law. Being convicted of a crime for certain conduct can collaterally estop someone, or otherwise prevent them from relitigating the issue of liability based on that same conduct. For example see *Ross v. Lawson*, 395 A.2d 54 (DC 1978) where the Court of Appeals held that having been convicted by a jury of assault with a dangerous weapon and that conviction having been affirmed on appeal, appellee, when sued in a civil action for damages resulting from that assault, could not relitigate the issue of liability for the assault.<sup>2</sup> So the Commentary is not correct when it says that “the conviction... will not affect subsequent litigation...” Unfortunately, the phrase in the Commentary that “unless otherwise specified by law” actually compounds the issue. The question then becomes whether the example, of *Ross*, falls under the “unless otherwise specified by law” statement in the Commentary. It is not clear whether the caveat is a reference to statutory law or common-law. An argument could be made that for common-law purposes, there is no impact because this is the result that the common-law actually requires.

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<sup>2</sup> It is true, however, that an “acquittal” is less likely to have an impact on civil cases because the acquittal simply allows the conduct at issue to be re-litigated in a subsequent civil proceeding. But note that an “acquittal” or “dismissal for want of prosecution” is one key requirement for a malicious tort claim (plaintiff must show that he or she prevailed on the underlying claim – in this case a criminal matter—that was instituted in bad faith or for malicious purposes).



# M E M O R A N D U M

THE  
PUBLIC  
DEFENDER  
SERVICE  
*for the District of Columbia*



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: April 24, 2017

Re: Comments on First Draft of Report No. 3:  
Recommendations for Chapter 2 of the  
Revised Criminal Code: Mistake, Deliberate  
Ignorance, and Intoxication

In general, the Public Defender Service approves the recommendations in the First Draft of Report No. 3. However, PDS has the following concerns and makes the following suggestions:

1. With respect to the Principles of Liability Governing Accident, Mistake, and Ignorance -- Although the Report explains that mistake and accident are not defenses but are “conditions that preclude the government from meeting its burden of proof” with respect to a mental state,<sup>1</sup> the proposed statutory language at §22A-208 does not make that point clear. This is particularly important because, in the view of PDS, judges and practitioners too often incorrectly (whether mistakenly or accidentally) view “accident” or “mistake” as “defenses,” creating a serious risk of burden shifting, a risk, as the Report notes, the DCCA has warned against.

PDS proposes adding language to subsection (a) of § 22A-208 that states plainly that accident and mistake are not defenses and that is explicit with regard to how accident and mistake relate to the *government’s* burden of proof. Specifically, PDS proposes changing §22A-208(a) to read as follows:

<sup>1</sup> “Viewing claims of mistake or accident through the lens of offense analysis has, on occasion, led Superior Court judges to treat issues of mistake and accident as true defenses, when, in fact, they are simply conditions that preclude the government from meeting its burden of proof with respect to an offense’s culpability requirement. In practical effect, this risks improperly shifting the burden of proof concerning an element of an offense onto the accused—something the DCCA has cautioned against in the context of both accident and mistake claims.” First Draft of Report No. 3, March 13, 2017, at page 7. (footnotes omitted)

Effect of Accident, Mistake, and Ignorance on Liability. A person is not liable for an offense when that person's accident, mistake, or ignorance as to a matter of fact or law negates the existence of a culpable mental state applicable to a result or circumstance in that offense. Accident, mistake and ignorance are not defenses. Rather, accident, mistake, and ignorance are conditions that may preclude the government from establishing liability.

This proposal exposes another problem however. While the above proposal refers to the government establishing liability, the Revised Criminal Code General Provisions are silent with respect to the government having such burden. Indeed, all of the proposed General Provisions are written in the passive voice. There is no clear statement that the government bears the burden of proving each element beyond a reasonable doubt. Certainly the constitutional principle is itself beyond any doubt and therefore including it in the Code might seem superfluous. The problem is that a statute explaining the effect of mistake or accident on liability, without a statement about who bears the burden of proving liability, allows confusion about whether it is the government or the defense that has the burden of proof with the (mistakenly termed) "mistake and accident defenses."

PDS further notes that the General Provisions frequently speak in terms of a person's "liability." For example -- § 22A-201(b): "'Offense element' includes the objective elements and culpability requirement necessary to establish *liability*;" §22A-203(b)(1): "Where a person's act provides the basis for *liability*, a person voluntarily commits the conduct element of an offense when that act was the product of conscious effort...;" §22A-204(c): "'Legal cause' means the result was a reasonably foreseeable consequence of the person's conduct. A consequence is reasonably foreseeable if its occurrence is not too remote, accidental, or otherwise dependent upon an intervening force or act to have a just bearing on the person's *liability*." However, the most important subsection in the General Provision Chapter, §22A-201(a), Proof of Offense Elements Beyond a Reasonable Doubt, speaks only in terms of *convicting* a person and not at all in terms of the person's *liability*. Thus, PDS strongly believes the General Provisions generally should make more explicit the connection between the proof beyond a reasonable doubt requirement and a person's liability for an offense. Therefore, PDS proposes the following change to §22A-201(a):

Proof of Offense Elements Beyond a Reasonable Doubt. No person may be convicted of an offense unless the government establishes the person's liability by proving each offense element ~~is proven~~ beyond a reasonable doubt.

The above proposed statement that the government bears the burden of establishing the person's liability now provides an express link for PDS's proposed language that accident, mistake and ignorance may preclude the government from establishing that liability. Together, these proposals should correct the too common misconception that mistake and accident are "defenses" and will prevent the unconstitutional burden shifting that can result from such misconception.

2. With respect to the Imputation of Knowledge for Deliberate Ignorance, at §22A-208(c) – PDS proposes a higher threshold before knowledge can be imputed to a person. Specifically, PDS proposes the following change to §22A-208(c):

When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if: ...

- (1) The person was reckless as to whether the circumstance existed; and
- (2) The person avoided confirming or failed to investigate whether the circumstance existed with the primary purpose of avoiding criminal liability.

The central problem, and PDS's main concern, with the willful indifference doctrine is that it permits culpability under a diluted *mens rea* standard. The willful indifference doctrine will allow convictions for offenses where knowledge of a circumstance is required when the person, in fact, did not have knowledge of the particular circumstance or when the government fails to prove that the person had the required knowledge. If the Revised Criminal Code is going to allow a backdoor for the government to use to convict someone for a crime serious enough that its *mens rea* is knowledge, then the backdoor should be difficult to open. Or more formally phrased, the Revised Criminal Code should distinguish between willfully blind actors who are more like knowing actors from those who are merely negligent or reckless. *See Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not an Element of Willful Blindness*, 121 Harv. L. Rev. 1245, 1248-49 (2008).

It is PDS's position that the language in First Draft of Report No. 3 for §22A-208(c) creates a backdoor that is too easy for the government to open; it so dilutes the knowledge requirement that it is barely a shade more onerous than requiring proof of mere recklessness. The lock on the backdoor, as it were, has two parts that work together – sub-subsections (1) and (2) of §22A-208(c). Focusing on the first part, the required level of circumstance-awareness the person must have, PDS proposed for discussion at the April 5, 2017 meeting of the Advisory Group that the appropriate standard, instead of the reckless standard, should be the "high probability" standard used in the Model Penal Code at § 2.02(7); that is, our Code would read "the person was aware of a high probability that the circumstance existed." As was noted at that meeting and more fully explained in the Commission's Report No. 2: Basic Requirements of Offense Liability, the

difference between awareness to a practical certainty (the Revised Criminal Code proposed language) and awareness of a high probability (MPC's willful blindness language) might be so narrow that the distinction is not worth recognizing.<sup>2</sup> PDS acknowledges that if the Revised Criminal Code is to have a deliberate ignorance provision at all, then it cannot be worded so as to require the same level of awareness as that required for knowledge.

If PDS is agreeing not to create a new level of awareness that would be less than knowledge but more than recklessness, then the strength of the “lock on the backdoor” must come from the second part. That is, if to satisfy the knowledge requirement, the government need only prove the reckless-level of awareness of the circumstance, then the purpose the person had for avoiding confirming the existence of the circumstance has to be a stringent enough test that it significantly distinguishes the deliberate avoider from the merely reckless person. Therefore, PDS proposes that to hold the person liable, the person must have avoided confirming the circumstance or failed to investigate whether the circumstance existed with the *primary* purpose of avoiding criminal liability. A primary purpose test embeds a *mens rea* element in that in order to have a primary purpose of avoiding criminal liability, a person must have had something approaching knowledge that the circumstance existed. Adding the requirement that avoiding liability was the person's primary purpose sufficiently separates the more culpable from those who were merely negligent or reckless.

3. With respect to § 22A-209, Principles of Liability Governing Intoxication – PDS recommends stating the correspondence between intoxication and negligence. The correspondence for this culpable mental state may be obvious or self-evident, but explaining the correspondence between three of the culpable mental state requirements and failing to explain the last comes across as a negligent (or even reckless) omission. PDS recommends the following language:

(4) Negligence. A person's intoxication negates the existence of the culpable mental state of negligence applicable to a result or circumstance when, due to the person's intoxicated state, that person failed to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists, and the person's intoxication was not self-induced.

4. With respect to §22A-209(c), Imputation of Recklessness for Self-Induced Intoxication, PDS strongly recommends defining the term “self-induced intoxication.” The imputation of recklessness for self-induced intoxication turns on whether the intoxication is self-induced. The outcome of some cases, perhaps of many cases, will depend entirely on whether the defendant's intoxication was “self-induced.” The term will have to be defined; the only question is who should define it. While perhaps only a few of the modern recodifications have codified such

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<sup>2</sup> First Draft of Report No. 2, dated December 21, 2016 at page 57.

general definitions and those that have codified intoxication definitions have drafted flawed ones,<sup>3</sup> the Commission cannot duck its responsibility to recommend the District's legislature proscribe criminal laws and define the terms used. The purpose of modernizing the District's Code is to reduce significantly the need for courts to create law by interpretation.

PDS recommends a definition that is based on the Model Penal Code definition at § 2.08. PDS's proposed definition differs from that of the Model Penal Code in how it treats substances that are introduced into the body pursuant to medical advice. PDS would agree to differentiate between individuals who abuse prescription drugs in order to induce intoxication and individuals who suffer unforeseen intoxicating consequences from prescribed medication. PDS does not disagree with treating the former as "self-induced intoxication," even if the substance was originally prescribed for a legitimate medical purpose. The latter, however, is not self-induced.

Specifically, PDS recommends the following definition:

"Self-induced intoxication" means intoxication caused by substances the person knowingly introduces into the body, the tendency of which to cause intoxication the person knows or ought to know, unless the person introduces the substances under such circumstances as would afford a defense to a charge of crime. Intoxication is not "self-induced" if it occurs as an unforeseen result of medication taken pursuant to medical advice.

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<sup>3</sup> First Draft of Report No. 3, March 13, 2017, at page 40.

**Comments of U.S. Attorney’s Office for the District of Columbia  
on D.C. Criminal Code Commission Recommendations  
for Chapter 2 (Mistake, Deliberate Ignorance, and Intoxication) (1st Draft of Report No. 3)  
and for Chapter 1 (Preliminary Provisions) (1st Draft of Report No. 4)  
Submitted April 24, 2017**

The U.S. Attorney’s Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on these materials provided for Advisory Group review:

**COMMENTS ON RECOMMENDATIONS FOR CHAPTER 2 (MISTAKE, DELIBERATE IGNORANCE, AND  
INTOXICATION) (First Draft of Report No. 3)**

- Section 22A-208: PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND IGNORANCE
  - In discussing the imputation of knowledge for deliberate ignorance (at 3), the Report states that the required culpable mental state is established if, among other things, “[t]he person avoided confirming or failed to investigate whether the circumstance existed with **the purpose of avoiding criminal liability**” (emphasis added).
  - This phrase could be misinterpreted as to require proof that a defendant knew that his/her actions would be against the law. In fact, what is relevant is a defendant’s awareness of the circumstances, not the legality of his/her actions in that circumstance.
  - This language should be revised so that “criminal liability” is replaced with “knowledge of whether the circumstance existed.” Thus, prong (2) would read: The person avoided confirming or failed to investigate whether the circumstance existed with the purpose of avoiding knowledge of whether the circumstance existed.”
  - This revised language also would avoid the problem identified in the Commentary (at 23); that is, for example, the incurious defendant.

- Section 22A-209: PRINCIPLES OF LIABILITY GOVERNING INTOXICATION (at 25-40)
  - As footnote 27 indicates (at 29), for certain non-conforming offenses (*i.e.*, “those offenses that the [D.C. Court of Appeals] has classified as “general intent” crimes, yet has also interpreted to require proof of one or more purpose of knowledge-like mental states”), the Commission, staff, and Advisory Group will need to re-visit this principle as substantive offenses are addressed.

**COMMENTS ON RECOMMENDATIONS FOR CHAPTER 1 OF THE REVISED CRIMINAL CODE:  
PRELIMINARY PROVISIONS (First Draft of Report No. 4)**

➤ § 22A-102: RULES OF INTERPRETATION

○ Rule of Lenity

The current language proposed (at 3) allows for an arguably broader application of the rule of lenity than under current D.C. Court of Appeals case law. USAO-DC proposes rephrasing as follows: “If ~~two or more reasonable interpretations~~ **the meaning** of a statutory provision remains **genuinely in doubt** after examination of that provision’s plain meaning, structure, purpose, and history, then the interpretation that is most favorable to the defendant applies.” See *United States Parole Comm’n v. Noble*, 693 A.2d 1084, 1104 (D.C. 1997).

○ Effect of Headings and Captions

- The draft commentary regarding Section 102(c) is incorrect in saying (at 7) that “There appears to be no case law in in the District assessing the significance of headings and captions for interpreting criminal statutes.” In fact, the proposed language reflects the current practice of the D.C. Court of Appeals, , i.e., the D.C. Court of Appeals is willing to look at titles, captions, and headings, but the Court of Appeals recognizes that they may not always be illuminating. See *In re: J.W.*, 100 A.3d 1091, 1095 (D.C. 2014) (interpreting the offense captioned “possession of implements of crime”).
- Also, the commentary text that precedes footnote 36 is misleading in suggesting that the proposed language is consistent with national trends. Specifically, the commentary is imprecise in saying that several jurisdictions have provisions “describing the relevance” of captions and headings. In fact, all of the jurisdictions cited in footnote 36 (Illinois, New Jersey, and Washington) expressly prohibit reliance on headings, as does South Carolina. See S.C. Stat. § 2-13-175 (“Catch line heading or caption not part of Code section.”). And although the commentary notes that “two recent code reform efforts have adopted a similar provision,” those reform efforts were not adopted, and instead both jurisdictions at issue expressly prohibit reliance upon captions or headings (*i.e.*, Illinois, (discussed *supra*) and Delaware (*see* 1 Del. C. § 306 (“titles, parts, chapters, subchapters and sections of this Code, and the descriptive headings or catchlines . . . do not constitute part of the law. All derivation and other notes set out in this Code are given for the purpose of



convenient reference, and do not constitute part of the law”). Thus, it appears that no jurisdiction has enacted a provision authorizing reliance on titles, captions, and headings.

- If the goal is to be consistent with current case law, USAO-DC proposes that Section 102(c) be revised as follows: EFFECT OF HEADINGS AND CAPTIONS. Headings and captions that appear at the beginning of chapters, subchapters, sections, and subsections of this title, may aid the interpretation of **otherwise ambiguous** statutory language. See *Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013) (“The significance of the title of the statute should not be exaggerated. The Supreme Court has stated that the title is of use in interpreting a statute only if it “shed[s] light on some ambiguous word or phrase in the statute itself.” *Carter v. United States*, 530 U.S. 255, 267, 120 S. Ct. 2159, 147 L.Ed.2d 203 (2000). It “cannot limit the plain meaning of the text,” *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998), although it may be a “useful aid in resolving an ambiguity” in the statutory language. 359 U.S. 385, 388–89, 79 S. Ct. 818, 3 L.Ed.2d 893 (1959). We agree with the Supreme Court of Arizona that in determining the extent and reach of an act of the legislature, the court should consider not only the statutory language, but also the title, *Maricopa County v. Douglas*, 69 Ariz. 35, 208 P.2d 646, 648 (1949), and we shall do so here.”).

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Office of the Attorney General for the District of Columbia**

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** June 15, 2017

**SUBJECT:** Comments to D.C. Criminal Code Reform Commission Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**§ 22A-206, Hierarchy of Culpable Mental States**

On page 3, the Report defines the Hierarchy of Culpable Mental States. It states:

(a) PURPOSE DEFINED.

(1) A person acts purposely with respect to a result when that person consciously desires that one's conduct cause the result.

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(2) A person acts purposely with respect to a circumstance when that person consciously desires that the circumstance exists.

(b) KNOWLEDGE & INTENT DEFINED.

(1) A person acts knowingly with respect to a result when that person is aware that one's conduct is practically certain to cause the result.

(2) A person acts knowingly with respect to a circumstance when that person is practically certain that the circumstance exists.

(3) A person acts intentionally with respect to a result when that person believes that one's conduct is practically certain to cause the result.

(4) A person acts intentionally with respect to a circumstance when that person believes it is practically certain that the circumstance exists.

Paragraphs (a)(1), (b)(1), and (b)(3) use the same sentence construction and word choice. We believe that a slight non-substantive change to each would make these sentences clearer. They each start with "A person" then refer to "that person" and then discuss "one's" conduct. By changing the word "one's" to "his or her" there would be no question that it is the same person whose mental state and conduct is being considered.<sup>2</sup>

To be consistent with paragraph (a) of the proposed code, and the rest of the first paragraph of the commentary, the last sentence of the first paragraph of the commentary should also be changed. The sentence currently reads,, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the actor that it is at least possible that the person's conduct will cause the requisite result or that the circumstance exists." The rest of that paragraph refers to the "person" and not the "actor." To make the commentary more clear and consistent this sentence should be modified to say, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the person that it is at least possible that his or her conduct will cause the requisite result or that the circumstance exists."

On page 4, of the Report the commentary discusses inchoate liability. While footnote 2 appropriately gives examples of hypothetical offenses, there is no footnote that shows the difference in proof if these offenses used the phrase "with intent" rather than "with knowledge." To better explain these concepts the commentary should have another footnote. That footnote

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<sup>2</sup> For example, Section 22A-206 (a)(1) would read, "A person acts purposely with respect to a result when that person consciously desires that his or her conduct causes the result."

should contain the same hypothetical offenses as footnote 2, but with the substitution of “with intent” for “with knowledge.”<sup>3</sup>

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<sup>3</sup> For example, “A hypothetical receipt of stolen property offense phrased in terms of possessing property “with intent that it is stolen” suggests that the property need not have actually been stolen.”

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Office of the Attorney General for the District of Columbia**

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** June 15, 2017

**SUBJECT:** Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties.

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission’s First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties. (the Report). OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**§ 22A-801, Offense Classifications**

On pages 3 and 4, the Report proposes offense classifications and defines the terms “felony” and “misdemeanor.”

Paragraph (b) (1) states “‘Felony’ means an offense with an authorized term of imprisonment that is more than one (1) year or, in other jurisdictions, death .” We assume that by the inclusion of the phrase “or, in other jurisdictions, death” that the term “felony” will be used to define both

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

in jurisdiction and out of state conduct. To avoid any confusion, we suggest that the language be redrafted as follows:

"Felony" means any offense punishable:

- (A) By an authorized term of imprisonment that is more than one (1) year; or
- (B) By death, in the case of a felony from a jurisdiction that permits capital punishment.

In addition, under current District law, there is one use of the word "felony" that does not comply with the definition in the proposal and which must be retained in the Revised Criminal Code. D.C. Official Code § 16-1022 establishes the offence of parental kidnapping. Section 22A-801 must be amended to account for offense.

Under certain circumstances the penalty for parental kidnapping is defined as a felony even though the maximum penalty is one year or less. D.C. Code § 16-1024 (b) states:

(b) A person who violates any provision of § 16-1022 and who takes the child to a place outside the District or detains or conceals the child outside the District shall be punished as follows:

- (1) If the child is out of the custody of the lawful custodian for not more than 30 days, the person is guilty of a felony and on conviction is subject to a fine not more than the amount set forth in [§ 22-3571.01] or imprisonment for 6 months, or both...
- (2) If the child is out of the custody of the lawful custodian for more than 30 days, the person is guilty of a felony and on conviction is subject to a fine of not more than the amount set forth in [§ 22-3571.01] or imprisonment for 1 year, or both ...

The reason why these penalties are defined as "felonies" is so that persons who are charged with parental kidnapping may be extradited. See D.C. Code 23-563.<sup>2</sup> To allow for parental kidnapping to be designated a felony, and for any other situations where the Council may want to create a felony offense that has a penalty of one year or less or a misdemeanor offense of more than a year, 22A-801 (a) should be amended to say "Unless otherwise provided by statute."

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<sup>2</sup>D.C. Official Code § 23-563 states:

(a) A warrant or summons for a felony under sections 16-1022 and 16-1024 or an offense punishable by imprisonment for more than one year issued by the Superior Court of the District of Columbia may be served at any place within the jurisdiction of the United States.

(b) A warrant or summons issued by the Superior Court of the District of Columbia for an offense punishable by imprisonment for not more than one year, or by a fine only, or by such imprisonment and a fine, may be served in any place in the District of Columbia but may not be executed more than one year after the date of issuance.... [emphasis added]

Similar language should be added to the definitions of “Felony” and “Misdemeanor” found in 22A-801 (a) and (b).<sup>3</sup>

### **§ 22A-803, Authorized Terms of Imprisonment**

Section 22A-803 (a) establishes the definitions for the various classes of felonies and misdemeanors. Paragraph (a) begins by saying that “... the maximum term of imprisonment authorized for an offense is ...” Except for a Class A felony, the definitions for all of the felony and misdemeanor offenses include the phrase “not more than...” The use of the term “not more than” appears redundant following that introductory language. For example, compare “the maximum term of imprisonment authorize for an offense is... for a Class 2 felony forty-five (45) years” with “the maximum term of imprisonment authorize for an offense is... for a Class 2 felony, not more than forty-five (45) years”.<sup>4</sup>

In the commentary, in the last paragraph on page 8 of the Report, it states “Under Supreme Court precedent, offenses involving penalties of six months or more are subject to a Sixth Amendment right to jury trial...” We believe that this is a typo and that the phrase should say “Under Supreme Court precedent, offenses involving penalties of more than six months are subject to a Sixth Amendment right to jury trial...” [emphasis added]<sup>5</sup>

### **RCC § 22A-804. AUTHORIZED FINES.**

Section 22A-804 (c) establishes an alternative maximum fine based on pecuniary loss to the victim or gain to the defendant. This provision states:

(c) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN.  
Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:

- (1) not more than twice the pecuniary loss,
- (2) not more than twice the pecuniary gain, or

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<sup>3</sup> Additionally, for the sake of clarity, the language “except as otherwise provided by statute” should also be added to the beginning of the paragraph that lists the penalty for “attempts.” See § 22A-803 (b).

<sup>4</sup> The repeated use of term “not more than” pertaining to fines in § 22A-804 appears also to be redundant.

<sup>5</sup> See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) and *Lewis v. United States*, 518 U.S. 322 (1996).

(3) not more than the economic sanction in subsection (a) that the defendant is otherwise subject to, whichever is greater. The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt.

OAG recommends that the sentence “The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt” be modified and made into its own paragraph. In addition, OAG suggests changing the paragraph structure and language in the subparagraphs from “not more than” to “Up to” to make the paragraph clearer. Paragraph (c) should be amended to read:

(c) (1) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:

(A) Up to twice the pecuniary loss;

(B) Up to twice the pecuniary gain; or

(C) Up to the economic sanction in subsection (a) that the defendant is otherwise subject to.<sup>6</sup>

(2) If the pecuniary loss or pecuniary gain exceeds the amount of fine authorized by subsection (a), the amount of gain or loss must be alleged in the indictment and proved beyond a reasonable doubt.

By rewording and breaking out new paragraph (c)(2) from former paragraph (c)(3) it is clear that the government only has to allege gain or loss in an indictment and prove the amount beyond a reasonable amount when it seeks an alternative maximum fine and not merely when the government wants to justify the court’s imposition of a fine based on pecuniary loss or gain which is less than or equal to the statutory amount in subsection (a). This rewording makes it clear that it is only when the alternative maximum fine is sought that the government should have to allege and prove the amount of gain or loss.

OAG recommends that the Commission consider two substantive changes to § 22A-804 (d). This paragraph addresses the alternative maximum fine for organizational defendants. Paragraph (d) states, “Subject to the limits on maximum fine penalties in subsection (b) of this section, if an

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<sup>6</sup> As there are three choices, we recommend that the word “greater” be replaced with the word “greatest.” This would clarify what the court’s options are if both the pecuniary loss and pecuniary gain are greater than the sanction in subsection (a), but are of unequal amounts. Under our proposed change it would be clear that the court could impose the largest sanction (not merely the greater of one of the sanctions and subsection (a)).



organizational defendant is convicted of a Class A misdemeanor or any felony, a court may fine the organizational defendant not more than double the applicable amount under subsection (a) of this section.”<sup>7</sup> First, there is no reason why the misdemeanor portion of this paragraph should be limited to Class A misdemeanors. Organizational defendants are frequently motivated by financial gain when committing offenses and a court should be able to set a fine that acts as a deterrent to such conduct. As the Council wrote in the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012,

The reason for imposing an unusually high fine is appropriate for certain offenses in the interest of deterring violations. Of the listed offenses many were designed to deter corporate entities from engaging in prohibited conduct... While the penalty provisions may have low imprisonment terms, the larger fine currently associated with the provision is deemed important to deterring the specified conduct. In addition, organizational defendants are subject to section 1002(b) of the legislation – which effectively doubles any fine amount authorized under the law.<sup>8</sup>

The court should be authorized, in appropriate circumstance, to double the fine when an organizational defendant is convicted of any misdemeanor offense – not just a Class A misdemeanor.

Second, § 22A-804 (d) limits the court’s ability to “double the applicable amount under subsection (a) of this section.” This paragraph does not address the courts authority to double fines for organizational defendants when the underlining fine is established in the individual offense, as an exception to the standard fine.<sup>9</sup> Section 22A-804 (d) should be amended to add that “... a court may fine the organizational defendant not more than double the applicable amount under subsection(a) of this section or twice the maximum specified in the law setting forth the penalty for the offense.” [Proposed language underlined]

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<sup>7</sup> OAG recognizes that this paragraph is substantially based on D.C. Official Code § 22-3571.01(c).

<sup>8</sup> See Section 1102 on page 15 of the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012. Section 22A-804 (d) is based upon §1002(b) of Bill 19-214

<sup>9</sup> The Criminal Fine Proportionality Amendment Act of 2012 exempts numerous offenses that carry higher fines than those established in the Act.

## M E M O R A N D U M

THE  
PUBLIC  
DEFENDER  
SERVICE  
*for the District of Columbia*



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: June 16, 2017

Re: Comments on First Draft of Report No. 5:  
Recommendations for Chapter 8 of the  
Revised Criminal Code: Offense Classes &  
Penalties

PDS understands that the proposed classification system and the corresponding penalties are preliminary and subject to significant revision during the final phase of the Commission's work. Despite the preliminary nature of the proposals in Report No. 5, PDS has two grave concerns it requests the Commission consider at this time.

1. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the felony classes – PDS disagrees with the Commission's approach of aligning its proposed felony classes and corresponding maximum imprisonment terms with current District sentencing norms. PDS believes that criminal code reform is an opportunity to rationally recalibrate our criminal justice system to reflect evidence-based research about public safety and crime. To start, PDS recommends the Commission eliminate the excessive sentence of life without release and all sentences above 20 years of incarceration. Sentences of life without release, particularly where there is no "second look" provision or parole eligibility, are not supported by evidence about dangerousness of the offender and are inhumane. The association between age and general criminal behavior is well established: most crimes are committed by young people and older adults have low rates of recidivism.<sup>1</sup> For instance, the Justice Policy Institute reported on the release of a large number of people, mostly age 60 and up who had been convicted of homicides in Maryland but released due to an appellate ruling. As of March 2016, of the more than 100

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<sup>1</sup> See Alfred Blumstein, Jacqueline Cohen, and P. Hsieh, *The Duration of Adult Criminal Careers*, (1982).

people who had been released, none had been convicted of a new felony offense.<sup>2</sup> Over the past decade, New Jersey, New York, and Michigan reduced their prison populations by a range of 20 percent through front end reforms such as decreasing sentence length and through back end reforms in their parole systems. No adverse impacts on public safety were observed in these states.<sup>3</sup>

The Commission, and ultimately the Council, should also consider the fiscal impact of constructing such an expensive sentencing system. Because persons convicted of felony offenses and sentenced to prison are in the legal custody of the Bureau of Prisons,<sup>4</sup> the fiscal impact statements that accompany legislation creating felonies or changing felony penalties have not had to assess the costs of incarceration. When the Council promulgates new felony offenses, sets mandatory minimum prison sentences or increases the maximum term of imprisonment possible for a felony offense, it need never ask itself what the additional prison time will cost the District taxpayer. Many states are considering sentence reform because of budget deficits and the cost of prison overcrowding due to long sentences.<sup>5</sup> The National Conference of State Legislatures estimated that the taxpayers paid approximately \$24 billion dollars to incarcerate persons convicted of something other than a non-violent offense; that estimate excludes spending on county and city jails and the federal corrections budget.<sup>6</sup> Given the tremendous support in the District for statehood,<sup>7</sup> and repeated calls for more local control over prosecutions and of the District's criminal justice system, the Commission, and ultimately the Council, should be mindful about building a sentencing system it would never be able to afford. Criminal code reform presents an ideal opportunity to weigh the high cost of long prison sentences against the little to no benefit in terms of increased public safety and propose the general reduction of

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<sup>2</sup> *Defining Violence: Reducing Incarceration by Rethinking America's Approach to Violence*, ("Defining Violence") Justice Policy Institute, August 2016.  
[http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi\\_definingviolence\\_final\\_report\\_9.7.2016.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report_9.7.2016.pdf).

<sup>3</sup> Judith Greene & Marc Mauer, *Downscaling Prisons: Lessons from Four States*, The Sentencing Project (2010).

<sup>4</sup> D.C. Code § 24-101.

<sup>5</sup> See e.g., "Skyrocketing prison costs have states targeting recidivism, sentencing practices." [https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/19/skyrocketing-prison-costs-have-states-targeting-recidivism-sentencing-practices/?utm\\_term=.a13e38050348](https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/19/skyrocketing-prison-costs-have-states-targeting-recidivism-sentencing-practices/?utm_term=.a13e38050348); "Fiscal and prison overcrowding crises could lead to Three-Strikes reform." <http://www.mercurynews.com/2011/07/22/fiscal-and-prison-overcrowding-crises-could-lead-to-three-strikes-reform/>.

<sup>6</sup> *Defining Violence* at page 20.

<sup>7</sup> "District voters overwhelmingly approve referendum to make D.C. the 51<sup>st</sup> state." [https://www.washingtonpost.com/local/dc-politics/district-voters-overwhelmingly-approve-referendum-to-make-dc-the-51st-state/2016/11/08/ff2ca5fe-a213-11e6-8d63-3e0a660f1f04\\_story.html?utm\\_term=.5234e8fc29f3](https://www.washingtonpost.com/local/dc-politics/district-voters-overwhelmingly-approve-referendum-to-make-dc-the-51st-state/2016/11/08/ff2ca5fe-a213-11e6-8d63-3e0a660f1f04_story.html?utm_term=.5234e8fc29f3).

maximum terms of imprisonment for felonies and the elimination of the life without possibility of release penalty.

In further support of reducing the prison terms proposed for the felony classes in Report No. 5, PDS focuses on and strongly objects to the proposed 45-year term of imprisonment for the Class 2 felony. A 45-year term penultimate penalty is significantly more severe than the 20-year maximum recommended by the American Law Institute and than the 30-year maximum recommended in the Proposed Federal Criminal Code. Further, the 45-year penalty is not justified by the data included in Memorandum #9, which supplements Report No. 5.

According to Figure 1, there are nine criminal offenses in Title 22 that have a maximum penalty of 30 years imprisonment. This grouping of offenses would correspond with the proposed Class 3 felony and its recommended 30-year maximum. There are six offenses that have a maximum penalty of life without possibility of release (LWOR). This grouping corresponds with the proposed Class 1 felony. Between the 30-year maximum grouping of offenses and the LWOR maximum grouping in the D.C. Code, Figure 1 shows that there is one offense with a maximum penalty of 40 years (which I assume is armed carjacking) and one offense with a maximum penalty of 60 years (which I assume is first-degree murder).

Figure 3 is a little more complicated in that it compares the Sentencing Guidelines groups and the proposed felony classifications; the correspondence between the two is a little tricky. Category 3 on Figure 3 compares the maximum proposed penalty for Class 3 (30 years or 360 months) and the top of the box for the Master Grid Group 3 for column A and for column D. Figure 3 indicates that a maximum of 360 months for Class 3 felony offenses would more than adequately accommodate the top of the box for Column A, 180 months, and Column D, 216 months. PDS recommends lowering the penalty proposed for Class 3 to significantly less than 30 years. Category 2 in Figure 3 compares the 45-year (540 months) penalty proposed for Class 2 felony to the Master Grid Group 2 for column A and column D. Again, Figure 3 indicates that a maximum of 45 years for Class 2 felony offenses is significantly higher than top of the box for Column A, 288 months (24 years), and Column D, 324 months (27 years). PDS acknowledges that the maximum prison term for the class should be higher than the top of the box in Column D, for example to allow for aggravating circumstances of the particular incident. A maximum penalty of 45 years, however, allows for an excessive 18 years “cushion” above the top of the box for Master Grid group 2, column D. Category 1 in Figure 3 corresponds to Master Group 1, the group into which first-degree murder is ranked. Thus the one offense with a statutory maximum of 60 years (720 months), as shown on Figure 1, is the main offense (and variations of it) in Master Group 1 and the maximum penalty is 720 months for column A and column D.

Figure 4 is perhaps more helpful for recognizing the proposed penalty for Class 2 felony should be much lower than 45 years, even if that class were reserved for the most serious offense in the

Code. Figure 4 in Memo #9 shows that the average sentence and the mean sentence for Category 1 (meaning the average sentence for murder I) are both 30 years, both well below the 45-year penalty proposed for Class 2 felony. Category 2 on Figure 4 compares the 45-year (540 months) proposed for Class 2 felony to the average and mean sentences for Master Grid Group 2 offenses and also demonstrates that the 45-year penalty proposed for Class 2 could be greatly reduced and still well accommodate current sentencing practice for those offenses. The average sentence for that category is 225 months (18 years, 9 months) and the mean sentence is 228 months (19 years), lower than the proposed 45-year maximum by 26 years, 3 months and 26 years respectively.

While PDS focuses here on the maximum imprisonment terms proposed for the three most serious classes for RCC §22A-803, all of the penalties should be examined in light of the sentencing practices but also in light of evidence-based research on public safety and of the potential fiscal impact of incarceration.

2. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the Class B misdemeanor penalty – The Commission proposes in Report No. 5 to eliminate the 6-month prison term as the penultimate penalty for misdemeanor offenses and instead to have the 180-day prison term as the penultimate misdemeanor penalty.<sup>8</sup> The 180-day/6-month distinction is important because, as the Report notes, D.C. Code §16-705 requires a jury trial as compelled by the Constitution<sup>9</sup> or if the offense is punishable by imprisonment for *more than 180 days*.<sup>10</sup> Six months is longer than 180 days;<sup>11</sup> therefore offenses with a penalty of 6 months imprisonment are jury demandable; those with a penalty of 180 days are not. PDS would prefer that the maximum penalty for Class B be set at 6 months. PDS acknowledges that, under current law, a 6-month penalty would make every offense assigned to that class jury-demandable and that flexibility around this misdemeanor mid-point might have merit. Thus, to provide for such flexibility, PDS would not object to Class B having a maximum penalty of 180 days **IF** there were also a statutory provision that stated offenses categorized in Class B were jury demandable unless otherwise provided by law. Report No. 5 proposes the opposite default rule – that Class B misdemeanors would be non-jury demandable unless there were a plain statement in the offense definition that the offense was to be jury demandable. Because “trial by jury in criminal cases is fundamental to the American scheme of justice,”<sup>12</sup> the default should be that Class B misdemeanors are jury demandable unless there is a plain statement in the offense definition that the offense is not jury demandable.

<sup>8</sup> The ultimate term of imprisonment penalty for a misdemeanor is one year.

<sup>9</sup> D.C. Code § 16-705(a).

<sup>10</sup> D.C. Code § 16-705(b)(1).

<sup>11</sup> *Turner v. Bayly*, 673 A.2d 596, 602 (D.C. 1996).

<sup>12</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

Trial by jury is critical to fair trials for defendants. “The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.... The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”<sup>13</sup>

Requiring jury trials is not only a acknowledgement of the core principle of American justice that a defendant should be tried by a jury of his or her peers, it also recognizes the importance to the community of serving as jurors. As the Supreme Court noted in *Batson v. Kentucky*, “Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try.... [B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.”<sup>14</sup> Constructing a system that by default precludes jury trials harms not only the defendant but the community as a whole. The ability of District residents to participate in civic life is already curtailed compared to residents of States; the Commission should not restrict that participation further by default.

When the Commission engages in the work of adjusting penalties and gradation of offenses to provide for proportionate penalties<sup>15</sup> and when the D.C. Council promulgates new misdemeanors, they should have to explicitly decide to deprive the defendant and the community of a jury trial and they should have to publicly declare they made that decision, not hide behind a default rule buried in a penalty classification system.

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<sup>13</sup> *Id.* at 151, 156.

<sup>14</sup> *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

<sup>15</sup> D.C. Code § 3-152(a)(6).

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Office of the Attorney General for the District of Columbia**

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** July 17, 2017

**SUBJECT:** Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code – Penalty Enhancements

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission’s First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code – Penalty Enhancements (the Report). OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**§ 22A-805, Limitations on Penalty Enhancements**

Section 22A-805 (a) uses the word “equivalent” but does not define it. Because it is defined in a later section the use of the word here is confusing, if not misleading.

Section 22A-805 (a) states:

PENALTY ENHANCEMENTS NOT APPLICABLE TO OFFENSES WITH EQUIVALENT ELEMENTS. Notwithstanding any other provision of law, an offense is not subject to a

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

penalty enhancement in this Chapter when that offense contains an element in one of its gradations which is equivalent to the penalty enhancement.

In giving definitions to undefined Code terms the Court of Appeals has looked to definitions found in Code provisions that were enacted at a different time for a different purpose. See *Nixon v. United States*, 730 A.2d 145 (D.C. 1999), where the Court applied the definition of "serious bodily injury" found in a sex offense statute to the offense of aggravated assault. Because the very next section after § 22A-805 contains a definition for the word "equivalent" it is possible that, notwithstanding the limiting language in § 22A-806 (f)(2)<sup>2</sup>, the Court of Appeals may look to that enacted definition when determining the meaning of the earlier use of the word "equivalent" in § 22A-805 (a). Clearly this is not what the Commission intends. To avoid any confusion about what the word means, to avoid making the Court of Appeals define the term, and to avoid unnecessary litigation, OAG suggests that the word "equivalent" be defined in § 22A-805 (a), a different word be used in § 22A-805 (a), or a definition be drafted that can be used in both sections.

Section 22A-805 (a) also uses the word "gradations." This word is also not defined. OAG suggests that the sentence be rewritten so that the word "gradations" is replaced by a term that includes "lesser included offenses."<sup>3</sup>

On page 4 of the Report there is a discussion of the holding in *Bigelow v. United States*, 498 A.2d 210 (D.C. 1985), and its application after the enactment of § 22A-805. The discussion initially leads the reader to believe that multiple repeat offender provisions would continue to apply when the dictates of *Lagon v. United States*, 442 A.2d 166, 169 (D.C. 1982), have been met. The paragraph then concludes with the statement "However, insofar as RCC § 22A-805 is intended to reduce unnecessary overlap in statutes, courts may construe the term "equivalent" in RCC § 22A-805 more broadly than under current law." It is OAG's position that this determination not be left to the courts to resolve. Rather, the Commission should unequivocally state that the holding in *Bigelow* would apply after enactment of these provisions.

### **§ 22A-806, Repeat Offender Penalty Enhancements**

On page 8 of the Report the term "Prior Convictions" is defined. Section 22A-806 (f)(5)(i) states, "Convictions for two or more offenses committed on the same occasion or during the same course of conduct shall be counted as only one conviction..." However, the proposed language does not clarify what is meant by the word "occasion." Unfortunately, the addition of the phrase "during the same course of conduct" does not clarify it. Take, for example, the following scenario. An in-home worker who visits an elderly patient once a week is convicted for stealing from the victim. Afterwards, the government learns that the in-home worker actually started working for the patient at an earlier time and also stole from the patient during that

<sup>2</sup> Section 22A-806 (f)(2) states "For the purposes of this section, 'equivalent' means a criminal offense with elements that would necessarily prove the elements of the District criminal offense."

<sup>3</sup> For example, § 22A-805 (a) could be rewritten to say "Notwithstanding any other provision of law, an offense is not subject to a penalty enhancement in this Chapter when that offense contains an or any of its lesser included offenses contains an element ~~in one of its gradations~~ which is equivalent to the penalty enhancement. "



previous time period. Would a second conviction of the in-home worker be the subject of an enhancement under § 22A-806 (f)(5)(i) or would it be considered “the same course of conduct”? Either the proposed code provision or the Commentary should address this issue. To the extent that there is current case law on this issue, it should be fleshed out in the Commentary.

In § 22A-806 (f)(5)(iv) it states “A conviction for which a person has been pardoned shall not be counted as a conviction. OAG suggests that this exception be expanded to include convictions that have been sealed by a court on grounds of actual innocence.

### **§ 22A-807, Hate Crime Penalty Enhancement**

On page 17 of the Report the Hate Crime Penalty Enhancement is explained. Section 22A-807 (a) states:

A hate crime penalty enhancement applies to an offense when the offender commits the offense with intent to injure or intimidate another person because of prejudice against that person’s perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation. [Emphasis added]

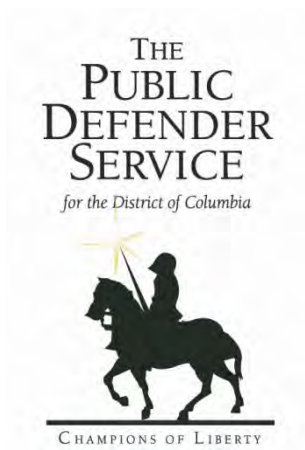
Though not expounded upon in the Commentary, this penalty enhancement has narrower application than the current bias-related crime penalty. The definition of a “Designated act” in D.C. Code § 22-3701 includes not only injury to another person but property crimes as well. So long as the act is based upon prejudice, a bias-related crime penalty can currently be given when a defendant is guilty of injuring property, theft, and unlawful entry. See § 22-3701 (2). The Hate Crime Penalty Enhancement should be expanded to cover all of the offenses currently included under the law.

### **§ 22A-808, Pretrial Release Penalty Enhancement**

On page 24 of the Report there are definitions for the misdemeanor, felony, and crime of violence pretrial release penalty enhancements. To be consistent with the wording of § 22A-806 (a), (b), and (c) two changes should be made to these provisions. First, the term “in fact” should be added to each of the pretrial release penalty enhancements. For example, § 22A-808 (a) should be redrafted to say “A misdemeanor pretrial release penalty enhancement applies to a misdemeanor when the offender, *in fact*, committed the misdemeanor while on release pursuant to D.C. Code § 23-1321 for another offense.” [Additional term italicized] Second, penalty enhancements found in § 22A-806 refer to “the defendant” whereas the penalty enhancements found in § 22A-808 refer to “the offender.” To avoid arguments about whether the difference in wording has legal significance, the same term should be used in both sections.

## M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: July 18, 2017

Re: Comments on First Draft of Report No. 6:  
Recommendations for Chapter 8 of the  
Revised Criminal Code: Penalty  
Enhancements

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PDS has the following concerns and makes the following suggestions:

1. With respect to RCC § 22A-806, Repeat Offender Penalty Enhancements, PDS recommends the complete elimination of this section. Repeat offender penalty enhancements represent a triple counting of criminal conduct and work a grave miscarriage of justice for individuals who have already paid their debt to society in the form of a prior sentence. Repeat offender penalty enhancements exacerbate existing racial disparities in the criminal justice system and increase sentences that are already too long.

The United States incarcerates more people than any other country in the world. The last forty years have seen relentless growth in incarceration.<sup>1</sup> The expansion in prison population is driven by greater numbers of people entering the system, less diversion, and longer sentences.<sup>2</sup> Enhancements create even longer sentences – beyond what the legislature originally envisioned for a particular offense committed by a broad range of potential culpable actors.

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<sup>1</sup> The Sentencing Project, *Ending Mass Incarceration: Charting a New Justice Investment*, available at: <http://www.sentencingproject.org/publications/ending-mass-incarceration-charting-a-new-justice-reinvestment>.

<sup>2</sup> James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012).

The commentary to the Revised Criminal Code (“RCC”) justifies, in part, the continued use of prior convictions to enhance criminal sentences on the lack of evidence on how the operation of criminal history in sentencing may affect racial disparities.<sup>3</sup> But evidence of the criminal justice system’s disparate impact on African-Americans abounds. The Black-white “disparity-ratio” in male imprisonment rates was nearly 6:1 in 2014.<sup>4</sup> Hispanic-white ratios for males were 2.3:1.<sup>5</sup> In the District, nearly fifty percent of black males between the ages of 18-35 were under criminal justice supervision according to a study by the National Center on Institutions and Alternatives.<sup>6</sup> The Sentencing Commission’s statement that “the number of non-black, felony offenders present too small a sample size for meaningful statistical analysis” tells the picture of who in fact is being sentenced on felony offenses.<sup>7</sup> While enhancements may not necessarily cause disparity in sentencing, the use of penalty enhancements has the effect of amplifying racial disparities already present in the criminal justice system.

For instance, consider the evidence of disparate prosecution for drug offenses. Although blacks and whites use drugs at roughly the same rates, African Americans are significantly more likely to be arrested and imprisoned for drug offenses.<sup>8</sup> “Black arrest rates are so much higher than white rates because police choose as a strategic matter to invest more energy and effort in arresting blacks. So many more blacks than whites are in prison because police officials have adopted practices, and policy makers have enacted laws, that foreseeably treat black offenders much more harshly than white ones.”<sup>9</sup> Sentencing enhancements for multiple prior misdemeanor or felony drug offenses create a feedback effect that amplifies the existing bias, or choices, already made by the criminal justice system.

PDS is not arguing that consideration of prior convictions should have no place in our criminal justice system, but rather that the place these prior convictions hold is already sufficient. As noted in the commentary, a defendant’s criminal history is a dominant feature in the Sentencing

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<sup>3</sup> Commentary for RCC§ 22A-806 at 12.

<sup>4</sup> See Bureau of Justice Statistics, Prisoners in 2014 (2015), available at: <https://www.bjs.gov/content/pub/pdf/p14.pdf>; see also, The Sentencing Project, Fact Sheet, available at: <http://www.sentencingproject.org/publications/trends-in-u-s-corrections>

<sup>5</sup> *Id.*

<sup>6</sup> Eric R. Lotke, “*Hobbling a Generation*,” National Center on Institutions and Alternatives, August 1997.

<sup>7</sup> Commentary for RCC§ 22A-806 at 12.

<sup>8</sup> Tonry, M., & Melewski, M. (2008), *The Malign Effects of Drug and Crime Control Policy on Black Americans*. In M. Tonry (Ed.), *Crime and justice: A review of research* (pp. 1-44). Chicago, IL: University of Chicago Press; James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012).

<sup>9</sup> *Id.*

Guidelines.<sup>10</sup> A prior felony conviction will often mean that probation is excluded as a guidelines-compliant sentencing option. Because it will move a defendant to a higher column on the guidelines grid, a prior felony conviction will also mean that the corresponding guidelines-compliant prison sentence the defendant will face is longer. This is important because judges overwhelmingly comply with the Sentencing Guidelines and thus already abide by a system that heavily weighs prior criminal history.<sup>11</sup> In addition to being determinative of which box a defendant will fall into on the Sentencing Guidelines, prior criminal history must be considered in sentencing the defendant within that box. This is the case because the D.C. Code explicitly requires judges to “impose a sentence that reflects the seriousness of the offense and the criminal history of the offender.”<sup>12</sup> Enhancements therefore create a system that triple counts prior convictions for individuals who have already faced consequences as a direct result of the prior conviction.

While misdemeanors are not covered by the Sentencing Guidelines or by D.C. Code § 24-403.01, there is no doubt that judges consider criminal history in deciding whether to impose incarceration and in deciding the amount of incarceration to impose. Prosecutors routinely argue for a sentencing result based in substantial part on the defendant’s criminal history. Penalty enhancements for misdemeanors create the same issue of over-counting criminal history for offenses where the defendant has already paid a debt to society. Further, as acknowledged in the commentary, misdemeanor enhancements exist in a tiny minority of jurisdictions. According to the commentary, only Maine, Missouri, and New Hampshire allow enhancements for prior misdemeanor convictions.<sup>13</sup>

There is no evidence that longer sentences for defendants who have committed multiple misdemeanors produce meaningful long-term improvements in community safety or better individual outcomes. To the contrary, many misdemeanor offenses can be addressed through comprehensive community based programming rather than ever longer periods of incarceration. For example, repeated drug possession offenses or offenses that stem from drug addiction such as theft may be successfully addressed through referrals to drug treatment.<sup>14</sup> Current Superior Court policies establishing specialized courts for individuals with mental illness or issues with

<sup>10</sup> Commentary for RCC§ 22A-806 at 12.

<sup>11</sup> Voluntary Sentencing Guidelines Manual (June 27, 2016) at 1. The 2015 annual report for the District of Columbia Sentencing and Criminal Code Revision Commission lists compliance as “very high” and “consistently above 90% since 2011” and 96% in 2015. Available at: <https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/Annual%20Report%202015%20Website%205-2-16.pdf>.

<sup>12</sup> D.C. Code § 24-403.01(a)(1).

<sup>13</sup> Commentary for RCC§ 22A-806 at 13 fn. 43.

<sup>14</sup> Justice Policy Institute, Substance Abuse Treatment and Public Safety January 2008 available at: [http://www.justicepolicy.org/uploads/justicepolicy/documents/08\\_01\\_rep\\_drugtx\\_ac-ps.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/08_01_rep_drugtx_ac-ps.pdf).

drug addiction reflect the community sentiment that there are better solutions to crime than more incarceration.

While the RCC does not propose specific mandatory minimums for enhancements, it contemplates a structure that would force a judge to sentence a defendant to a mandatory minimum once the prosecution proves the applicability of a repeat offender enhancement.<sup>15</sup> PDS opposes the use of mandatory minimums in the RCC. PDS believes that judges should be trusted to exercise discretion in sentencing defendants. Judges are in the best position to review the facts in each case and the unique history of each defendant. Judges make decisions informed by a presentence report, statements of victims, the community, and sometimes medical professionals. Judges should be trusted to weigh the equities in each case and impose, consistent with the law, a fair sentence.

2. With respect to RCC § 22A-807, Hate Crime Penalty Enhancement, PDS appreciates that the causal nexus between the crime and the bias is clarified in RCC § 22A-807. However, PDS has concerns about several of the broad categories of bias listed in the RCC. As acknowledged in the commentary for RCC § 22A-807, the list of protected categories is broader than other jurisdictions and includes several characteristics many states do not recognize, such as personal appearance, matriculation, marital status, and family responsibility.<sup>16</sup> PDS believes that it is appropriate to include these categories in the District's human rights law which prohibits discrimination in employment, housing, public accommodation, and education.<sup>17</sup> However, when used in the criminal code, these categories may allow for prosecution outside of the intended scope of the hate crime statute. For instance, by including marital status and family responsibility, a defendant who kills an ex-husband because of a bitter divorce or because the ex-husband fails to take on family responsibility may be subject to a hate crime enhancement. A teenager who commits a robbery motivated by anger at a complainant's flashy personal appearance could similarly be subject to a hate crime enhancement.<sup>18</sup> This expansion of the hate crime categories would allow for a sentencing enhancement to apply to what the legislature likely envisioned to be within the standard range of motives for the commission of an offense. Thus, PDS recommends removing the following categories from proposed §22A-807: marital status, personal appearance, family responsibility, and matriculation.

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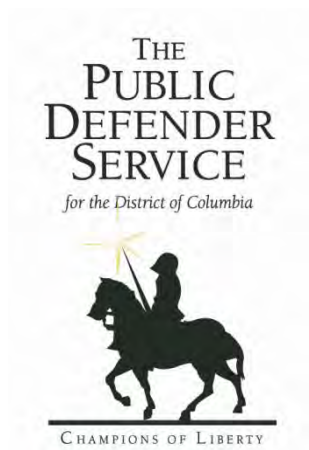
<sup>15</sup> The RCC § 22A-806(e) provides for at least the possibility of mandatory minimum sentences for the commission of repeat offenses. PDS understands that sentencing will be fully considered by the Commission at a later time.

<sup>16</sup> Commentary for RCC§ 22A-806 at 21.

<sup>17</sup> D.C. Code § 2-1402.01-§2-1402.41.

<sup>18</sup> PDS does not disagree with treating as a hate crime a crime committed because of a prejudice against a person's appearance or dress that is or appears to be different than the person's gender but believes that bias is covered by the "gender identity or expression" term in §22A-807.

# M E M O R A N D U M



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: July 18, 2017

Re: Comments on First Draft of Report No. 7:  
Recommendations for Chapter 3 of the  
Revised Criminal Code: Definition of a  
Criminal Attempt

In general, the Public Defender Service approves the recommendations in the First Draft of Report No. 7. PDS has the following concerns, however, and makes the following suggestions:

1. The Commentary refers to two cases with the name “*Jones v. United States*”: (*Richard C.) Jones v. United States*, 124 A.3d 127 (D.C. 2015), cited on pages 7 and 10; and (*John W.) Jones v. United States*, 386 A.2d 308 (D.C. 1978), cited on pages 13-14 and 18. We suggest that the defendants’ first names be added to these citations to make it easier to distinguish between the two cases.
2. We suggest omitting two hypothetical examples from Footnotes 2 and 8 of the Commentary to avoid unnecessary confusion about the scope and application of attempt.
  - The last sentence of Footnote 2, on page 4, poses the following hypothetical: “For example, to determine whether a person arrested by police just prior to pulling a firearm out of his waistband acted with the intent to kill a nearby victim entails a determination that the person planned to retrieve the firearm, aim it at the victim, and pull the trigger.”

As written, this example suggests that a defendant could be convicted of attempted assault with intent to kill where he had not yet pulled a firearm out of his waistband. We believe that this conduct, without more, would be insufficient to sustain a conviction for attempted assault with intent to kill. Moreover, the example raises complex questions that this group has yet to resolve concerning the interplay between attempt and gradations of assault offenses. We therefore propose that the footnote be deleted to avert the risk that readers will draw incorrect inferences about sufficiency.

- Footnote 8, on page 5, includes among its examples of incomplete attempts “the attempted felony assault prosecution of a person who suffers a debilitating heart attack just as he or she is

about to exit a vehicle and repeatedly beat the intended victim.” We believe that these facts, without more, provide an insufficient basis for an attempted felony assault conviction. This hypothetical likewise raises questions about the type of proof necessary to establish an attempted felony assault, where felony assault requires a specific degree of harm. We propose that the hypothetical be deleted.

3. PDS proposes modifying § 22A-301(a)(3) to read as follows (alterations are underlined):

(3) The person’s conduct is either:

(A) Reasonably adapted to and dangerously close to the accomplishment of that offense; or

(B) Would be dangerously close to the accomplishment of that offense if the situation was as the person perceived it, provided that the person’s conduct is reasonably adapted to the accomplishment of that offense.

First, we suggest changing the subject of (a)(3) from “the person” to “the person’s conduct,” to make more explicit that the jury’s focus should be on the conduct of the defendant.

Second, PDS proposes modifying subsection (A) to insert the phrase “reasonably adapted to” before the phrase “dangerously close,” to make clear that the requirement of conduct “reasonably adapted” to completion of the target offense applies to *all* attempt charges, and not only those that fall under subsection (B). This alteration would comport with case law from the D.C. Court of Appeals, which has held that “[t]he government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime . . . .” *Seeney v. United States*, 563 A.2d 1061, 1083 (D.C. 1989); *see also Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); (*John W.) Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978). The current draft, which uses the “reasonably adapted” language only in subsection (B), creates the impression—at odds with case law—that this requirement does not exist for attempts that fall under subsection (A), and could lead the jury to conclude that the conduct requirements under subsection (A) are looser than under subsection (B). This alteration would also align the draft provision with the current Red Book instruction, which reflects current District law in this area and which requires proof that the defendant “did an act reasonably adapted to accomplishing the crime.” Criminal Jury Instructions for the District of Columbia No. 7.101, Attempt (5th ed. rel. 14).

Inclusion of the “reasonably adapted” language in subsection (A) would have the additional benefit of giving some substance to the “dangerously close” requirement and ensuring that innocent conduct is not punished as an attempt. PDS supports the draft’s adherence to the “dangerously close” standard for conduct, which reflects current case law. The term “dangerously close,” however, is not defined. Consistent use of the “reasonably adapted” language in both (A) and (B) would help to establish a clearer limitation on the conduct that can give rise to an attempt conviction. We believe that clear and exacting conduct standards are essential in the context of attempt, because the defendant’s thoughts and plans play such a critical role in the question of guilt, but must often be inferred from a defendant’s actions.

Third, we suggest modifying both (A) and (B) to replace the phrases “committing that offense” and “commission of that offense” with the phrase “the accomplishment of that offense.” Like the

phrase “reasonably adapted,” the “accomplishment” language appears in both the current Redbook instruction on Attempt and DCCA case law. *See, e.g., Seeney*, 563 A.2d at 1083; *Williams*, 966 A.2d at 848. Maintaining that terminology in the statutory provision would thus provide continuity and consistency. It would also avert confusion about the point at which the target offense has been “committed.” Just as the “dangerously close” standard requires the jury to focus on the defendant’s proximity to completing the target offense, rather than his preparatory actions, the “accomplishment” language keeps the jury’s focus on the completion of the target crime.



**Comments of the U.S. Attorney's Office for the District of Columbia  
on D.C. Criminal Code Commission Recommendations**

**for Chapter 3 of the Revised Criminal Code: Definition of a Criminal Attempt (First Draft  
of Report No. 7)**

**and for Chapter 8 of the Revised Criminal Code: Penalty Enhancements (First Draft of  
Report No. 6)**

**Submitted July 21, 2017**

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on these materials provided for Advisory Group review:

**RECOMMENDATIONS FOR CHAPTER 3 OF THE REVISED CRIMINAL CODE  
(DEFINITION OF A CRIMINAL ATTEMPT)  
First Draft of Report No. 7**

- Section 22A-301(a): Definition of Attempt - COMMENTARY
  - Page 3: tenant → tenet
  - Pages 5 (text accompanying footnotes 8 and 9), 14-15, 37: Advisory Group should discuss further whether the DCCA sees a meaningful distinction between the "dangerous proximity" and "substantial step" tests, considering *Hailstock*

**RECOMMENDATIONS FOR CHAPTER 8 OF THE REVISED CRIMINAL CODE  
(PENALTY ENHANCEMENTS)  
First Draft of Report No. 6**

- Section 22A-805: Limitations on Penalty Enhancements - COMMENTARY
  - Page 4: USAO-DC agrees that subsections (b) and (c) “codify procedural requirements for penalty enhancements . . . required in *Apprendi* . . . and subsequent case law.”
  
- Section 22A-807: Hate Crime Penalty Enhancement (at page 17)
  - Section title: Labeling it a “hate” crime is a change from current law, which refers to this as a “bias-related crime.”
  
  - (c) Definitions: (iii)-(v) should be subheadings within (ii)

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division

**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** November 3, 2017

**SUBJECT:** First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT****RCC § 22A-2001. Property Offense Definitions**

RCC § 22A-2001 defines “coercion”, “consent”, “deceive”, and “effective consent.” Those definitions are then used throughout the offenses contained in the first drafts of Reports number 9, 10, and 11. When reviewing some of the offenses that use one or more of these terms it is unclear what the penalty would be for a person who meets all of the other elements of the offense except that the “victim” turns out to be law enforcement involved in a sting operation. As written it would appear that the person would only be guilty of an attempt. Assuming, that the Commission will recommend that, in general, the penalty for an attempt will be lower than the penalty for a completed offense, we believe that that penalty is insufficient in this context. Take

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

the offense of Financial Exploitation of a Vulnerable Adult or Elderly Person under RCC §22A-2208. The elements of that offense in Report #10 are:

- (a) A person is guilty of financial exploitation of a vulnerable adult or elderly person if that person:
- (1) Knowingly:
    - (A) Takes, obtains, transfers, or exercises control over;
    - (B) Property of another;
    - (C) With consent of the owner;
    - (D) Who is a vulnerable adult or elderly person;
    - (E) The consent being obtained by undue influence; and
    - (F) With intent to deprive that person of the property, or
  - (2) Commits theft, extortion, forgery, fraud, or identity theft knowing the victim to be a vulnerable adult or elderly person.<sup>2</sup>

Let's say that the police learn of a ring of criminals who prey on vulnerable adults. They set up a sting where the perpetrators believe that the police officer is a vulnerable adult. The perpetrators go through all of the acts to exercise undue influence<sup>3</sup>, believe that they have exercised undue influence, and the police officer eventually gives them property. In this hypothetical, at the time that the perpetrator receives the property they "are practically certain that the police officer is a vulnerable adult and that they obtained his or her consent due to undue influence."<sup>4</sup> In this situation there is no reason why the perpetrators should not be subject to the same penalty as if they did the exact same things and obtained property from a person who was actually a vulnerable adult. To change the outcome, the Commission could change the definitions contained in RCC § 22A-2001 or have a general provision that states that in sting operations the person has committed the offense if the facts were as they believed it to be.

### **§ 22A-2003, Limitation on Convictions for Multiple Related Property Offenses.**

Section 22A-2003 establishes a procedure whereby the trial court will only enter judgment of conviction on the most serious of certain specified property offenses that arise out of the same act or course of conduct. Should the Court of Appeals reverse the conviction it directs the trial court to resentence the defendant on the next most serious offense. Should the person have been found guilty at trial for multiple offenses that would merge under this standard, there could be successive appeals and resentencings.<sup>5</sup> Such a procedure would lead to increased litigation and

<sup>2</sup> See page 50 of First Draft of Report #10 – Recommendations for Fraud and Stolen Property Offenses.

<sup>3</sup> Undue influence is defined as "mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being."

<sup>4</sup> See the definition of "knowingly" in § 22A-205, Culpable Mental State Definitions.

<sup>5</sup> The charges that merge under RCC § 22A-2003 (a) are theft, fraud, extortion, stolen property, and other property damage offenses (including any combination of offenses contained in

costs and an increase in the amount of time before a conviction can be finalized. Rather than create such a system, OAG recommends that the RCC instead adopt a procedure which has already been accepted by the Court of Appeals for barring multiple convictions for overlapping offenses.

Section 22A-2003 (c) states, “Where subsections (a) or (b) prohibit judgments of conviction for more than one of two or more offenses based on the same act or course of conduct, the court shall enter a judgment of conviction for the offense, or grade of an offense, with the most severe penalty; provided that, where two or more offenses subject to subsection (a) or (b) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses.”

The Commentary, at page 52, states:

The RCC limitation on multiple convictions statute does not raise double jeopardy issues or create significant administrative inefficiency... jeopardy does not attach to a conviction vacated under subsection (c), and the RCC statute does not bar subsequent entry of a judgment of conviction for an offense that was previously vacated under subsection (c)... A conviction vacated pursuant to subsection (c) of the RCC statute may be re-instated at that time with minimal administrative inefficiency. Sentencing for a reinstated charge may entail some additional court time as compared to concurrent sentencing on multiple overlapping charges at the close of a case. However, any loss to procedural inefficiency appears to be outweighed by the benefits of improving penalty proportionality and reducing unnecessary collateral consequences convictions concerning substantially overlapping offenses. [emphasis added]

Notwithstanding the Commentary’s assertion that multiple appeals and resentencings would have minimal administrative inefficiency and take some additional court time, such a procedure would lead to increased court inefficiencies and increased litigation costs and times.<sup>6</sup> For example, a person could be found guilty of three property offenses that would merge under the provisions proposed by the RCC. At sentencing the judge would sentence the person only to the offense with the most severe penalty. The defendant’s attorney would then file an appeal based solely on the issues that pertain to that count, write a brief, and argue the appeal. The prosecutors would have to respond in kind. After some amount of time, perhaps years, should the Court of Appeals

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Chapters 21, 22, 23, 24, or 25 of the RCC for which the defendant satisfies the requirements for liability). The charges that merge under RCC § 22A-2003 (b) are Trespass and Burglary (and any combination of offenses contained in Chapters 26 and 27 of the RCC for which the defendant satisfies the requirements for liability.)

<sup>6</sup> It should be noted that the increase in litigation expenses would not only be born by the prosecution entities and by some defendants, but by the court who, under the Criminal Justice Act, must pay for court appointed attorneys to brief and argue multiple appeals and appear at multiple sentencings.

agree with the defense position on that one count, the count would be reversed and the case would be sent back to the trial court for resentencing. The process would then repeat itself with an appeal on the count with the next most severe penalty. Should the defense win again, the process would repeat again. It is more efficient to have all the issues in a case briefed and argued once before the Court of Appeals and have the judgment finalized at the earliest time.

In *Garris v. United States*, 491 A.2d 511, 514-515 (D.C. 1985), the D.C. Court of Appeals noted with approval the following practice where two or more counts merge. It suggested that the trial court can permit convictions on both counts, allowing the Court of Appeals to determine if there was an error that affected one count but not the other. *Id.* (“No legitimate interest of the defendant is served by requiring a trial court to guess which of multiple convictions will survive on appeal.”). Then, if no error is found, this Court will remand the case to the trial court to vacate one conviction, and double jeopardy will be avoided. If error was found concerning one count but not the other, no double jeopardy problem will arise because only one conviction would stand. *Id.*

On a separate note, Section 22A-2003 (c) ends by saying “where two or more offenses subject to subsection (a) or (b) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses.” The Commentary does not explain, however, what standards the judge should use in choosing which offense should be retained and which offense should be vacated. As the penalty is the same, the defendant has reduced interest in which offense remains and which is vacated. Given the broad authority that the prosecutor has in choosing what, if any, offenses to charge and to negotiate a plea offer that meets the state’s objectives, after a sentence has been imposed, it should be the prosecutor that decides which sentences should be retained and which should be vacated.

To accomplish the more efficient procedure proposed in *Garris* and to address how the determination should be made concerning which conviction should stand and which should be vacated, OAG proposes that the following language be substituted for RCC § 22A-2003:

- (a) *Theft, Fraud, Extortion, Stolen Property, or Property Damage Offenses.* A person may initially be found guilty of any combination of offenses contained in Chapters 21, 22, 23, 24, or 25 for which he or she satisfies the requirements for liability; however, pursuant to paragraph (c), following an appeal, or if no appeal following the time for filing an appeal, the court shall retain the conviction for the offense, or grade of an offense, with the most severe penalty and vacate any other offense within these chapters which is based on the same act or course of conduct.
- (b) *Trespass and Burglary Offenses.* A person may initially be found guilty of any combination of offenses contained in Chapters 26 and 27 for which he or she satisfies the requirements for liability; however, pursuant to paragraph (c), following an appeal, or if no appeal following the time for filing an appeal, the court shall retain the conviction for

the offense, or grade of an offense, with the most severe penalty and vacate any other offense within these chapters which is based on the same act or course of conduct.

- (c) *Judgment to be Finalized after Appeal or Appeal Time has Run.* Following a remand from the Court of Appeals, or the time for filing an appeal has run, the court shall, in addition to vacating any convictions as directed by the Court of Appeals, retain the conviction for the offense, or grade of an offense, with the most severe penalty within subsection (a) or (b) and vacate any other offense within these chapters which are based on the same act or course of conduct. Where two or more offenses subject to subsection (a) or (b) have the same most severe penalty, the court shall impose a judgment of conviction for the offense designated by the prosecutor.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** November 3, 2017

**SUBJECT:** First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses<sup>1</sup>

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses. OAG reviewed this document and makes the recommendations noted below.<sup>2</sup>

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<sup>1</sup> In OAG's memo on the First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions, we argued against the proposal for successive appeals and resentencings proposed in § 22A-2003, Limitation on Convictions for Multiple Related Property Offenses. We proposed a system based upon *Garris v. United States*, 491 A.2d 511, 514-515 (D.C. 1985) where there would be a single appeal and then a remand where the court would retain the sentence for the offense with the most severe penalty and then dismiss specified offenses that arose out of the same act or course of conduct. If that proposal were adopted, conforming amendments would have to be made to the provisions in this Report. For example, RCC § 22A-2103, (e) pertaining to Multiple Convictions for Unauthorized Use of a Rented or Leased Motor Vehicle or Carjacking would have to reflect the new procedure.

<sup>2</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.



## **COMMENTS ON THE DRAFT REPORT**

### **§ 22A-2103, Unauthorized Use of a Motor Vehicle**

Section 22A-2103 (a) establishes that a person commits this offense if he or she knowingly operates or rides as a passenger in a motor vehicle without the effective consent of the owner. Paragraph (c) states that only the operator of the motor vehicle is guilty of First Degree Unauthorized Use of a Motor Vehicle. A person who is a passenger in a vehicle he or she knows is being operated without effective consent is only guilty of second degree Unauthorized Use of a Motor Vehicle. This is a change from current law. As the commentary notes:

... The current UUV statute is limited to a single grade, and it is unclear whether it reaches use as a passenger. However, liability for UUV as a passenger has been upheld in case law. In the revised UUV offense, liability for a passenger is explicitly adopted as a lesser grade of the offense. Codifying UUV case law for a passenger in the RCC does not change District case law establishing that mere presence in the vehicle is insufficient to prove knowledge, such as *In re Davis* and *Stevens v. United States*. Nor does codification of UUV for a passenger change the requirement in existing case law that a passenger is not liable if he or she does not have a reasonable opportunity to exit the vehicle upon gaining knowledge that its operation is unauthorized.” [internal footnotes removed]

There are at least two reasons why the current single penalty scheme should be retained. First, a person who can be charged as a passenger in a UUV is necessarily an aider and abettor to its illegal operation and, therefore, faces the same penalty as the operator.<sup>3</sup> In fact, driving passengers in the stolen car is frequently the reason why the operator is using the vehicle in the first place. Second, stolen cars are frequently passed from driver to driver. A person who is a driver one moment may be a passenger the next and the passenger in a UUV may soon become the driver. The penalty for unlawful use of a motor vehicle should not be dependent on the luck of when the stolen car is stopped by the police.

### **§ 22A-2104. Shoplifting**

The shoplifting proposal contains a qualified immunity provision. One of the requirements to qualify for the immunity under § 22A-2104(e)(1) is that “The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section...” [emphasis added]

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<sup>3</sup> See Redbook Instruction 3.200 AIDING AND ABETTING which states “To find that a defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated himself/herself with the commission of the crime, that s/he participated in the crime as something s/he wished to bring about, and that s/he intended by his/her actions to make it succeed.”

However, stores frequently rely on surveillance and other technology to identify would be shoplifters and so, not all persons who are validly stopped for shoplifting committed the offense “in that person’s presence.” For example, stores frequently rely on video technology to observe people in the store. A security officer may be in a room on a different floor observing someone hide merchandise or exchange price tags. Without a definition of “committed in the in the person’s presence” that includes the use of surveillance technology, store personnel would not have qualified immunity for stopping a person based on watching them commit the offense through a surveillance system.

Another, common anti-theft feature that stores rely on to reduce shoplifting is the use of Radio frequency (RF and RFID) tags. When someone goes through the store’s doorway without paying for something, the radio waves from the transmitter (hidden in on one of the door gates) are picked up by something hidden in a label or attached to the merchandise. This generates a tiny electrical current that makes the label or attachment transmit a new radio signal of its own at a very specific frequency. This in turn sets off an alarm. People who set off the alarm are justifiably stopped to see if they have merchandise that was not paid for even though the offense, arguably, did not occur in the store employee's presence (or at least the store employee did not actually notice the merchandise being hidden. If the person, in fact, has such merchandise, and are held for the police, the store personnel should still qualify for immunity. The gravamen for having qualified immunity should not be whether the offense occurred in the store employee’s presence, but whether the store employee’s stop was reasonable. The Commission should either remove the requirement that the offense occur “in that person’s presence” or it should define that term to include situations where the shoplifter is identified because of some technology, wherever the store employee is actually located.

### **RCC § 22A-2504. Criminal Graffiti**

- (a) RCC § 22A-2504 (a) states that “A person commits the offense of criminal graffiti if that person:
- (1) knowingly places;
  - (2) Any inscription, writing, drawing, marking, or design;
  - (3) On property of another;
  - (4) That is visible from a public right-of-way;
  - (5) Without the effective consent of the owner.”

There is no reason why this offense needs to have the element that the graffiti “...is visible from a public right-of-way...” A person who paints a marking on the back of a person’s house (that is not visible from a public right-of-way) has caused just as much damage to the house as if he painted something on the front of the house. In addition, to the extent that Criminal Graffiti may

be considered as a plea option for an offense that has a greater penalty, its availability should not be contingent on whether the marking is visible from a public right-of-way. In fact, it is counter-intuitive that if more people can see the marking Criminal Graffiti could be used as a plea down offense, but if fewer people can see it, because of its location, that the defendant would only be exposed to an offense with a greater penalty.

Paragraph (e) provides for parental liability when a minor commits criminal graffiti. It states, “The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court.” While OAG appreciates that the Commission would want to include a provision that establishes parental responsibility, we request that paragraph (e) be stricken. We do this for two reasons. First, D.C. Code § 16-2320.01 authorizes the court to enter a judgment of restitution in any case in which the court finds a child has committed a delinquent act and it also provides that the court may order the parent or guardian of a child, a child, or both to make such restitution. The inclusion of RCC § 22A-2504 (e) is, therefore, unnecessary and could cause litigation concerning whether it trumps D.C. Code § 16-2320.01 or merely provides for a separate means to make parents and guardians liable for their children’s behavior. In addition, there are no fine provisions contained in the juvenile disposition (sentencing) statute and, so, the court would never be in a position to require parents and guardians to be responsible for its payment. See D.C. Code § 16-2320.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Office of the Attorney General for the District of Columbia**

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** November 3, 2017

**SUBJECT:** First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-2201. Fraud.**

Section 22A-2201 (a) establishes the offense of Fraud. It states:

*Offense.* A person commits the offense of fraud if that person:

- (1) Knowingly takes, obtains, transfers, or exercises control over;
- (2) The property of another;
- (3) With the consent of the owner;
- (4) The consent being obtained by deception; and
- (5) With intent to deprive that person of the property.

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

In the Commentary, on page 5, it discusses what is meant by “Knowingly takes, obtains, transfers, or exercises control over...” It states, “For instance, the revised statute would reach conduct that causes the transfer of the victim’s property (and otherwise satisfies the elements of the offense), whether or not the transfer is to the defendant or received by the defendant. The breadth of the new language in practice may cover all or nearly all fact patterns covered under the prior “causes another to lose” language.” While we agree that the statute should reach this behavior, we suggest slightly modifying the statutory language to ensure that it is clear that it does. Section 22A-2201 (a)(1) actually states, that a person commits the offense when he or she “Knowingly ... transfers...” the property. Before a person can transfer something, they must possess it in some way, which is not the case presented in the hypothetical. To ensure that the activity stated there is covered by the statute, it should actually say “causes the transfer.” Then it is clear that a person is guilty of fraud “whether or not the transfer is to the defendant or received by the defendant.”

### **RCC § 22A-2205. Identity Theft.**

RCC § 22A-2205 criminalizes identity theft. We suggest that two additional situations be added to paragraph (a)(4) to cover situations where a person’s identity was used to harm that person and where a person uses another’s identifying information to falsely identify himself when being issued a ticket, a notice of infraction, during an arrest, to conceal his commission of a crime, or to avoid detection, apprehension, or prosecution for a crime.

RCC § 22A-2205 states:

- (a) A person commits the offense of identity theft if that person:
  - (1) Knowingly creates, possesses, or uses;
  - (2) Personal identifying information belonging to or pertaining to another person;
  - (3) Without that other person’s effective consent; and
  - (4) With intent to use the personal identifying information to:
    - (A) Obtain property of another by deception;
    - (B) Avoid payment due for any property, fines, or fees by deception; or
    - (C) Give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception.

All the conditions outlined in RCC § 22A-2205 (a)(4) have to do with using somebody’s identity to enrich the person committing identity theft or some third party. Unfortunately, people also use identity theft to embarrass someone or to get even with them for a perceived slight. For example, a person may setup a Facebook account, or other social media, using the identity of a person that they would like to hurt, “friend” their friends,

and then put up false or embarrassing posts and pictures.<sup>2</sup> While some stalking statutes might cover repeated behavior similar to what is presented here, a single use of someone's identity would not come under a stalking statute no matter how traumatizing the use of the victim's identity may be to the victim. The traumatic effects on the person whose identity was impersonated can be just as devastating to him or her as the financial loss that may occur under the statute as written. We, therefore, suggest that a paragraph (D) be added to RCC § 22A-2205 (a)(4) which states, "Harm the person whose identifying information was used."<sup>3</sup>

The other issue with RCC § 22A-2205 is that it narrows the scope of the current law. As noted in the Commentary, on page 39, "the revised statute eliminates reference to use of another person's identifying information to falsely identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension, or prosecution for a crime—conduct included in the current identity theft statute.<sup>4</sup> Most such conduct already is criminalized under other offenses, including the obstructing justice,<sup>5</sup> false or fictitious reports to Metropolitan Police,<sup>6</sup> and false statements.<sup>7</sup> All such conduct is criminalized under other offenses in the RCC, including the revised obstructing justice<sup>8</sup> and revised false statements offenses." Contrary to the assertion made in the quoted text, giving out false identifying information belonging to or pertaining to another person to identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime is not criminalized elsewhere in the Code. OAG takes no position on whether RCC § 22A-

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<sup>2</sup> The practice is so common that there are numerous websites that explain what a person can attempt to do to report an account for impersonation. See for example, <https://www.facebook.com/help/167722253287296>

<sup>3</sup> If the Commission accepts this suggestion, then an amendment would have to be made to paragraph (c), gradations and penalties, to establish what penalty, or penalties, this non-value based offense would have. This would could be handled similarly to how the Commission ranked a motor vehicle as a Second Degree Theft, in RCC § 22A-2101 without it having a stated monetary value.

<sup>4</sup> D.C. Code § 22-3227.02(3). Notably, while the current identity theft statute purports to criminalize use of another's personal identifying information without consent to identify himself at arrest, conceal a crime, etc., current D.C. Code § 22-3227.03(b) only provides a penalty for such conduct in the limited circumstance where it results in a false accusation or arrest of another person. [This footnote and the following three are footnotes to the quoted text.]

<sup>5</sup> D.C. Code § 22-722(6).

<sup>6</sup> D.C. Code § 5-117.05.

<sup>7</sup> D.C. Code § 22-2405. Further, supporting treating this offense as more akin to false statements is the fact that under current law penalty for 22-3227.02(3) versions of identity theft is just 180 days.

<sup>8</sup> RCC § 22A-XXXX.

2205 should be amended to add back the language that is currently in D.C. Code § 22-3227.02(3) or whether there should be a stand-alone offense that covers using personal identifying information belonging to or pertaining to another person, without that person's consent, to identify himself or herself at the time of he or she is given a ticket, a notice of infraction, is arrested; or to facilitate or conceal his or her commission of a crime; or to avoid detection, apprehension, or prosecution for a crime.<sup>9</sup> Note that under both the current law and OAG's suggestion the giving out of a fictitious name would not be an offense. The person has to give out the personal identifying information belonging to or pertaining to another person, without that person's consent. See D.C. Code § 22-3227.02(3).

### **RCC §22A-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person**

RCC §22A-2208 establishes an offense for the financial exploitation of a vulnerable adult or elderly person. The Commentary, on page 52, correctly notes that D.C. Code § 22-933.01. "...provides an affirmative defense if the defendant "knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed." Further, the statute states that "[t]his defense shall be established by a preponderance of the evidence." [internal citations omitted]. RCC §22A-2208 would change current law and would instead require the government to prove the mental state of "knowingly" about the element that the victim was a vulnerable adult or elderly person and would remove the self-defense provision. If passed, the government would frequently not be able to meet its burden. How could the government prove the mental state of "knowingly" to the element that the person was 65 years old or that a given individual met the definition of a vulnerable adult<sup>10</sup> when all the defendant would have to do is put on something to show that he or she thought the person was 64 years old or had limitations that impaired the person's ability but that those limitations were not "substantial"? (Note that "substantial" is not a defined term.)

The current statute correctly establishes the burdens. It requires that government prove that the victim was, in fact, a vulnerable adult or elderly person and it provides an

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<sup>9</sup> OAG's suggested language slightly expands the current law. While under current law it is illegal for a person to give someone else's name out at time of arrest, under OAG's proposal it would also prohibit the giving of such false information when the person is given a ticket or a notice of infraction. These two additional situations may also trigger state action against an innocent person and should likewise be made criminal.

<sup>10</sup> RCC § 22A-2001 (25) states that a vulnerable adult "means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests."

affirmative defensive, established by a preponderance of the evidence, that would allow the person to prove that he reasonably believed the victim was not a vulnerable adult or elderly person. All of the evidence concerning the person's belief are peculiarly within that persons' possession.



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** November 3, 2017

**SUBJECT:** First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary Offenses. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT<sup>2</sup>**

**RCC § 22A-2603. Criminal Obstruction of a Public Way<sup>3</sup>**

The offense of Criminal Obstruction of a Public Way would replace D.C. Code § 22-1307(a), crowding, obstructing, or incommoding. It omits clarifying language that was added in the

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

<sup>2</sup> The Extortion statute, RCC § 22A-2301, is limited to obtaining property by coercion. We assume that the Commission is planning to draft a separate provision that criminalizes forcing a person to commit an act or refrain from committing an act by coercion, so we did not recommend changes to that proposal.

<sup>3</sup> To the extent that the comments and recommendations to this provision apply to RCC § 22A-2605, Unlawful Obstruction of a Bridge to the Commonwealth of Virginia, they should be considered as comments and recommendations to that provision.

Disorderly Conduct Amendment Act of 2010 (the Act). Although prior to 2010, D.C. Code § 22-1307(a) did not state a minimum number of people who had to obstruct the public way, the Court of Appeals read the common law requirement that three or more persons must act in concert for an unlawful purpose before anyone could be convicted of this offense.<sup>4</sup> To address this Court interpretation and to make it clear that a single person or two could arrange their bodies in such a way that they could obstruct a public way, the Act added that it was unlawful for a person to act alone or in concert with others. We, therefore, recommend that this language be added back into the lead in language contained in paragraph (a).

In addition, the current law makes it unlawful for a person to “crowd, obstruct, or incommode” the public way.<sup>5</sup> The proposal would limit the reach of the law to people who “render impassable without unreasonable hazard.”<sup>6</sup> Under this formulation, it arguably would not be a crime for two people to lie down and block two lanes of a highway if police were on the scene directing traffic around them to avoid them being run over. Because of the police presence, despite the affect on traffic the two people may not be considered causing an unreasonable hazard. This despite the ensuing traffic jam and inconvenience to drivers, commuters, and pedestrians. To address this situation, and others, RCC § 22A-2603 (a) should be redrafted to state “obstruct or inconvenience. [proposed addition underlined].<sup>7</sup>

Finally, D.C. Code § 22-1307(a) makes it illegal to obstruct “The passage through or within any park or reservation.”<sup>8</sup> The Commentary does not explain why RCC § 22A-2603 omits these areas. Absent a strong reason why it should be permissible to obstruct one of these areas, we suggest that they be retained in the law. To accomplish this, RCC § 22A-2603(a)(2) should be redrafted to say, “A park, reservation, public street, public sidewalk, or other public way.”

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<sup>4</sup> For example, see *Odum v. District of Columbia*, 565 A.2d 302 (D.C. 1989).

<sup>5</sup> D.C. Code § 22-1307 (a) states:

It is unlawful for a person, alone or in concert with others:

(1) To crowd, obstruct, or incommode:

- (A) The use of any street, avenue, alley, road, highway, or sidewalk;
- (B) The entrance of any public or private building or enclosure;
- (C) The use of or passage through any public building or public conveyance; or
- (D) The passage through or within any park or reservation; and

(2) To continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease the crowding, obstructing, or incommoding.

<sup>6</sup> See the definition of “obstruct” in RCC § 22A-2603 (b).

<sup>7</sup> The current law makes it a crime to inconvenience people and so adding this language would not expand the scope of the current law. To express this concept, D.C. Code § 22-1307(a) uses the word “incommode” which means “to inconvenience.”

<sup>8</sup> See D.C. Code § 22-1307(a)(1)(D).

### **RCC § 22A-2604. Unlawful Demonstration**

Paragraph (b) defines demonstration as including “any assembly, rally, parade, march, picket line, or other similar gathering by one or more persons conducted for the purpose of expressing a political, social, or religious view.” D.C. § 22-1307(b)(2) describes a demonstration as “marching, congregating, standing, sitting, lying down, parading, demonstrating, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief.” We believe that the current definition of a demonstration better describes the behavior that this provision is trying to reach. As the Commentary states that there is no intention to change the scope of the law on this point, we believe that RCC § 22A-2604 should be redrafted to include the current definition.

### **RCC § 22A-2701. Burglary**

We have two suggested amendments to RCC § 22A-2701.<sup>9</sup> First, we agree with the basic formulation that “A person is guilty of first degree burglary if that person commits burglary, knowing the location is a dwelling and, in fact, a person who is not a participant in the crime is present in the dwelling...” However, the law should be clear that should the person enter the dwelling simultaneously with the victim or proceeds the victim by a couple of steps that those occurrences should also constitute first degree burglary. For example, it should not matter whether a person with gun forces someone to walk just a head of them into a dwelling to rape them or whether the person walks backwards with the gun on the victim into a dwelling intending on raping them; either way the statute should be clear that the person is guilty of burglary. The same should amendment should be made to second degree burglary.

Second, we suggest that the gradations and penalty section makes it clear that where a watercraft is used as a dwelling (e.g. houseboat), a person who commits the offense in paragraph (a) when a person is in the watercraft/dwelling is guilty of First Degree Burglary.

### **RCC § 22A-2702. Possession of Burglary and Theft Tools**

Paragraph (a) states:

- (a) Offense. A person commits the offense of possession of burglary and theft tools if that person:
- (1) Knowingly possesses;
  - (2) A tool, or tools, created or specifically adapted for picking locks, cutting chains, bypassing an electronic security system, or bypassing a locked door;
  - (3) With intent to use the tool or tools to commit a crime.

As people are just as likely to commit a burglary by going through a window as a locked door, we suggest that RCC § 22A-2702(a)(2) be expanded to include tools created or specifically adapted for cutting glass.

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<sup>9</sup> See RCC § 22A-2701(c)(1).

# M E M O R A N D U M

THE  
PUBLIC  
DEFENDER  
SERVICE  
*for the District of Columbia*



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: November 3, 2017

Re: Comments on First Drafts of Reports 8  
through 11, Property Offenses

The Public Defender Service makes the following comments.

Report #8: Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

1. Coercion.<sup>1</sup>

PDS makes two recommendations regarding the commentary explaining the meaning of “coercion.” First, PDS recommends the modifying the explanation of sub-definition (H) of the definition at page 10 to read as follows:

Subsection (H) covers threats to inflict wrongful economic injury on another person. It is intended to include not only causing wrongful financial losses but also situations such as threatening labor strikes or consumer boycotts when. ~~While labor activities are not inherently problematic, when~~ threats of labor or consumer activity are issued to order to personally enrich a person, and not to benefit the workers as a whole, ~~such threats may constitute a criminal offense.~~

As currently written, the second sentence implies that simply threatening a labor strike or a consumer boycott may be “coercion.” The rest of the paragraph, however, seems to say that such threat is only coercion if it is done for the personal enrichment of a person, rather than for the benefit of a group. The paragraph should be modified such that it is clear that a mere threat of a labor strike, without more, does not meet the definition of “coercion.”

Second, PDS recommends rewriting the explanation for (J), the residual sub-definition of coercion. The residual sub-definition states that “‘coercion’ means causing another person to fear

<sup>1</sup> RCC § 22A-2001(5).

that, unless that person engages in particular conduct then another person will ... perform any other act that is calculated to cause *material harm* to another person's health, safety, business, career, reputation, or personal relationships."<sup>2</sup> Currently, the explanation, at page 10 of Report #8, states that the conduct of threatening to lower a student's grade would fall within the provision, implying that any threat to lower any grade would necessarily constitute "material harm." PDS strongly disagrees. PDS agrees with the suggestion made during the November 1, 2017 public meeting of the Advisory Group to explain this residual sub-definition with an example that is clearly a threat of material harm, falling within the sub-definition, and an example that equally clearly is a threat of de minimis harm, falling outside the sub-definition.

## 2. Deceive and deception.<sup>3</sup>

The definition of "deceive" has unequal sub-definitions. Sub-definitions (A), (B), and (C) each have a "materiality" requirement as well as additional negative conduct. Sub-definitions (A) and (C) require a "false impression" and sub-definition (B) requires a person act to prevent another. Sub-definition (D), in contrast, makes it "deception" merely to fail to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property. Thus, it would be "deception" for a person to disclose an adverse claim to someone whom the person knows already has knowledge of the adverse claim. As was discussed at the November 2, 2017 public meeting of the Advisory Group, this sub-definition is most likely to be used when "deceive" is used in Fraud, RCC § 22A-2201, and perhaps also when used in Forgery, RCC § 22A-2205. PDS requests that the explanations for those offenses in Report #9 and the explanation of this sub-definition in Report #8, state that the deception must be causally connected to the consent. Thus to be convicted of Fraud, the person must not merely have obtained the owner's consent and failed to disclose a known lien or adverse claim, the person must have, knowingly, obtained the owner's consent because the person failed to disclose a known lien or adverse claim, etc.

## 3. Dwelling.<sup>4</sup>

PDS strongly recommends rewriting the definition of "dwelling" to read:

"Dwelling" means a structure, or part of a structure, that is ~~either designed for lodging or residing overnight, or that is used for lodging or residing overnight.~~ In multi-unit buildings, such as apartments or hotels, each residential or lodging unit is an individual dwelling.

The most significant problem with the Report #8 proposed definition is that by including structures that are "designed" for residing or lodging it is vague and if strictly applied, too broad. Across the original City of Washington, particularly in the Capitol Hill and Foggy Bottom neighborhoods, and in Georgetown, there are numerous structures that were "designed" as residences or lodgings, and were even used that way for years, that have since been converted solely for office or business use. The rooms inside some of these structures may not have even

<sup>2</sup> Report #8 at page 3 (emphasis added).

<sup>3</sup> RCC § 22A-2001(8).

<sup>4</sup> RCC §22A-2001(10).

changed. The kitchen and bathrooms may remain the same but the living and bedroom areas are now full of desks, bookshelves and computers.<sup>5</sup> To avoid the possibility that a converted house will be defined as a “dwelling” because of its original “design” and to avoid the courts defining which “design” is dispositive, the original or the redesigned interior, the definition of “dwelling” should be rewritten so that the actual use of the structure is dispositive.

Rewriting the definition to exclude “design” solves another problem. PDS does not disagree with categorizing as a “dwelling” “a car if a person is using the car as the person’s primary residence.” PDS does disagree, however, with categorizing as a “dwelling” a camper that is “designed” for residing or lodging but that is parked in front of a person’s primary residence and used more often as a family vehicle than for camping.<sup>6</sup> It would be disproportionate, a result the reformed code should avoid, to treat a camper differently from a car merely because of “design.”

The reason “dwelling” is distinguished from other structures in the RCC should inform the definition. The term is used in RCC arson, reckless burning, trespass, and burglary. In each, the term is used in a gradation with a higher punishment. PDS posits that this distinction is justified because “dwellings” are places where people expect privacy, where people can lock the door and feel it is safe to rest and safe to keep their possessions, where they can control who enters and who must leave. The Report #8 defines “dwelling” as a place “used for residing and lodging overnight”. “Residing” and “lodging” are easy to understand terms; neither needs further modification.<sup>7</sup> The use of the word “overnight” is confusing. Is it to convey that even a single night could make a structure a “dwelling?” Is it meant to imply that sleep, which most people do at night, is a strong factor to consider when determining if a structure is for residing or lodging? Is it meant to exclude structures where sleeping might take place during the daytime? If someone consistently works a night shift and always sleeps in his rented room during the day, is that room not a “lodging” and therefore not a “dwelling”?

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<sup>5</sup> Importantly, the proposed “dwelling” definition does not allow for the reverse problem. There are also many buildings in D.C. that were originally designed for commercial or public use, such as warehouses or schools, that have since been converted to “loft” residences or condominiums, though the façade and even some internal design elements of the original building have not been changed. See for example, The Hecht Co. Warehouse, <http://www.hechtwarehouse.com/>. Because the Report #8 definition includes structures “used” as residences or for lodging, that the structures were “designed” for commercial use is not disqualifying. (Shockingly, see also the Liberty Crest Apartments, located on the grounds of Lorton Reformatory and their tasteless and insensitive retention of some original design elements. <https://libertycrestapartments.com/>).

<sup>6</sup> From this writer’s childhood, see, the VW camper, [https://en.wikipedia.org/wiki/Volkswagen\\_Westfalia\\_Camper](https://en.wikipedia.org/wiki/Volkswagen_Westfalia_Camper), which the writer regularly drove in high school and college. See also, the RoadTrek, which was also parked regularly in front of a primary residence and was a family car far more often than a camping “residence.” <http://www.roadtrek.com/>

<sup>7</sup> “Reside” means to settle oneself or a think in a place; to dwell permanently or continuously: have a settled abode for a time; “lodging” means a place to live, a place in which to settle or come to rest, a sleeping accommodation, a temporary place to stay. See Webster’s Third New International Dictionary.

While sleeping in a place is a strong indication that the place is a “dwelling,” it should not be dispositive. PDS objects to the term “dwelling” including, as Report #8 says it would, “a room in a hospital where surgeons or resident doctors might sleep between lengthy shifts.” Other than the fact that people sleep there, there is nothing else about such a room that makes it a “dwelling.” The people intended to sleep there do not control who else has access to the room; presumably, anyone hired by the hospital into certain positions and given certain security badges can enter the room. Such a room would not be distinguishable from a daycare center, where the infants and toddlers might sleep during their long “shifts,” or from the pre-kindergarten rooms in the elementary school where those children might be expected to sleep during naptime every day. A person who enters the daycare room or the pre-k classroom with the intent to steal a computer therein has burgled a building, not a dwelling.

Finally, the definition and the explanation should make clear that in a multi-unit building, each residential or lodging unit is a separate dwelling but that also necessarily means that areas of the building that are not used for residing or lodging are not dwellings. The vestibule of the apartment building, the lounge in the college dorm, and the “party room” and the fitness room in the condominium building are not “dwellings.”

#### 4. Financial Injury.<sup>8</sup>

The “legal fees” sub-definition of “financial injury” is a significant and unwarranted expansion of the current law.<sup>9</sup> The Report #8 proposed definition’s separate listing of “legal fees” is supposed to be “clarificatory” and “not intended to substantively change current District law.” (See page 28.) However, the definition to which it “generally corresponds,”<sup>10</sup> D.C. Code § 22-3227.01, links “attorney fees” to the cost of clearing a person’s credit rating, to expenses related to a civil or administrative proceeding to satisfy a debt or contest a lien, etc. Unmooring “legal fees” from those categories of losses, expands what fees could be considered part of “financial injury.” For example, if the allegedly financially injured person is a witness at the criminal trial but hires an attorney because of a 5<sup>th</sup> Amendment issue that could arise tangentially, adding in the cost of that attorney could be considered “legal fees” under the Report #8 definition but definitely would not be considered “attorney fees” pursuant to D.C. Code § 22-3227.01. PDS recommends rewriting the definition to read as follows:

“Financial injury” means all monetary costs, debts ....including, but not limited to:

- (A) The costs of clearing the person’s credit rating, ...;
- (B) The expenses...;
- (C) The costs of repairing...;
- (D) Lost time or wages ...; and

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<sup>8</sup> RCC §22A-2001(14).

<sup>9</sup> No doubt as a result of auto-formatting, the “legal fees” sub-definition of financial injury” is labeled as (J). All of the sub-definitions are mislabeled as (F) through (J). Correct formatting would label them (A) through (E), with (E) being “legal fees.”

<sup>10</sup> Report #8 at page 28.

(E) Legal fees incurred for representation or assistance related to (A) through (D).

5. Motor vehicle.<sup>11</sup>

The term “motor vehicle” should more clearly exclude modes of transportation that can be propelled by human effort. A “moped” can be propelled by a small engine but it can also be pedaled, meaning it can operate simply as a bicycle. It should not qualify as a “motor vehicle.” Also, the definition should be clear that it is a “truck tractor” that is a “motor vehicle;” a semitrailer or trailer, if detached from the truck tractor, is not a motor vehicle. The definition should be rewritten as follows:

“Motor vehicle” means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, ~~moped~~, scooter, truck, ~~truck tractor~~, truck tractor with or without a semitrailer or trailer, bus, or other vehicle solely propelled by an internal combustion engine or electricity or both, including any such non-operational vehicle temporarily non-operational that is being restored or repaired.

6. Services.<sup>12</sup>

The definition of “services” should be rewritten as follows to except fare evasion:

“Services” includes, but is not limited to:

(A) Labor, whether professional or nonprofessional

(B) ...

(C) ~~Transportation, telecommunications,~~ Telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;

(D) Transportation, except transportation in vehicles owned and/or operated by the Washington Metropolitan Area Transit Authority or other governmental entity;

(E) The supplying of food ....

As “services” is defined in Report #8, fare evasion could be prosecuted as theft or, potentially as fraud, both of which would be prosecuted by the U.S. Attorney’s Office. There is a separate fare evasion offense in the D.C. Code, at D.C. Code §35-216. It is prosecuted by the Office of the Attorney General for D.C.<sup>13</sup> and because it is, it may be resolved through the post-and-forfeit

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<sup>11</sup> RCC § 22A-2001(15).

<sup>12</sup> RCC § 22A-2001(22).

<sup>13</sup> D.C. Code § 35-253.



process.<sup>14</sup> Offenses prosecuted by the USAO, including theft and fraud, are categorically not eligible for resolution through post-and-forfeit.

The PDS recommendation to modify the definition of “services” would still provide for a “U.S. offense,” theft, or even possibly fraud, but would make exclusively a D.C. offense that of fare evasion on a WMATA vehicle or other public transportation.

If fare evasion is criminalized as theft, it would exacerbate the consequences of the enforcement of what is really a crime of poverty. It will subject more people to the arrest, detention, criminal record and other consequences of contact with the criminal justice system as a result of failing to pay a fare that ranges from \$2 to \$6.

PDS supports Bill 22-0408, currently pending before the D.C. Council, to decriminalize fare evasion (D.C. Code §35-216). Even if that effort is unsuccessful, however, the Revised Criminal Code should exclude the conduct of fare evasion on WMATA or public transportation, allowing for exclusive local enforcement.

#### 7. Limitation on Convictions for Multiple Related Property Offenses.

PDS strongly supports proposed RCC § 22A-2003, Limitation on Convictions for Multiple Related Property Offenses. The proposal represents a more thoughtful, comprehensive approach with predictable results than having to resort to the “Blockburger test” or the scattershot inclusion of offenses at D.C. Code § 22-3203. However, the grouping of theft, fraud and stolen property offenses pursuant to subsection (a) as completely separate from the grouping of trespass and burglary offenses pursuant to subsection (b) leaves one notable gap. Though likely not strictly a lesser included offense, a person necessarily commits the offense of trespass of a motor vehicle<sup>15</sup> every time he or she commits the offense of unauthorized use of a vehicle.<sup>16</sup> A person cannot knowingly operate or ride in as a passenger a motor vehicle without the effective consent of the owner without having first knowingly entered and remained in a motor vehicle without the effective consent of the owner. It may also be the case that a person necessarily commits the offense of trespass of a motor vehicle when he or she commits the offense of unauthorized use of property and the property is a motor vehicle.<sup>17</sup> However, because UUV and UUP are in Chapter 21 and TMV is in Chapter 26, RCC § 22A-2003 provides no limitation on convictions for these

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<sup>14</sup> D.C. Code § 5-335.01(c). “The post-and-forfeit procedure may be offered by a releasing official to arrestees who: (1) meet the eligibility criteria established by the OAG; and (2) are charged with a misdemeanor that the OAG, in consultation with the MPD, has determined is eligible to be resolved by the post-and-forfeit procedure.” Fare evasion may not have been determined eligible for resolution by the post-and-forfeit procedure and an individual arrested for it may not meet other eligibility criteria; however, because it is an OAG misdemeanor, it is an offense that the OAG could determine, in consultation with MPD, to be eligible for post-and-forfeit resolution. In contrast, no offense prosecuted by the USAO is eligible.

<sup>15</sup> RCC §22A-2602.

<sup>16</sup> RCC § 22A-2103.

<sup>17</sup> RCC § 22A-2102.

multiple *related* property offenses. PDS recommends amending RCC § 22A-2003 to address this problem.

## Report #9: Recommendations for Theft and Damage to Property Offenses

### 1. Theft.<sup>18</sup>

PDS recommends changes to the gradations of theft<sup>19</sup> to make penalties for theft of labor more fair and proportionate. “Labor” as a type of property should be valued as time and not as a monetary fair market value. As currently structured, “property” is defined to include “services,” which is defined to include “labor, whether professional or nonprofessional.” Theft of property, therefore, includes “theft of labor.” “Value” means the fair market value *of the property* at the time and place of the offense.<sup>20</sup> The gradations for theft are keyed to different levels of “value.” For example, it is third degree theft if the person commits theft and “the property, in fact, has a value of \$250 or more.” Presumably, if the “property” obtained without consent of the owner were the owner’s labor, the fair market value of that labor would be calculated based on the wages or salary of the owner. This would mean that stealing, to use the colloquial term, 8 hours of labor from a professional who charges \$325 per hour would result in a conviction of 2<sup>nd</sup> degree theft. Second degree theft requires the property have at least a value of \$2,500 (or that property be, in fact, a motor vehicle).  $\$325 \times 8 = \$2,600$ . In contrast, stealing 8 hours of labor from a worker in the District making minimum wage would result in a charge of 4<sup>th</sup> degree theft. Fourth degree theft requires the property have any value. As of July 1, 2017, the minimum wage in the District was \$ 12.50 per hour.<sup>21</sup>  $\$12.50 \times 8 = \$100$ . The Fair Shot Minimum Wage Amendment Act will increase the minimum wage every year until July 1, 2020 when the wage will be set at \$15 per hour. A full day’s work at that top minimum wage rate still will not pass the third-degree theft threshold of \$250.  $\$15 \times 8 = \$120$ . Stealing a full days’ work at the top minimum wage rate is two gradations lower than stealing even the rustiest of clunkers. The professional robbed of 8 hours of labor is not 26 times more victimized than the minimum wage worker robbed of 8 hours of labor. ( $325 \div 12.50 = 26$ .) And the person convicted of stealing 8 hours from the professional should not be punished as if his crime was categorically worse than had he or she stolen from a low-wage worker. PDS proposes that when the property is labor, the gradation should be keyed to time, specifically to hours of labor, rather than to monetary value. Thus, PDS proposes rewriting the gradations for theft as follows:

Aggravated theft -

- (1) the property, in fact, has a value of \$250,000 or more; or
- (2) the property, in fact, is labor, and the amount of labor is 2080 hours<sup>22</sup> or more.

<sup>18</sup> RCC § 22A-2101.

<sup>19</sup> RCC § 22A-2101(c).

<sup>20</sup> RCC § 22A-2001(24)(A).

<sup>21</sup> See D.C. Law 21-044, the Fair Shot Minimum Wage Amendment Act of 2016.

<sup>22</sup> 2080 hours is fifty-two 40-hour weeks, or one year of work.

## 1st degree -

- (1) the property, in fact, has a value of \$25,000 or more; or
- (2) the property, in fact, is a motor vehicle and the value of the motor vehicle is \$25,000 or more; or
- (3) the property, in fact, is labor, and the amount of labor is 160 hours<sup>23</sup> or more

## 2nd degree -

- (1) the property, in fact, has a value of \$2,500 or more; or
- (2) the property, in fact, is a motor vehicle; or
- (3) the property, in fact, is labor, and the amount of labor is 40 hours<sup>24</sup> or more

## 3rd degree -

- (1) the property, in fact, has a value of \$250 or more; or
- (2) the property, in fact, is labor and the amount of labor is 8 hours<sup>25</sup> or more.

## 4th degree -

- (1) the property, in fact, has any value; or
- (2) the property, in fact, is labor and is any amount of time.

PDS recommends this same penalty structure be used for fraud, RCC § 22A-2201(c), and extortion, RCC §22A-2301(c).

2. Unauthorized Use of a Motor Vehicle.<sup>26</sup>

PDS recommends amending unauthorized use of a motor vehicle to eliminate riding as a passenger in a motor vehicle from criminal liability. Being in a passenger in a car, even without the effective consent of the owner, should not be a crime. Where the passenger is aiding and abetting the driver, the passenger can be held liable. Where the passenger and the driver switch roles, and the government can prove that the passenger has also been a driver, liability would lie. But merely riding in a car should not result in criminal liability. Decriminalizing the passenger also eliminates the problem of having to determine when the passenger knew he or she lacked effective consent of the owner and whether, after that time, the passenger had an opportunity to leave the vehicle but failed to do so. If riding as a passenger were decriminalized, there would only be a single penalty grade for the offense.

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<sup>23</sup> 160 hours is four 40-hour weeks, or one month of work.

<sup>24</sup> 40 hours is five 8-hour days, or one workweek.

<sup>25</sup> 8 hours is one workday.

<sup>26</sup> RCC § 22A-2103.

3. Shoplifting.<sup>27</sup>

PDS recommends two amendments to the offense of shoplifting. First, element (2) should be amended to read: “personal property that is or was displayed, held, stored, or offered for sale.” This change would take care of the problem of property that is still in “reasonably close proximity to the customer area”<sup>28</sup> but that is not presently for sale. For example, a person shoplifts<sup>29</sup> a seasonal item, such as a snow shovel or beach ball, that has just been moved to the back store room. Two, the qualified immunity provision at subsection (e) should be amended to replace the phrase “within a reasonable time” where it appears<sup>30</sup> with the phrase “as soon as practicable.” Qualified immunity should only be allowed for a person who as promptly as possible notifies law enforcement, releases the individual or surrenders him or her to law enforcement. The District should not shield from liability a shop owner or agent who engages in a form of vigilante justice by locking a person in a room and taking their time to contact law enforcement.

4. Arson.<sup>31</sup>

PDS strongly objects to the revision of arson as proposed in Report #9. First, PDS objects to the significant lowering of the mental state for arson. While the D.C. Code may be silent as to the required mental state for a number of criminal offenses, the Code is explicit that malice is the culpable mental state for arson.<sup>32</sup> The D.C. Court of Appeals has held that the definition of “malice” is the same for arson and malicious destruction of property, which is the same as the malice required for murder.<sup>33</sup> The Court has defined malice as “(1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result.”<sup>34</sup> The Court has noted that the “actual intent to cause the particular harm” corresponds to the “purposely” state of mind in the Model Penal Code and the “wanton and willful” act with “awareness of a plain and strong likelihood that such harm may result” “blends

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<sup>27</sup> RCC § 22A-2104.

<sup>28</sup> Report #9 at page 36.

<sup>29</sup> Knowingly takes possession of the personal property of another that is *or was* offered for sale with intent to take or make use of it without complete payment.

<sup>30</sup> The phrase “within a reasonable time” appears once in RCC § 22A-2104(e)(3) and twice in RCC § 22A-2104(e)(4). RCC § 22A-2104(e)(4) should be rewritten: “The person detained or arrested was released ~~within a reasonable time~~ of as soon as practicable after detention or arrest, or was surrendered to law enforcement authorities ~~within a reasonable time~~ as soon as practicable.”

<sup>31</sup> RCC § 22A-2501.

<sup>32</sup> D.C. Code § 22-301; “Whoever shall maliciously burn or attempt to burn any dwelling...” (emphasis added).

<sup>33</sup> See *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987); *Thomas v. United States*, 557 A.2d 1296, 1299 (D.C. 1989)

<sup>34</sup> *Harris v. United States*, 125 A.3d 704, 708 (D.C. 2015).

the Model Penal Code's 'knowingly' and 'recklessly' states of mind."<sup>35</sup> The Revised Criminal Code proposes to use the mental state of "knowing" and eliminates mitigation. The effect is a significant and unjustifiable lowering of the mental state, which then greatly expands the conduct the revised offense criminalizes. PDS proposes that the mental state of "purpose" be applied to the RCC offense of arson.<sup>36</sup>

Second, the revised arson offense should not extend to a "business yard." A "business yard" is *land*, which is securely fenced or walled and where goods are stored or merchandise is traded.<sup>37</sup> It is "mainly *areas* that are surrounded by some sort of barrier, such as a fence, where goods are kept for sale."<sup>38</sup> While it is possible to damage land as a result of starting a fire or an explosion, it does not make sense to criminalize causing damage to land that happens to be securely fenced. If the point is to punish conduct that damages the fence or the wall, that is criminalized by criminal damage to property.<sup>39</sup> Similarly if the point is to punish conduct that damages the goods stored within the business yard, that too can be prosecution as a violation of the criminal damage to property offense. But there is no reason to distinguish between starting a fire that damages goods stored in a business yard and goods that happen to be within a fenced area but not for sale, or goods for sale but stored momentarily in an open parking lot. If, however, a fire set in a business yard damages the adjacent business *building*, then that is arson.

Third, the term "watercraft" is too broad. It would include canoes and rubber rafts, particularly a raft fitted for oars. Starting a fire that damages a rubber raft is not of the same seriousness as fire that damages a dwelling or building. PDS is not suggesting that damaging a canoe or a raft should not be a crime, only that it not be deemed "arson." Damaging a canoe or raft should be prosecuted as "criminal damage to property." The definition of "watercraft" should be similar to that of "motor vehicle"; it should be restricted to vessels that are not human-propelled. PDS recommends the following definition be added to RCC §22A-2001.

"Watercraft" means a vessel for travel by water that has a permanent mast or a permanently attached engine.

Fourth, arson should require that the dwelling, building, (narrowly-defined) watercraft, or motor vehicle be *of another*. That is the current law of arson and it should remain so. Damaging one's own dwelling, building, etc. should be proscribed by the reckless burning offense.<sup>40</sup> Setting fire to one's own dwelling knowing that it will damage or destroy another's dwelling would be arson.

Fifth, the gradation of second degree arson should read: "A person is guilty of second degree arson if that person commits arson and the amount of damage is \$2,500 or more." What is

<sup>35</sup> *Harris*, 125 A.3d at 708 n.3.

<sup>36</sup> PDS would also accept a mental state of knowing plus the absence of all elements of justification, excused or recognized mitigation.

<sup>37</sup> RCC § 22A-2001(3).

<sup>38</sup> Report #8 at page 8 (emphasis added).

<sup>39</sup> RCC § 22A-2503.

<sup>40</sup> RCC § 22A-2502.

proposed as revised second degree arson, that the person merely commits arson,” should be third degree arson and it should have a misdemeanor classification. Thus, there will be four gradations of arson in total.

## 5. Reckless Burning.<sup>41</sup>

PDS recommends amending the revised reckless burning offense. First, for the reasons explained above with respect to arson, “building yard” should be removed from the offense and “watercraft” should be defined. Second, there should be gradations created as follows:

### (c) *Gradations and Penalties.*

#### (1) *First Degree Reckless Burning.*

(A) A person is guilty of first degree reckless burning if that person commits reckless burning and the dwelling, building, watercraft, or motor vehicle, in fact, is of another.

(B) First degree reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

#### (2) *Second Degree Reckless Burning.*

(A) A person is guilty of second degree reckless burning if that person commits reckless burning.

(B) Second degree reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Starting a fire to one’s own building *purposely* to damage another’s building would be arson. Starting a fire to one’s own building *reckless* as to the fact that the fire damages another’s building would be first degree reckless burning. Starting a fire that damages only one’s own building would be second degree reckless burning.

## 6. Criminal Damage to Property.<sup>42</sup>

PDS strongly objects to the revision that eliminates the offense of malicious destruction of property and replaces it with the much broader offense of criminal damage to property. Like revised arson, the offense of criminal damage to property significantly and unjustifiably lowers the mental state that currently explicitly applies to the offense, thereby greatly expanding the conduct criminalized by the offense. As it does for revised arson and for the same reasons, PDS strongly recommends that the mental state for criminal damage to property be “purposely.”<sup>43</sup>

PDS also recommends adding mental states to two of the gradations. As currently written, it is second degree criminal damage to property to knowingly damage or destroy property that, in fact, is a cemetery, grave, or other place for the internment of human remains,<sup>44</sup> or that, in fact, is

<sup>41</sup> RCC § 22A-2502.

<sup>42</sup> RCC § 22A-2503.

<sup>43</sup> PDS would also accept a knowing mental state plus the absence of all elements of justification, excused or recognized mitigation.

<sup>44</sup> RCC § 22A-2503(c)(3)(ii) (emphasis added).

a place of worship or a public monument.<sup>45</sup> Rather than strict liability, PDS recommends that these elements require that the person be reckless as to the fact the property is a grave, etc. or a place of worship. An object weathered and worn down over time may not appear to be grave marker. A building with a façade of a residence or a business may be used as a place of worship but because of the façade, will not appear to be a place of worship.

## 7. Criminal Graffiti.<sup>46</sup>

With respect to revised criminal graffiti, PDS recommends eliminating the mandatory restitution and parental liability provisions. Without speculating as to the reasons why, indigent people are charged with crimes in D.C. Superior Court in numbers that are grossly higher than their numbers in the District of Columbia. Requiring restitution from individuals and families that cannot afford to pay it is a waste of judicial resources. A mandatory restitution order cannot be enforced through contempt because the person is unable, not unwilling, to pay. Most such orders, therefore, will simply be unenforceable. Restitution when the person can afford it is fair and the law should provide courts the discretion to impose such an order.

## Report #10: Recommendations for Fraud and Stolen Property Offenses

### 1. Check Fraud.<sup>47</sup>

PDS recommends amending the offense for clarity.

A person commits the offense of check fraud if that person:

- (1) Knowingly obtains or pays for property;
- (2) By using a check;
- (3) Knowing at the time of its use that the check ~~which~~ will not be honored in full upon its presentation to the bank or depository institution drawn upon.

If the revised offense does not require an “intent to defraud,” then it is important that it be clear that the “knowing” that the check will not be honored occur at the time the check is used. It must be clear that gaining knowledge after using the check that the check will not be honored is not check fraud.

PDS objects to the permissive inference stemming from a failure to promptly repay the bank.<sup>48</sup> While true that a *permissive* inference means a jury is not required to apply it, such inferences still unfairly and inappropriately point the jury towards conviction. A law that serves to highlight

<sup>45</sup> RCC § 22A-2503(c)(3)(iii) (emphasis added).

<sup>46</sup> RCC § 22A-2504.

<sup>47</sup> RCC § 22A-2203.

<sup>48</sup> This permissive inference currently exists in the Redbook Jury Instructions at §5-211, though not in D.C. Code § 22-1510 which criminalizes uttering.

certain facts and suggests how those facts should be interpreted, allows the ignoring of other facts or context. Permissive inferences operate as an explicit invitation to make one specific factual inference and not others; though nominally permissive, such inferences signal that this is *the* inference jurors should draw. The permissive inference in revised check fraud, like others of its kind, “eases the prosecution’s burden of persuasion on some issue integrally related to the defendant’s culpability” and “undercut[s] the integrity of the jury’s verdict.”<sup>49</sup> “By authorizing juries to “find” facts despite uncertainty, such inferences encourage arbitrariness, and thereby subvert the jury’s role as a finder of fact demanding the most stringent level of proof.”<sup>50</sup>

The permissive inference in check fraud is additionally problematic *because* the revised check fraud offense has eliminated the explicit element that the person have an “intent to defraud.” For revised check fraud, the person must knowingly obtain or pay for property by using a check, knowing at the time the person uses the check that it will not be honored in full upon its presentation to the bank. The problem with this permissive inference is that it suggests that it is check fraud to fail to make good on the check within 10 days of receiving notice that the check was not paid by the bank. The permissive inference is supposed to mean that failing to make good on the check within 10 days of notice tells jurors something about what the person was thinking at the time the person presented the check. What the permissive inference does, however, is expand the time frame by suggesting that notice (or knowledge) that the check will not be honored, has not thus far been honored, constitutes check fraud if the bank is not made whole.

## 2. Unlawful Labeling of a Recording.<sup>51</sup>

For the reasons explained above about the unfairness of highlighting certain facts and then sanctioning by law a particular interpretation of those facts, PDS objects to the permissive inference in the revised unlawful labeling of a record offense.

## 3. Alteration of Motor Vehicle Identification Number.<sup>52</sup>

PDS recommends amending the gradations to clarify that whether it is the value of the motor vehicle or the value of the motor vehicle part that determines the gradation depends on whether the alteration of the identification number was intended to conceal the motor vehicle or the part. If the intention was to conceal the part, then the gradation will not be decided based on the value of the motor vehicle, but rather based on the value of the part.

PDS also has concerns that the revised alteration of motor vehicle identification number offense sets too low the value used to distinguish the first degree from second degree gradation. If set at \$1,000 as currently proposed almost all alteration of VINs would be charged as a first degree offense and second degree altering a vehicle identification number would only be available after

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<sup>49</sup> Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1216 (1979).

<sup>50</sup> *Id.*

<sup>51</sup> RCC §22A-2207.

<sup>52</sup> RCC §22A-2403.



a plea. If the purpose of separating the offense into degrees is to distinguish between offenses with different levels of severity, than the \$1000 dollar limit will fail to do so.

## Report #11 Recommendations for Extortion, Trespass, and Burglary Offenses

### 1. Trespass.<sup>53</sup>

PDS again objects to the creation of a statutory permissive inference. The prosecution can argue and prove that property was signed and demarcated in such a way that it would be clear that entry is without the effective consent of the owner. The revised offense should not be drafted in such a way that alleviates or lessens the prosecution's burden of persuasion. If the revised offense maintains this permissive inference, PDS recommends that the language regarding signage should state that the signage must be visible *prior to* or *outside of* the point of entry.

Consistent with the intent of the RCC to separate attempt to commit trespass from the trespass statute and make attempt trespass subject to the general attempt statute, revised trespass should not criminalize the partial entry of a dwelling, building, land, or watercraft.<sup>54</sup> A partial entry of the physical space properly should be treated as an attempt to trespass. For instance, if a person tries to squeeze under a chain link fence in order to trespass on land, but he gives up because his head and chest cannot fit under the fence, that conduct should be charged as attempted trespass, not trespass. To the extent that the partial entry is to commit another crime, for instance to take property through a hole in the fence, numerous other statutes would cover that offense. To truly treat attempted trespass differently than trespass, the revised offense cannot accept partial entry as satisfying the element of knowingly entering or remaining.

The commentary explains: "A person who has been asked to leave the premises must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass."<sup>55</sup> PDS believes that this provision should be added to the statutory language for the clarity of judges and practitioners.

The revised trespass offense defines the consent element of trespass as "without the effective consent of the occupant, or if there is no occupant, the owner." This element fails to address joint possession, joint occupancy, and joint ownership of property. The commentary explains that it is creating a "legal occupancy" model of trespass to address the conflicting rights of owners and occupants. This approach seems sensible when dealing with court orders barring a particular individual's access. But it leaves roommates, cohabitating spouses, and business cotenants subject to a trespass charge when they remain in a space that they lawfully occupy after an equal co-tenant demands that they vacate. It also subjects the guests of a cotenant to a trespass charge

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<sup>53</sup> RCC § 22A-2601.

<sup>54</sup> See Report #11 at page 12.

<sup>55</sup> Report #11 at page 12.

when another tenant opposes the guest.<sup>56</sup> For instance, one roommate feuding with another over the upkeep of space could demand that the first roommate leave and not come back. When the messy roommate returns to occupy her rightful place in the home, pursuant to the revised offense, the messy roommate would be subject to arrest for trespass. The definition would also subject to arrest any visitor approved by one roommate but not another.

The revised offense creates this anomaly that one can be guilty of trespass on one's own land, because it discards the "entry without lawful authority" element of the unlawful entry statute.<sup>57</sup> To address the rights of cotenants, including their right to remain on property and have guests on property despite objections of an equal cotenant, PDS recommends rewriting the third element of the offense as follows:

Without the effective consent of ~~the~~ an occupant, or if there is no occupant, ~~the~~ an owner.

This phrasing would establish that the accused could provide the consent to enter or remain on the property. In addition, the commentary should explicitly state that more than one person can be an occupant and that absent a superior possessory interest of the other occupant, it is not trespass for an occupant to enter or remain in a dwelling, building, land, or watercraft, or part therefore, even if the other occupant does not consent.

The commentary recognizes that trespass on public property is inherently different because of First Amendment concerns: "[T]he DCCA has long held that individual citizens may not be ejected from public property on the order of the person lawfully in charge absent some additional, specific factor establishing their lack of right to be there."<sup>58</sup> PDS believes that this statement should be included in the statutory language rather than in the commentary. A similar statement regarding the exclusion of liability for First Amendment activity is included in the statutory language of revised criminal obstruction of a public way,<sup>59</sup> and revised unlawful demonstration.<sup>60</sup>

## 2. Burglary.<sup>61</sup>

The revised burglary offense has the same joint occupancy problem as revised trespass does. Revised burglary, by doing away with the current burglary statute's requirement that the property

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<sup>56</sup> Under property law, tenants and cotenants generally have a right to have invited guests on the property. Without a contractual limitation on a tenant's right to invite guests of his choosing, a landlord cannot unconditionally bar a tenant's guests from visiting the tenant or traversing common areas in order to access the tenant's apartment. *State v. Dixon*, 725 A.2d 920, 922 (Vt. 1999).

<sup>57</sup> See *Jones v. United States*, 282 A.2d 561, 563 (D.C. 1971), (noting entry without lawful authority is a requisite element of the offense of unlawful entry).

<sup>58</sup> Report #11 at page 20.

<sup>59</sup> RCC §22A-2603.

<sup>60</sup> RCC §22A-2604.

<sup>61</sup> RCC § 22A-2701.

is “of another,” allows the burglary conviction of a joint tenant who, after being told to leave the apartment by a roommate without lawful authority to do, enters his own home with intent to steal a television belonging to the roommate. While the theft of the television would be unlawful, the conduct should not give rise to the additional, more severely punished, offense of burglary since the individual in fact had authority to enter the residence. As in trespass, the burglary definition fails to address the rights of cotenants and their guests. PDS again recommends amending the third element as follows:

Without the effective consent of ~~the~~ an occupant, or if there is no occupant, ~~the~~ an owner.

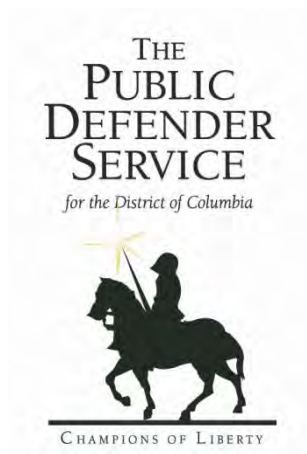
Additionally, as with trespass, the commentary should explain that an equal occupant cannot be convicted of burglary though another occupant does not consent to the entry.

PDS strongly objects to treating partial entry the same as a full entry. Reaching in through a home’s open window to steal something laying just inside is not the same as picking a lock and entering the same home at night and stealing the same object now laying on the floor of the bedroom of sleeping children. Revised burglary should distinguish between these two vastly different scenarios. To do so, PDS urges the RCC make partial entry into a dwelling or building, watercraft, or part thereof an attempt burglary rather than a completed offense. As stated in the commentary, burglary is a location aggravator. A location based aggravator makes sense because of the potential danger posed by individuals entering or remaining inside of dwellings or buildings. The danger inherent in that situation is not present when someone reaches a hand through a window or puts a stick through a chain link fence to extract an item.

PDS further proposes that, like with arson, a defendant must be *reckless* as to the fact that a person who is not a participant is present in the dwelling or building, rather than having an “in fact” strict liability standard. In the vast majority of cases when a defendant enters a home and that home happens to be occupied, the defendant will have been reckless as to occupancy. When a dwelling or building is used as a home or business, defendants can expect occupants or guests to be inside at any time, regardless of whether the lights are on or off, whether there is a car near the building, or whether there looks like there is activity from the windows. However, there will be instances, when a defendant enters a dwelling that truly appears to vacant and abandoned. For instance, if a defendant uses a crowbar to open a boarded up door in what appears to be an abandoned rowhouse in order to steal copper pipes and discovers inside this house, which lacks heat or running water, a squatter who entered through other means, without a *mens rea* applicable to the occupancy status of the home, that conduct would constitute first degree burglary. It would constitute first degree burglary although the defendant had every reason to believe that the seemingly abandoned building was unoccupied. By adding the requirement that a defendant must be reckless as to whether the dwelling is occupied, the RCC would appropriately limit the severely increased penalties of first degree burglary to situations that warrant the increased penalty. Further because recklessness could typically be proved contextually – in that the home does not appear to be boarded up – providing the *mens rea* does not decrease the applicability of the first degree burglary statute.

## M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: December 18, 2017

Re: Comments on First Draft of Report No. 12:  
Recommendations for Chapter 3 of the  
Revised Criminal Code – Definition of a  
Criminal Conspiracy

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The Public Defender Service makes the following comments on the First Draft of Report No. 12.

1. PDS recommends the offense of criminal conspiracy be applicable only to conduct that involves conspiring to commit a felony offense. It is PDS’s belief that conspiracy to commit a misdemeanor offense is almost never charged by the Office of the United States Attorney. Thus, limiting liability to felony offenses would merely reflect, not restrict, current practice. The underlying rationale for a separate substantive offense of criminal conspiracy is that agreement by multiple individuals for concerted unlawful action has the potential to increase the danger of the crime and the likelihood of its successful commission.<sup>1</sup> If the RCC accepts the notion that a criminal agreement is a “distinct evil,”<sup>2</sup> that “evil” is certainly less when the object of the conspiracy is a misdemeanor offense. A conspiracy to commit a misdemeanor offense frequently lacks the complex planning and commitment to criminal enterprise that warrants the punishment of the agreement and a single overt act as a separate additional offense. For instance, an agreement to shoplift may be formed by two teenagers, one who agrees to distract the clerk by asking for something behind the counter while the other takes something from the store. This conspiracy required *de minimis* planning, and resulted in no more harm than action by one individual. Both teenagers could be found guilty of shoplifting, under a theory of liability of

<sup>1</sup> See Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 922, 923-924 (1959).

<sup>2</sup> *United States v. Recio*, 537 U.S. 270, 274 (2003) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

aiding and abetting or conspiracy, but where the societal harm did not increase as a result of the agreement itself, the teenagers should not be subject to the separate offense of conspiracy to commit shoplifting.

Misdemeanor conduct should be a line of demarcation below which separate offense liability cannot attach. This would be similar to the line of demarcation in the present statute of possession of a firearm during a crime of violence. The crime of violence serves as a demarcation line above which there can be liability for a separate offense. We do not separately punish possession of a firearm while driving recklessly or while committing disorderly conduct as a third substantive offense in addition to the possession of the firearm. Finally, allowing conspiracy liability where the underlying offense is a misdemeanor creates unfettered discretion for prosecutors. Since RCC § 22A-303 does not at this time propose penalty gradations, it appears likely that conspiracy would be criminalized as a felony; prosecutors could escalate misdemeanor conduct into a felony conviction without any showing of greater societal harm in the majority of instances when defendants act together.

2. PDS recommends technical amendments to two subsections to increase the clarity of the language of criminal conspiracy.
  - A) PDS supports having the RCC continue the District’s current bilateral approach to conspiracy. PDS believes, however, that the requirement that a criminal conspiracy must be bilateral or mutual could be written more clearly. To that end, PDS proposes amending to RCC § 22A-303(a)(1) to read as follows: “Purposely agree came to an agreement to engage in or aid the planning or commission of conduct which, if carried, out, will constitute every element of that planned [felony] offense or an attempt to commit that planned [felony] offense.” Replacing “purposefully agree” with “purposefully come to an agreement” more clearly conveys the mutuality of the agreement that is the *sine quo non* of the District’s current approach to conspiracy.<sup>3</sup>

Clarifying that the (alleged) coconspirators must agree to engage in (or aid the planning or commission of) conduct which would constitute every element of the planned offense further bolsters the joint nature of the agreement required for criminal conspiracy liability. While “proof of a formal agreement or plan in which everyone sat down together and worked out the details”<sup>4</sup> is not required for conviction, liability does require that the “coconspirators” come to an agreement about the same conduct, conduct that if engaged in would result in the commission of the specific planned (charged) offense. So if the charge is conspiracy to commit a robbery and the evidence demonstrates that while coconspirator X believed the agreed upon conduct was to rob someone, coconspirator Y believed the agreed upon conduct was to assault someone, the lack of mutual agreement would result in a not guilty finding for the conspiracy to commit robbery charge. Though cited in the section explaining intent

<sup>3</sup> Report #12 at pages 6-7 codifying a bilateral approach to conspiracy.

<sup>4</sup> Report #12 at page 7, quoting D.C. Crim. Jur. Instr. § 7.102.

elevation, the Connecticut Supreme Court’s opinion in *State v. Pond* is instructive here as well.<sup>5</sup> While the Connecticut Supreme Court in *Pond* extended its “specific intent” analysis to “attendant circumstances,” its analysis began with requiring “specific intent” with respect to conduct elements, stating the “general rule” that “a defendant may be found guilty of conspiracy ... only when he specifically intends that *every element of the object crime* be committed.”<sup>6</sup>

- B) PDS recommends amending the Principles of Culpable Mental State Elevation subsection, RCC §22A-303(b), to substitute “and any” where the draft uses the disjunctive “or.” The commentary to the RCC makes clear that the principle of intent elevation, adopted by the RCC, requires that in forming an agreement the parties intend to cause any result required by the target offense and that the parties act with intent as to the circumstances required by the target offense.<sup>7</sup> The use of “or” as the bridge might wrongly suggest to a reader that the mental state elevation requirement is satisfied if applied to a required circumstance or result. PDS asserts that the proposed amendment better conveys the principle that mental state elevation applies to any required circumstance<sup>8</sup> and to any required result.<sup>9</sup>
3. Finally, PDS recommends that the RCC include language that acknowledges that where a conspiracy crosses jurisdictional lines and the conspiracy is planned in a jurisdiction where the conduct is not against the law, the legality of the conduct in the place where the agreement was formed may be relevant to the determination of whether the government has proved sections (a) and (b). As currently drafted section (e) could be read to bar the defense from arguing that the cross-jurisdiction disparity in legality is relevant to the considerations in (a) and (b).

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<sup>5</sup> Report #12 at page 38; *State v. Pond*, 108 A.3d 1083 (Conn. 2015).

<sup>6</sup> *Pond*, 108 A.3d at 463 (emphasis added).

<sup>7</sup> Report #12 at page 41.

<sup>8</sup> If an offense has more than one possible circumstance, such as whether something is dwelling or business yard, then it applies to at least one such circumstance.

<sup>9</sup> If an offense has more than possible result, such as damaging or destroying, then it applies to at least one such result.

Fully revised as PDS recommends, criminal conspiracy in the RCC would read as follows:

**§ 22A-303 CRIMINAL CONSPIRACY**

(a) DEFINITION OF CONSPIRACY. A person is guilty of a conspiracy to commit an offense a felony when, acting with the culpability required by that felony offense, the person and at least one other person:

(1) Purposely ~~agree~~ come to an agreement to engage in or aid the planning or commission of conduct which, if carried out, will constitute every element of that planned felony offense or an attempt to commit that planned felony offense; and

(2) One of the parties to the agreement engages in an overt act in furtherance of the agreement.

(b) PRINCIPLES OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO RESULTS AND CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be guilty of a conspiracy to commit ~~an offense~~ a felony, the defendant and at least one other person must intend to bring about any result ~~or~~ and any circumstance required by that planned felony offense.

(c) JURISDICTION WHEN OBJECT OF CONSPIRACY IS LOCATED OUTSIDE THE DISTRICT OF COLUMBIA. When the object of a conspiracy formed within the District of Columbia is to engage in conduct outside the District of Columbia, the conspiracy is a violation of this section if:

(1) That conduct would constitute a ~~criminal~~ felony offense under the D.C. Code performed in the District of Columbia; and

(2) That conduct would also constitute a criminal offense under:

(A) The laws of the other jurisdiction if performed in that jurisdiction; or

(B) The D.C. Code even if performed outside the District of Columbia.

(d) JURISDICTION WHEN CONSPIRACY IS FORMED OUTSIDE THE DISTRICT OF COLUMBIA. A conspiracy formed in another jurisdiction to engage in conduct within the District of Columbia is a violation of this section if:

(1) That conduct would constitute a ~~criminal~~ felony offense under the D.C. Code performed within the District of Columbia; and

(2) An overt act in furtherance of the conspiracy is committed within the District of Columbia.

(e) LEGALITY OF CONDUCT IN OTHER JURISDICTION IRRELEVANT. Under circumstances where §§ (d)(1) and (2) can be established, it is ~~immaterial and~~ no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a criminal offense under the laws of the jurisdiction in which the conspiracy was formed, however it may be relevant to whether the defendant acted with the mental states required by RCC § 22A-303(a) and (b).

PENALTY. [Reserved].

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** December 19, 2017

**SUBJECT:** First Draft of First Draft of Report #12, Definition of a Criminal Conspiracy

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-303 CRIMINAL CONSPIRACY**

The offense of Criminal Conspiracy would replace D.C. Code § 22-1805a. The current offense is broader than that proposed in the Draft Report. D.C. Code § 22-1805a (1) states in relevant part:

If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined ... or imprisoned ... [emphasis added]

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.



RCC § 22A-303 (a) states:

DEFINITION OF CONSPIRACY. A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person:

- (1) Purposely agree to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense; and
- (2) One of the parties to the agreement engages in an overt act in furtherance of the agreement.

The proposed language does not contain the underlined provision in D.C. Code § 22-1805a (1) pertaining to “defraud[ing] the District of Columbia or any court or agency thereof in any manner or for any purpose.” OAG suggests that either RCC § 22A-303 be redrafted so that the Code continues to criminalize conspiracy to defraud “the District of Columbia or any court or agency thereof” or that the Commission draft a separate offense which reaches this behavior. The Commission should not recommend the repeal of D.C. Code § 22-1805a unless the replacement(s) criminalizes both conspiracy to commit a crime and conspiracy to defraud the District of Columbia or any court or agency thereof.

What is less clear is whether § 22A-303 narrows the applicability of current conspiracy law pertaining to whether a person can be prosecuted for conspiracy when that person “conspires” with an undercover law enforcement officer in a sting operation. RCC § 22A-303 (b) states, “Notwithstanding subsection (a), to be guilty of a conspiracy to commit an offense, the defendant and at least one other person must intend to bring about any result or circumstance required by that offense.” Arguably a person who “conspires” with an undercover officer has not “conspired” with another person who intends to bring about a particular result or circumstance.<sup>2</sup> There are good reasons, however, that such behavior should be illegal. As Report #12, on page 25, quotes, an actor “who fails to conspire because her ‘partner in crime’ is an undercover officer feigning agreement is no less personally dangerous or culpable than one whose colleague in fact possesses the specific intent to go through with the criminal plan.” [citation omitted].<sup>3</sup> OAG was only able to find one D.C. Court of Appeals case where a person was convicted at trial of conspiracy based upon conversations with an undercover officer. The case, however, does not discuss the issue of whether a person can be convicted of “conspiring” with a police officer. It was reversed on other grounds.<sup>4</sup>

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<sup>2</sup> See footnote 7, on page 2, and related text.

<sup>3</sup> In addition, Report #12, on page 26, notes that the unilateral approach to conspiracy, the one that permits prosecution for conspiracy where the other party is an undercover officer, “reflects the majority practice in American criminal law...” See page 25 of Report #12 for an explanation of the “unilateral approach to conspiracy.”

<sup>4</sup> See *Springer v. United States*, 388 A.2d 846, where the appellant was convicted by a jury of conspiracy to commit first-degree murder and of solicitation to commit a felony based upon evidence of tape recordings -- and transcripts thereof -- of conversations between the appellant and an undercover MPD detective.

OAG suggests that either RCC § 22A-303 (b) be redrafted so that a person may be convicted of conspiracy notwithstanding that the “co-conspirator” is an undercover officer working a sting operation or that the Commission draft a separate offense which reaches this behavior. The Commission should not recommend the repeal of D.C. Code § 22-1805a unless the replacement criminalizes conspiracy in a sting context or unless a separate offense is created that criminalizes this behavior.

RCC § 22A-303 (c) and (d) would narrow the current scope of the District’s jurisdiction to prosecute offenses when the object of the conspiracy is located outside the District or when the conspiracy is formed outside the District. Both paragraphs contain the phrase “That conduct would constitute a criminal offense under the D.C. Code if performed in the District of Columbia.”<sup>5</sup> [emphasis added] Unless the intent is to only encompass offenses in enacted titles (such as this one), these paragraphs should use the phrase “District law”; it should not be specific to the Code. OAG, therefore, recommends that all references to “D.C. Code” in paragraphs (c) and (d) be changed to “District law.”<sup>6</sup>

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<sup>5</sup> Paragraph (c)(2)(B) also contains a reference to “The D.C. Code.”

<sup>6</sup> D.C. Code § 22-1805a (d) uses the phrase “would constitute a criminal offense.” It is not limited to D.C. Code offenses.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division

**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 9, 2018

**SUBJECT:** Third Draft of Report #2, Basic Requirements of Offense Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT****RCC § 22A-206 HIERARCHY OF CULPABLE MENTAL STATES**

RCC § 22A-206 should separately define the term “enhanced recklessness” and account for it in the hierarchy of culpable Mental states. RCC § 22A-206, as written, includes the definitions of purpose, knowledge, intent, recklessness, and negligence, as well as the hierarchy of the culpable mental states. Proof of a greater culpable mental state satisfies the requirements for a lower state. RCC § 22A-206 (d) (1) defines recklessness with respect to a result and (d)(2) defines recklessness with respect to a circumstance. On pages 20 through 22 the Commentary explains how recklessness differs from “enhanced recklessness.” The explanation of enhanced recklessness is contained in RCC § 22A-206 (d)(3). As enhanced recklessness differs from recklessness, it should not be treated as a subpart of the definition of recklessness. Instead, the

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

definition should stand on its own and should follow the formatting of the other definitions in RCC § 22A-206. In other words, RCC § 22A-206 (d)(3) should be deleted and replaced with a new paragraph. That paragraph should be entitled “ENHANCED RECKLESSNESS DEFINED” and should be followed by two paragraphs that explains how “A person acts with enhanced recklessness” with respect to a result and a circumstance. The hierarchy should make clear that proof of recklessness is satisfied by proof of enhanced recklessness.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 9, 2018

**SUBJECT:** First Draft of Report #13, Penalties for Criminal Attempts

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #13, Penalties for Criminal Attempts. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-301 CRIMINAL ATTEMPTS**

RCC § 22A-301 (c) (1) establishes that general penalty scheme for attempts. It states, “An attempt to commit an offense is subject to one half the maximum imprisonment or fine or both applicable to the offense attempted, unless a different punishment is specified in § 22A-301 (c) (2).”<sup>2</sup> We believe that the intent of this provision is to permit a sentence to be imposed that is up to ½ the stated imprisonment amount for the completed offense, ½ the stated fine amount, or up to ½ the stated imprisonment term and up to ½ the stated fine amount. As written, it is unclear, however, if the phrase “½ the stated” only modifies the word “imprisonment” or whether it also

<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

<sup>2</sup> OAG believes that it cannot fully evaluate this proposal until actual penalties are assigned to the underlying offenses. We are also curious as to how this proposal will affect the percentage of trials that are jury demandable.

modifies “fine” “or both.” We believe that this needs to be clarified either in the proposal or in the Commentary. If the Commission chooses to clarify this penalty provision in the Commentary, it should give an example.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 9, 2018

**SUBJECT:** First Draft of Report #14 Recommendations for Definitions for Offenses Against Persons

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #14 Recommendations for Definitions for Offenses Against Persons. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-1001. Offense Against Person’s Definition**

RCC § 22A-1001 (3) defines the word “Coercion.” When the lead in language is read with many of the subparagraphs it is not clear which person must be affected. For example, the lead in language when read with the first subparagraph states, “‘Coercion’ means causing another person to fear that, unless that person engages in particular conduct, then another person will...” (A) Inflict bodily injury on another person...” It would be clearer if (A) stated, “Inflict bodily injury on that person or someone else.” All other paragraphs that are phrased like (A) should be similarly amended.

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

RCC § 22A-1001 (11) defines the term “Law enforcement officer.” Unlike D.C. Code § 22-405(a), this definition does not include District workers who supervise juveniles. A sentence should be added that states that a law enforcement officer also means “Any officer, employee, or contractor of the Department of Youth Rehabilitation Services.”<sup>2</sup> In addition, neither this section nor the corresponding assault offenses address the jurisdictional provision contained in current law. D.C. Code § 22-405(a) includes a provision within the definition of a law enforcement officer that includes “any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District.” RCC § 22A-1001 (11) must include such a statement or the District would lose jurisdiction to prosecute offenses that occur at New Beginnings.

RCC § 22A-1001 (15) defines the term “Protected person.” Within the class of people who are protected are: a law enforcement officer, public safety employee, transportation worker, and District official or employee, but only “while in the course of official duties.” See RCC § 22A-1001 (15) (D)-(G). It is unclear, however, whether one of these people would fall under this definition if they were assaulted, as a direct result of action they took in their official capacity, after they clocked out of work or whether they must be working at the time of the assault. A person may be assaulted or threatened at home for actions that they took on the job. In other words, what are the limits of the term “while in the course of official duties.” To clarify, this definition should be expanded to say, “while in the course of official duties or on account of those duties.”

RCC § 22A-1001 (17) defines the term “Serious Bodily injury.” It includes within its definition “... obvious disfigurement.” The question that must be clarified is obvious to whom? For example, if a person shoots off some else’s big toe, depending on what shoe the victim wears the toe being missing may – or may not – be obvious. Similarly, if someone is shot on the inner thigh and has a scar, that scar may be obvious to the victim’s spouse or other family members, but not to the general public. The Commission should consider either addressing this issue in the definition itself or in the Commentary.

RCC § 22A-1001 (18) defines the term “Significant bodily injury.” It is unclear, however, if the government just fails to prove serious bodily injury, RCC § 22A-1001 (17), whether it would necessarily prove significant bodily injury. To improve proportionality, etc., the definition of significant bodily injury should always include the subset of offenses that are included in the definition of serious bodily injury. To use the example from the previous paragraph, if the government proves that the person was disfigured, but doesn’t prove that it was obvious, then the disfigurement should qualify as a significant bodily injury.

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<sup>2</sup> As many Department of Youth Rehabilitation Services facilities are staffed by contractors, as opposed to employees, the proposed language is a slight expansion of current law.



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 9, 2018

**SUBJECT:** First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-1202. Assault<sup>2</sup>**

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

<sup>2</sup> In OAG's Memorandum concerning the First Draft of Report #14, Recommendations for Definitions for Offenses Against Persons, we noted that the proposed definition did not include the grant of jurisdictional authority that exists in current law. D.C. Code § 22-405(a) contains a provision that includes within the definition of a law enforcement officer, "any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District." If the jurisdictional issue is not resolved in RCC § 22A-1001 (11) then it needs to be resolved here, and in other substantive provisions.

RCC § 22A-1202 defines the offense of “Assault.” Paragraph (a) establishes the elements for aggravated assault. Paragraph (A)(4) addresses protected persons in two contexts. RCC § 22A-1202 states, in relevant part, “A person commits the offense of aggravated assault when that person...:

- (4) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; and
  - (A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
  - (B) Such injury is caused with the purpose of harming the complainant because of the complainant’s status as a:
    - (i) Law enforcement officer;
    - (ii) Public safety employee;
    - (iii) Participant in a citizen patrol;
    - (iv) District official or employee; or
    - (v) Family member of a District official or employee;

This provision raises the question of what, in practice, it means to be reckless as to whether the complainant is a protected person. The definition of “protected person” includes a person who is less than 18 years old ...and a person who is 65 years old or older.<sup>3</sup> As the Commentary notes, recklessly is a culpable mental state, defined in RCC § 22A-206, means that the accused must disregard a substantial and unjustifiable risk that the complainant is a “protected person.” So, if a perpetrator sees a person who is 67 years old, looks her over, and decides that she looks to be in her early 60s, and then assaults the woman, is the perpetrator disregarding a substantial and unjustifiable risk that the complainant is a “protected person”? Clearly, it is inappropriate to penalize a 67-year-old victim by taking her out of the class protected persons for looking like she is in better health than her age would otherwise indicate. People who attack persons in their 60s and 70s should bear the risk that they are assaulting a protected person and will be committing an aggravated assault.

There are two ways that the Commission can clarify, or correct, this issue. The first is to directly address this issue in the Commentary making it clear that in this situation assaulting the 67-year-old woman would be an aggravated assault. The second is to change the mental state that is associated with age related offenses. To do this, the phrase “with recklessness as to whether the complainant is a protected person” would be split into two phrases. The first would be “when the person is, in fact, a protected person as defined in RCC § 22A-1001 (15) (A) and (B)” and the other would be “with recklessness as to whether the complainant is a protected person as defined in RCC § 22A-1001 (15) (C) through (H).” This would preserve the mental state of

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<sup>3</sup> See RCC § 1001 (15) generally. The definition of “protected person” further requires that if the victim is a person who is less than 18 years old that the defendant must, in fact, be at least 18 years old and be at least 2 years older than the victim.

recklessness as an element for all non-age related protected persons, while establishing an “in fact” requirement for age related protected persons.

The elements of second degree assault are established in RCC § 22A-1202 (c). It states that:

A person commits the offense of second degree assault when that person:

- (1) Recklessly causes bodily injury to another person by means of what, in fact, is a dangerous weapon;
- (2) Recklessly causes significant bodily injury to another person; and
  - (A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
  - (B) Such injury is caused with the purpose of harming the complainant because of the complainant’s status as a:
    - (i) Law enforcement officer;
    - (ii) Public safety employee;
    - (iii) Participant in a citizen patrol;
    - (iv) District official or employee; or
    - (v) Family member of a District official or employee; [emphasis added]

RCC § 22A-1202 (c)(1) enhances the penalty over third, fourth, and fifth degree assault because the perpetrator causes bodily injury by using a dangerous weapon. It addresses society’s interest in discouraging the use of weapons during an assault. RCC § 22A-1202 (c)(2) enhances the penalty provision when the perpetrator causes significant bodily injury to any protected person or to certain protected persons when the injury is caused with the purpose of harming the complainant because of the person’s government affiliation. It addresses society’s interest in discouraging assaults against law enforcement personal, government workers, and others involved in public safety or citizen patrols, as well as family members of a District official or employees. RCC § 22A-1202 (c)(1) and (c)(2), therefore, serve different societal interests.

As these two sets of elements are both penalized as second degree assault, there is no additional penalty for a person using a gun while causing significant bodily injury to a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or a family member of a District official or employee. In other words, if the perpetrator plans on causing significant bodily injury, they may as well use a dangerous weapon. To make the penalties proportionate, a person who uses a dangerous weapon against a person listed in RCC § 22A-1202 (c)(2)(B) and causes significant bodily injury should be subject to a higher penalty than if they use a dangerous weapon in assaulting one of those persons and only cause bodily injury. The Commission should create a new degree of assault that comes between the current first and second degree assaults to accommodate this offense.<sup>4</sup>

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<sup>4</sup> A similar argument can be made concerning the need to amend aggravated assault under RCC § 22A-1202 (a).

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 9, 2018

**SUBJECT:** First Draft of Report #16 Recommendations for Robbery

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #16 Recommendations for Robbery. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-1201. Robbery**

OAG would like to memorialize an observation that it discussed with the Commission. The Commission is charged with using clear and plain language in revising the District’s criminal statutes.<sup>2</sup> We believe that the idea is to make the Code more understandable. We have described the problem as multi-step nesting. For example, in order to determine the elements of robbery (including which degree is appropriate in a given circumstance), one has to look up the elements of criminal menacing, and in order to determine the elements of criminal menacing, one must look up the elements of assault. While there are many sound drafting principles for using this approach to criminal code reform, it does leave proposals that may not be “clear” to a person who is trying to understand the elements of this offense.

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

<sup>2</sup> See D.C. Code § 3-152 (a)(1).

OAG would like the Commission to clarify the amount of force that is necessary to complete a robbery. OAG understands from conversations with the Commission that a person who grabs a purse out of someone's hand or from out from under someone's arm would be guilty of third degree robbery. Specifically, the force that is needed merely to take the purse would meet the requirement in Section 1201 (d) (4)(A) that it was accomplished by "Using physical force that overpowers any other person present..." On the other hand, the force that is necessary to complete a pick pocket (where the victim is unaware of the taking), would not be sufficient to convert the taking to a robbery. To ensure that the proposal is interpreted as intended, the Commission should consider adding more hypotheticals to the Commentary.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 9, 2018

**SUBJECT:** First Draft of Report #17 Recommendations for Criminal Menace & Criminal Threat Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #17 Recommendations for Criminal Menace & Criminal Threat Offenses. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**Both RCC § 22A-1203 and RCC § 22A-1204. Criminal Menace and Criminal Threat**

OAG would suggest that that the titles to Sections 1203 and 1204 be changed to drop the word “Criminal.” Instead of calling them “Criminal Menacing” and “Criminal Threats”, we believe that they should simply be called “Menacing” and “Threats.” By adding the word “criminal” to the name it unnecessarily raises the question what a non-criminal menacing and non-criminal threat is. The words “menacing” and “threat” meet the requirements of D.C. Code § 3-152(a) that the Criminal Code to “Use clear and plain language.”

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

In addition, the Commentary should make clear that the effective consent defense in both offenses,<sup>2</sup> is the consent to being menaced or threatened, not consent to the underlying conduct constituting the offenses of homicide, robbery, sexual assault, kidnapping, and assault (and for criminal threats, the offence of criminal damage to property).<sup>3</sup>

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<sup>2</sup> See RCC § 22A-1203 (e) and RCC § 22A-1204 (e).

<sup>3</sup> See RCC § 22A-1203 (a)(3) and (b)(2) and RCC § 22A-1204 (a)(2) and (b)(2).

## M E M O R A N D U M

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THE  
PUBLIC  
DEFENDER  
SERVICE  
*for the District of Columbia*



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: March 9, 2017

Re: Comments on First Draft of Report 13,  
Penalties for Criminal Attempts

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The Public Defender Service makes the following comments on Report #13, Penalties for Criminal Attempts. PDS agrees with the principle embodied in proposed RCC 22A-301 of a substantial punishment reduction between completed and attempted criminal conduct. However, PDS strenuously objects to any revision of the criminal code that will result in longer periods of incarceration for individuals convicted of crimes. While before the RCC's sentencing provisions are drafted it is difficult to say exactly how many and by how much sentences will increase under RCC § 22A-301(c), it is clear that many sentences will increase under RCC § 22A-301. The commentary itself concedes<sup>1</sup> that pursuant to RCC §22A-301(c) various non-violent property offenses, currently punishable as misdemeanors with a maximum imprisonment term of 180 days,<sup>2</sup> would become felony offenses punishable by a term of years. This would not only increase the length of incarceration, it would also have negative consequences for persons' prospects for housing, education, and employment. By making some attempt offenses felonies rather than misdemeanors, options for record sealing and diversion programs would also likely decrease. Sentences for crimes such as attempted burglary, which under D.C. Code § 22-1803 carries a statutory maximum of 5 years imprisonment, may also increase under RCC § 22-301(c). Since the District has no locally accountable control over how offenses are ultimately prosecuted, whether diversion programs are offered, and what sort of plea offers are available to defendants, the District must take exceptional care in labeling offenses felonies and establishing statutory maxima.

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<sup>1</sup> Report #13, page 14.

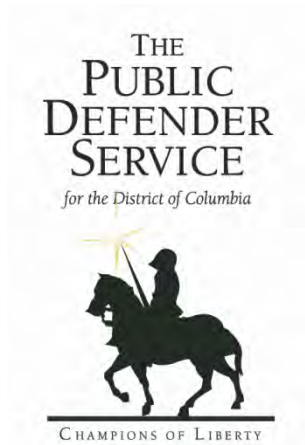
<sup>2</sup> D.C. Code § 22- 1803.



The principal benefit of the RCC's default rule of a 50% reduction between attempted and completed criminal conduct is bringing order and uniformity to legislation that has evolved piecemeal. Increased incarceration is too high a price to pay for the benefit of a clearer statutory scheme.

Therefore, for attempts, PDS proposes: 1) maintaining the sentencing consequences of D.C. Code § 22-1803, with a maximum punishment of 180 days of incarceration, for property offenses and other non-violent offenses covered in that section and the RCC equivalent; 2) maintaining the sentencing consequences of D.C. Code § 22-1803, with a five year maximum sentence for attempted crimes of violence such as burglary, as defined in D.C. Code § 23-1331; and 3) replacing D.C. Code § 22-401 (assault with intent to kill, rob, or poison or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse) with the RCC proposal to make the statutory maximum for the attempt crime half of that for the completed offense.

# M E M O R A N D U M



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: March 9, 2017

Re: Comments on First Drafts of Reports 14  
through 17, Offenses Against Persons

The Public Defender Service makes the following comments.

Report #14: Recommendations for Definitions for Offenses Against Persons

1. PDS recommends strengthening the definition of “bodily injury.” PDS supports the overall structure of assault and offensive physical contact proposed for the RCC. To reduce unnecessary overlap of offenses and to improve the proportionality of penalties, RCC creates a number of assault gradations and creates a new offense of Offensive Physical Contact. Offensive Physical Contact “punishes as a separate offense ... low-level conduct that was previously not distinguished from more serious assaultive conduct in current law.”<sup>1</sup> The offense “criminalizes behavior that does not rise to the level of causing bodily injury or overpowering physical force.”<sup>2</sup> PDS heartily endorses that approach. However, that approach becomes hollow when “bodily injury” is defined to include fleeting physical pain. To give real meaning to the distinction between “assault” and “offensive physical contact,” the definition of “bodily injury” must be rewritten to set a higher floor for “assault”, thus creating a more realistic ceiling for “offensive physical contact.” PDS recommends “bodily injury” require at least moderate physical pain. Specifically, the definition should read: “‘Bodily injury’ means moderate physical pain, illness, or any impairment of physical condition.” This proposal creates a more clear progression of criminalized physical touching: offensive physical contact; bodily injury, which requires moderate physical pain; significant bodily injury, which requires a bodily injury that warrants hospitalization or immediate medical treatment to abate severe pain; and serious bodily injury,

<sup>1</sup> Report #15, page 52.

<sup>2</sup> Report #15, page 50.

which requires a substantial risk of death, protracted disfigurement, or protracted impairment of a bodily member.

2. PDS recommends clarifying in the commentary for the definition of “dangerous weapon” that the issue of whether an object or substance “in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury”<sup>3</sup> is a question of fact, not a question of law.
3. PDS notes that the use and definition of the umbrella term “protected person” expands the application of certain enhancements to allow for greater punishment than in current law. For example, under current law the enhancement when the complainant is a minor only applies to offenses that are “crimes of violence,” which does not include simple assault;<sup>4</sup> however, RCC Fourth Degree Assault would allow for increased punishment for conduct that results in (mere) bodily injury of a protected person.<sup>5</sup> Similarly, the elderly enhancement in current law does not apply to simple assault,<sup>6</sup> but bodily injury assault would be punished more severely if committed against a protected person (elderly person). Under current law, there is no law enforcement enhancement for the offense of robbery in contrast with RCC section 1201 for robbery.<sup>7</sup> PDS does not object to this expansion only because it is included in the proposed restructuring of assaults and robbery that incorporates a number of currently free-standing penalty enhancements, thus preventing stacking of enhancements.<sup>8</sup>

#### Report # 15: Recommendations for Assault & Offensive Physical Contact Offenses

1. The commentary states that for both Section 1202(a)(4)(A) and (a)(4)(B), the complainant must be a protected person.<sup>9</sup> However, the statutory language does not specify that the complainant must “in fact” be a protected person. As it is currently written, the “protected person” circumstance element could be read to apply when a person causes the requisite injury reckless as to whether the complainant might be a protected person regardless of whether the complainant actually is. Thus, PDS recommends that wherever the “protected person” circumstance element

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<sup>3</sup> See RCC § 22A-1001(4)(F).

<sup>4</sup> See D.C. Code §§ 22-3611, 23-1331, 22-404.

<sup>5</sup> RCC § 22A-1202(e)(1).

<sup>6</sup> See D.C. Code § 3601.

<sup>7</sup> Compare D.C. Code §22- 2801 and RCC § 22A-1201(a)(2)(B), (b)(2)(iii), (c)(2)(iii).

<sup>8</sup> See e.g., Report #15, page 22.

<sup>9</sup> See Report #15, page 7. Although the commentary on this point only cites “protected person” for aggravated assault, presumably the requirement that the complainant actually be a protected person extends to each gradation that has a “protected person” circumstance element.

appears, it be rewritten to clarify that the circumstance element requires that the complainant must, *in fact*, have that status. For example, aggravated assault should be rewritten as follows:

“(4) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person and the complainant, in fact, is a protected person; or

(B) (i) Such injury is caused with the purpose of harming the complainant because of the complainant’s status as a:

(i)(I) Law enforcement officer;

(i)(II) Public safety employee;

...

(i)(V) Family member of a District official or employee; and

(ii) the complainant, in fact, has that status;

2. PDS recommends eliminating the use of the mental state “recklessly, under circumstances manifesting extreme indifference to human life” where it is used throughout the assault section. The added component of “under circumstances manifesting extreme indifference” means that the various gradations of RCC Assault fail to merge with (become lesser included offenses of) RCC Robbery. For example, Aggravated Robbery requires Third Degree Robbery plus recklessly causing serious bodily injury by means of a dangerous weapon. Aggravated Assault, in contrast, requires recklessly under circumstances manifesting extreme indifference to human life causing serious bodily injury by means of a dangerous weapon. Because each offense has an additional element - aggravated robbery requires 3rd degree robbery and aggravated assault requires “under circumstances manifesting extreme indifference to human life” - they do not merge. PDS recommends replacing the “reckless with extreme indifference” mental state with “knowing” for the more serious gradation and with simple “recklessness” for the less serious gradations. “Knowing” and “reckless” are easier to differentiate from each other and more of the gradations of assault will merge with gradations of robbery.

Specifically, PDS recommends rewriting the four most serious gradations of assault as follows:

**“Section 1202. Assault**

(a) *Aggravated Assault.* A person commits the offense of aggravated assault when that person:

- (1) Purposely causes serious and permanent disfigurement to another person;
- (2) Purposely destroys, amputates, or permanently disables a member or organ of another person’s body;
- (3) ~~Knowingly Recklessly, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person by means of what, in fact, is a dangerous weapon; or

- (4) ~~Knowingly Recklessly, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person; and
- (A) Such injury is caused ~~knowing with recklessness as to whether~~ the complainant is a protected person; or
  - (B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
    - (i) Law enforcement officer;
    - (ii) Public safety employee;
    - (iii) Participant in a citizen patrol;
    - (iv) District official or employee; or
    - (v) Family member of a District official or employee;
- (b) *First Degree Assault.* A person commits the offense of first degree assault when that person:
- (1) ~~Recklessly, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person by means of what, in fact, is a dangerous weapon; or
  - (2) Recklessly causes serious significant bodily injury to another person ~~by means of what, in fact, is a dangerous weapon~~; and
    - (A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
    - (B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
      - (i) Law enforcement officer;
      - (ii) Public safety employee;
      - (iii) Participant in a citizen patrol;
      - (iv) District official or employee; or
      - (v) Family member of a District official or employee;
- (c) *Second Degree Assault.* A person commits the offense of second degree assault when that person:
- (1) Recklessly causes significant bodily injury to another person by means of what, in fact, is a dangerous weapon;
  - (2) Recklessly causes serious bodily injury to another person;
  - (3) Recklessly causes significant bodily injury to another person; and
    - (A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
    - (B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
      - (i) Law enforcement officer;
      - (ii) Public safety employee;
      - (iii) Participant in a citizen patrol;
      - (iv) District official or employee; or
      - (v) Family member of a District official or employee;
- (d) *Third Degree Assault.* A person commits the offense of third degree assault when that person:
- (1) Recklessly causes significant bodily injury to another person; or

(2) Recklessly causes bodily injury to another person by means of what, in fact, is a dangerous weapon; ...

3. PDS objects to increasing the severity of assault based on strict liability as to whether the object that is the means of causing the requisite injury is a “dangerous weapon.”<sup>10</sup> For example, a person commits RCC Fifth Degree Assault when that person recklessly causes bodily injury to another person;<sup>11</sup> a person commits RCC Second Degree Assault when that person recklessly causes bodily injury to another person by means of what, *in fact, is a dangerous weapon*.<sup>12</sup> PDS recommends that the mental state of “negligence” apply to whether the object that is the means by which the requisite injury is caused is a “dangerous weapon.” A series of hypotheticals will illustrate the unfairness of strict liability and the ease with which the prosecution will likely be able to prove negligence in most cases.

- A. Defendant hits complainant with a light cloth purse. Beading on the purse scratches the complainant and causes a “bodily injury” → Perhaps RCC 2nd degree offensive physical contact. Perhaps RCC 5th degree assault, if the jury finds that the defendant was aware of a substantial risk that hitting someone with a cloth purse would result in a bodily injury. But not a more severe gradation of assault because the cloth purse is not a per se dangerous weapon.<sup>13</sup> If the offense allowed strict liability, it’s unlikely that the jury would find “in fact” that the cloth purse was a dangerous weapon, that is, that the defendant used it in a manner that was likely to cause death or serious bodily injury. A negligence standard would probably lead to the same result -- it is unlikely that the jury would find that the defendant was negligent in failing to perceive a substantial risk that the cloth purse, “in the manner of its actual use, was likely to cause death or serious bodily injury.”<sup>14</sup>
- B. Defendant lunges at the complainant with a switchblade, nicks the complainant, causing bodily injury → perhaps 2nd degree assault, if the jury finds that the defendant recklessly caused bodily injury by means of an object -- if strict liability were the standard, the jury would find that “in fact” the switchblade was a per se dangerous weapon;<sup>15</sup> likely the same result if negligence were the standard as the jury would almost surely find that the

<sup>10</sup> This objection and corresponding recommendation applies throughout the Offenses Against Persons Chapter of the RCC, not just to the Assault Section.

<sup>11</sup> RCC § 22A-1202(f) at Report #15, page 4.

<sup>12</sup> RCC §22A-1202(c)(1) at Report #15, page 3 (emphasis added).

<sup>13</sup> See RCC §22A-1001(4)(A) – (E).

<sup>14</sup> See RCC §22A-1001(4)(F).

<sup>15</sup> See RCC §22A-1001(4)(B); (13)(E).

defendant was negligent in failing to perceive a substantial risk that the object in her hand was a switchblade, a per se dangerous weapon.

- C. Defendant swings heavy cloth purse at complainant's derriere, the heavy object inside the purse, a Kindle tablet, causes bodily injury (physical pain) → similar to (A) but more likely than (A) to result in RCC 5th degree assault (versus just RCC 2nd degree offensive physical contact) because the jury might more easily find that the defendant was aware of a substantial risk that swinging a heavy cloth purse would cause bodily injury. But like (A), this would likely not result in a more severe assault gradation. A Kindle tablet is not a per se dangerous weapon. If the standard were negligence, it is unlikely that the jury would find that the defendant was negligent in failing to perceive a substantial risk that the manner in which she used the heavy cloth purse/Kindle tablet would likely result in death or serious bodily injury. It is similarly unlikely that strict liability has a different result; it is improbable that the jury would find, in fact, that the cloth purse/Kindle tablet, in the manner in which it was used was likely to cause death or serious bodily injury.
- D. Defendant swings heavy cloth purse at complainant's derriere, the heavy object inside the purse causes bodily injury (physical pain). The heavy object is a firearm, a per se dangerous weapon.<sup>16</sup> If strict liability were the standard, the defendant in this scenario could be found guilty of RCC 2nd degree assault if the jury found that the defendant was aware of a substantial risk that swinging a heavy cloth purse would cause bodily injury; if the jury found that it was the heavy object in the purse that caused the bodily injury, then "in fact" the heavy object was a firearm, which is a per se dangerous weapon. Thus, the defendant is guilty of recklessly causing bodily injury by means of what, in fact, is a dangerous weapon. However, the negligence standard could lead to a different result, a result more proportionate to the previous hypos. To find the defendant guilty of RCC 2nd degree assault, the jury would have to find, much like in (C), that the defendant was aware of a substantial risk that the conduct of swinging a heavy cloth purse would result in bodily injury. Then, again, if the jury found that it was the heavy object within the cloth purse that caused the bodily injury, the jury would have to find that the defendant failed to perceive a substantial risk that the "heaviness" was a firearm (a per se dangerous weapon) or find that the defendant failed to perceive a substantial risk that the heavy object was used in a manner that was likely to cause death or serious bodily injury. It is possible that there will be evidence to show that the defendant was aware that the heaviness was a "firearm" or, more accurately, there could be evidence that would create a substantial risk that the heaviness is a firearm and the defendant was negligent in failing to perceive that risk. Even though using a firearm as a weight in a cloth purse to hit someone on their derriere is not the intended use of a firearm and is not likely to cause death or serious bodily injury, PDS does not object to applying the per se dangerous weapon to enhance assault in this way. PDS strongly objects however to enhancing

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<sup>16</sup> See RCC § 22A-1001(4)(A).

assault to a more severe gradation based on strict liability that the mystery heavy object happens to be a firearm.

PDS recommends the dangerous weapon circumstance element be worded as follows (with modifications as necessary for the various levels of bodily injury): “recklessly causes bodily injury to another person by means of ~~what, in fact, is~~ an object and is negligent as to the object being a dangerous weapon.”

4. PDS objects to Fourth Degree Assault criminalizing negligently causing bodily injury with an unloaded firearm. Criminalizing negligent conduct is severe and should be done rarely. The particular problem with Fourth Degree Assault is applying such a low mental state to conduct that is indistinguishable from conduct that would have the same result. Negligently causing bodily injury by means of an unloaded firearm is indistinguishable from negligently causing bodily injury by means of a cloth purse/Kindle tablet or by means of a rubber chicken. What sets a firearm apart from other objects or even other weapons is its use *as a firearm* (to fire a projectile at a high velocity), not its use as a heavy object or club. For this reason, PDS does not object to criminalizing negligently causing bodily injury by the discharge of a firearm. Fourth Degree Assault should be rewritten as follows: “Negligently causes bodily injury to another person by means of the discharge of what, in fact, is a firearm as defined at D.C. Code § 22-4501(2A), ~~regardless of whether the firearm is loaded;~~...”

#### Report #16: Recommendations for Robbery

1. PDS recommends rewriting Third Degree Robbery (on which all of the more serious gradations are based) and Second Degree Criminal Menace so that they are not circular. As currently written, one of the ways to commit Third Degree Robbery is to take property of another from the immediate actual possession or control of another by means of committing conduct constituting a Second Degree Criminal Menace.<sup>17</sup> Second Degree Criminal Menace can be committed when a person communicates to another person physically present that the person immediately will engage in conduct against that person constituting Robbery.<sup>18</sup> PDS agrees with the approach that a form of robbery could be committed by taking property of another by means of having made a communication threatening bodily injury and agrees that a form of criminal menacing could be committed by threatening to take property by use of force. Each offense statute however should be rewritten to specify culpable conduct without circular references to other offense statutes.
2. PDS objects to incorporating attempt conduct into the completed Robbery offense. Heretofore, the RCC has adopted the laudable principle of punishing attempts separately from completed

<sup>17</sup> RCC §22A-1201(d)(4)(C).

<sup>18</sup> RCC §22A-1203(b)(2)(B). Note, RCC §22A-1203(b)(2) uses the word “defendant;” this is clearly a typo and should be changed to “person.”



conduct.<sup>19</sup> However, PDS is willing to accept incorporating attempt in this instance on two conditions. One, the commentary must include a concise statement that the attempt only applies to the element of taking or exercising control over the property; attempted or “dangerously close” conduct will not suffice for any other element of Robbery. Two, element (4) must be rewritten to eliminate the “facilitating flight” language.

RCC Robbery does not have a requirement of asportation or movement of the property.<sup>20</sup> That makes sense; if a completed robbery no longer requires property to have been taken – indeed, it does not require that there even be property<sup>21</sup> – then completed robbery cannot require property to have been moved.<sup>22</sup> Similarly, flight or facilitating flight is intrinsically tied to taking (controlling) the property. “A thief who finds it necessary to use force or threatened force after a taking of property in order to retain possession may in legal contemplation be viewed as one who never had the requisite dominion and control of the property to qualify as a ‘possessor.’ Hence, it may be reasoned, the thief has not ‘taken’ possession of the property until his use of force or threatened force has effectively cut off any immediate resistance to his ‘possession.’”<sup>23</sup> District case law supports the nexus between taking property and flight. *Williams v. United States*,<sup>24</sup> cited in Report #16 to support the notion that force after the taking constitutes “robbery,”<sup>25</sup> does hold that the robbery was “still in progress” when the defendant was fleeing. However, *Williams* is clear in basing its analysis on “the asportation of goods” and in examining the particular circumstances that the defendant “was acting as a principal in effecting a robbery *by carrying away the proceeds of that robbery*.”<sup>26</sup> Because pursuant to RCC Robbery, the robbery can be completed without having exercised control of the property (or without there being property) and

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<sup>19</sup> See e.g., Report #9, page 54, Arson; Report #9, page 70, Reckless Burning; Report #9, page 81, Criminal Destruction of Property; Report # 10, page 6, Fraud; Report # 11, page 5, Extortion.

<sup>20</sup> Report #16, page 12.

<sup>21</sup> See Report #16, page 13, n. 56 (“For example, if a person causes bodily injury to another in an attempt to take property from that person, but finds that other person does not actually possess any property ..., that person could still be found guilty of robbery.”)

<sup>22</sup> Compare robbery that requires a taking (“shall take”) and has an asportation requirement, even if minimal with armed carjacking that allows “attempts to do so” and does not require asportation.

<sup>23</sup> Report #16, page 16, n. 80 (Quoting 4 Charles E. Torcia, Wharton's Criminal Law § 463, at 39-40 (15th ed. 1996))(emphasis added).

<sup>24</sup> 478 A.2d 1101 (D.C. 1984).

<sup>25</sup> Report #16, page 16, n. 82.

<sup>26</sup> *Williams*, 478 A.2d at 1105. (“The asportation under our analysis continues so long as the robber indicates by his actions that he is dissatisfied with the location of the stolen goods immediately after the crime...” (emphasis added)).

because there is no “carrying away” requirement, District law does not, in fact, support extending the duration of robbery to include flight. Thus, “robbery” should complete when the person takes, exercises control over, or attempts to take or exercise control over, the property of another from the immediate actual possession or control of another by means of [physical force that overpowers]. This construction does not mean that the intent to take the property must be formed before the force is used nor does it mean that the force must be used with the purpose of creating an opportunity to take property.<sup>27</sup> It does mean, however, that the force necessary to elevate the conduct from a theft from the person to a robbery must occur before or simultaneous to the taking of the property; the force must create the opportunity to take or exercise control or the attempt to take or exercise control of the property. If the force occurs after the property is taken, then it is not a robbery. The taking is a theft from person and the force might separately be an assault.

3. As noted above, PDS supports the intent embodied in the structure of proposed RCC Chapter 12 to reduce unnecessary overlap of offenses and to improve the proportionality of penalties. Though the offenses are obviously meant to stack and build on each other, various “stray” elements mean that the offenses will not merge using a strict elements analysis. In addition, the way robbery is written, a more serious gradation could be charged based on an injury to someone other than the “victim” of the robbery (the robbery victim being the person in actual possession or control of the property).<sup>28</sup> It would not reduce overlap of offenses nor improve the proportionality of penalties to allow a conviction of a more severe gradation of robbery based on injury to a non-robbery victim and also allow an assault conviction for injury to the non-robbery victim when if the force were used against only the robbery victim, the assault or offensive touching or menacing conduct would merge.

To further carry out the intent of the proposed structure, PDS strongly recommends that the RCC include a section that limits convictions for multiple related offenses against persons. Modeled on RCC § 22A-2003,<sup>29</sup> PDS proposes the following language be added to Chapter 12 of the RCC.

RCC § 22A-1206. Limitation on Convictions for Multiple Related Offenses Against Persons.

- (a) *Robbery, Assault, Criminal Menacing, Criminal Threats, or Offensive Physical Contact Offenses.* A person may be found guilty of any combination of offenses

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<sup>27</sup> See Report #16, page 12, n. 17.

<sup>28</sup> An example would be a person who knocks Bystander out of the way in order to take wallet sitting on table in front of “robbery victim.” The overpowering force used against Bystander would raise this taking to a robbery even though the property was in the control of the “robbery victim.” See also Report #16, page 6, n. 14.

<sup>29</sup> See Report #8, First Draft at page 49.

contained in Chapter 12<sup>30</sup> for which he or she satisfies the requirements for liability; however, the court shall not enter a judgment of conviction for more than one of these offenses based on the same act or course of conduct against the same complainant or based on the same act or course of conduct when the offense against one person is used to establish a gradation for an offense against another person.

- (b) *Judgment to be Entered on Most Serious Offense.* Where subsection (a) prohibits judgments of conviction for more than one of two or more offenses based on the same act or course of conduct against the same complainant, the court shall enter a judgment of conviction for the offense, or grade of an offense, with the most severe penalty; provided that, where two or more offenses subject to subsection (a) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses.

#### Report #17: Recommendations for Criminal Menace & Criminal Threats Offenses

PDS recommends that the RCC omit the words “criminal” in the titles of criminal threats and criminal menace language. The language is redundant and could cause the offenses to be judged more harshly in the contexts of employment, housing, and education.

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<sup>30</sup> At this time, PDS is proposing this section to apply to robbery, assault, criminal menacing, criminal threats, and offensive physical contact. PDS anticipates proposing expanding this section or proposing another one to limit multiple related offenses for those offenses and homicide, sexual assaults, and kidnapping.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division

**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** May 11, 2018

**SUBJECT:** First Draft of Report #18 Solicitation and Renunciation

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #18 Solicitation and Renunciation. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT****RCC § 22A-304. Renunciation Defense to Attempt, Conspiracy, and Solicitation**

Section 22A-304(a)(1) says that for the defendant to be able to use the affirmative defense of renunciation, the defendant must have engaged in conduct “sufficient to prevent commission of the target offense.” The discussion of that provision says it was drafted that way to include situations where the defendant attempts to “persuade” a solicitee who was actually an informant not to commit a crime he or she was never going to commit in the first place. However, in order for the conduct to be “sufficient to prevent the commission of the target offense”, the defendant’s actions must have at least decreased the likelihood of the offense happening. But when a defendant is “persuading” an informant not to act, the defendant’s actions have no effect on the probability that the criminal conduct will take place. This provision should be rewritten to specifically include both situations; where the defendant engages in conduct that is sufficient to

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

prevent the commission of the target offense, as well as where the defendant's actions would have been sufficient to prevent the offense, if the circumstances were as the defendant believed them to be. The provision could be redrafted as follows:

(a) DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE. In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that:

(1) The defendant engaged in conduct sufficient to prevent commission of the target offense or would have been sufficient to prevent the commission of the target offense if the circumstances were as the defendant believed them to be;

(2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.

Section 22A-304(b)'s title states that it is the provision that defines when a renunciation is voluntary and complete. However, the paragraph that follows actually says what isn't voluntary and complete renunciation. It states, "A renunciation is not 'voluntary and complete' within the meaning of subsection (a) when it is motivated in whole or in part by... [certain circumstances]." This implies that a renunciation is voluntary and complete as long as none of the elements in (b) are satisfied.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** May 11, 2018

**SUBJECT:** First Draft of Report #19. Homicide

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #19, Homicide. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-1101. Murder**

Section 22A-1101 (a)(2)(E) makes it an aggravated murder when the requisite elements are met and “The defendant committed the murder after substantial planning...” As noted on page 6 of the memorandum, “Subsection (a)(2)(E) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The accused must have formed the intent to kill a substantial amount of time before committing the murder.” The phrasing of this subparagraph raises several issues. First, the plain meaning of the term “substantial planning” sounds as if the planning has to be intricate.<sup>2</sup> However, the Comment portion just quoted makes it sound like the word “substantial” refers to the amount of time the intent was formed prior to the murder. These provisions should be redrafted to clarify

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

<sup>2</sup> In other words, the planning was of considerable importance, size or worth.

whether the intent is to have the enhancement apply when the perpetrator plans the murder some period prior to actually committing it (even if it is a simple plan to just shoot the victim), whether the plan to commit the murder has to have many steps to it (even if it was conceived almost instantaneously with the commission of crime), or whether either will suffice.

If the term “substantial planning” refers to the time between the planning and the commission of the offense and that “Substantial planning requires more than mere premeditation and deliberation” How much more – and how will anyone know? As the discussion points out, premeditation can happen in the blink of an eye. How much more is needed for substantial planning?

Section 22A-1101 (a)(2)(I) makes it an aggravated murder when the requisite elements are met and “In fact, the death is caused by means of a dangerous weapon.” However, this is a change from current District law. As noted on page 14 of the memorandum “Current D.C. Code § 22-4502 provides enhanced penalties for committing murder “while armed” or “having readily available” a dangerous weapon.” While there may be arguments for not providing an enhancement for an unseen weapon that is not used, there should be enhancements for when weapons are used or brandished. For example, a perpetrator shoots a person in chest and then sits on the bleeding victim and chokes him to death. While it cannot be said that “the death was caused by means of a dangerous weapon” the use of the gun certainly prevented the victim from defending herself. Similarly, victims may be less likely to defend themselves if assailants have guns aimed at them while they are being assaulted. To take these scenarios into account, we suggest that § 22A-1101 (a)(2)(I) be redrafted such that the enhancement applies any time a weapon is displayed or used, whether or not it in fact caused the death.

Section 22A-1101 (f) establishes a mitigation defense. Subparagraph (1)(B) says one mitigation defense to murder is “[a]cting with an unreasonable belief that the use of deadly force was necessary...” [emphasis added] Our understanding is that this was intentional, and wasn’t meant to say “reasonable.” We ask because of the discussion of it on page 9 of the memorandum. That discussion seems to say that a reasonable belief of necessity would be a complete defense to murder, while an unreasonable belief merely mitigates murder down to manslaughter. But the leadoff sentence in the comment implies the opposite. It says that “[s]ubsection (f)(1)(B) defines mitigating circumstances to include acting under a reasonable belief that the use of deadly force was necessary” [emphasis added] – suggesting that a reasonable belief merely mitigates down to manslaughter. This discussion needs to be clarified.

Subparagraph (3) of § 22A-1101(f) explains the effect of the mitigation defense. It states:

- (A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant shall not be found guilty of murder, but may be found guilty of first degree manslaughter.

(B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant shall not be found guilty of murder, but may be found guilty of aggravated manslaughter.

Paragraphs (A) and (B) dictate what the defendant is guilty of if the government fails to prove the absence of mitigation circumstances beyond a reasonable doubt. We have a few observations and suggestions concerning this provision.

First, paragraphs (A) and (B) are written in terms of what a trier of fact may do as opposed to what the law is concerning mitigation (i.e. “shall not be found guilty of murder, but may be found guilty...”). These paragraphs should be rewritten to state what the law is concerning mitigation, as follows:

(A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant is not guilty of murder, but is guilty of first degree manslaughter.

(B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant is not guilty of murder, but is guilty of aggravated manslaughter.

Second, a successful mitigation defense results in a conviction for either first degree or aggravated manslaughter notwithstanding that, but for the mitigation defense, the person committed an aggravated murder, first degree murder, or second degree murder. In other words, the penalties for committing these offenses are no longer proportionate to the conduct. More egregious conduct is penalized the same as less egregious conduct. There are a number of ways that the Commission could make these offenses proportionate. For example, a successful mitigation defense could lower the offense by one level.<sup>3</sup>

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<sup>3</sup> Under this proposal a person who would have been guilty of aggravated murder, but for a successful mitigation defense would be guilty of first degree murder, and a person who would have been guilty of first degree murder, but for a successful mitigation defense would be guilty of second degree murder.



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** May 11, 2018

**SUBJECT:** First Draft of Report #20. Abuse & Neglect of Children, Elderly, and Vulnerable Adults

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #20 - Abuse & Neglect of Children, Elderly, and Vulnerable Adults.

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A- Section 1501 and 1502. Child Abuse and Child Neglect.<sup>1</sup>**

The Commission should consider changing the names of these proposed offenses. The terms “child abuse” and “child neglect” have long been associated with the District’s child welfare system. See D.C. Code § 16-2301 (9). Calling the criminal offense and the civil offense by the same name will cause unnecessary confusion. We recommend renaming the RCC child abuse provision, “criminal cruelty to a child” and renaming RCC child neglect, “criminal harm to a child.”<sup>2</sup>

**RCC § 22A- Section 1501. Child Abuse.**

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<sup>1</sup> Third Degree Child Abuse includes “Recklessly ... us[ing] physical force that overpowers a child.” As noted in previous memoranda and discussions, the term “overpower” is not defined.

<sup>2</sup> There may be other names that the Commission may choose that avoids confusion with the child welfare system.

In establishing the offense degree, the Child abuse statute utilizes the terms “serious bodily injury” and “significant bodily injury” that were developed to distinguish between the various degrees of offenses against persons. While those definitions may be appropriate when distinguishing between injuries for adults, they are not sufficient to distinguish between injuries to a baby or small child. Either the definitions need to be expanded or additional degrees of child abuse need to be established. For example, it appears that the following injuries to a baby would not qualify as a first or second degree child abuse: regularly failing to feed the baby for 24 hours; causing a laceration that is .74 inches in length and less than a quarter of an inch deep; failing to provide medicine as prescribed, which causes the baby to suffer pain, problems breathing, or a serious rash; holding a baby’s hand against a stove causing a first degree burn; and choking the child, but not to the point of loss of consciousness.<sup>3</sup> As drafted, a parent who injured a child in one of the ways described in these examples would be guilty of third degree child neglect along with parents who merely “Recklessly fail[ed] to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of a child.”<sup>4</sup>

RCC § 22A- §1501 (f)(1) establishes the parental discipline defense. Subparagraph (D) limits the defense to conduct that does not include burning, biting, or cutting the child; striking the child with a closed fist; shaking, kicking, or throwing the child; or interfering with the child’s breathing. We suggest that that list be expanded to include, interfering with the child’s blood flow to the brain or extremities.

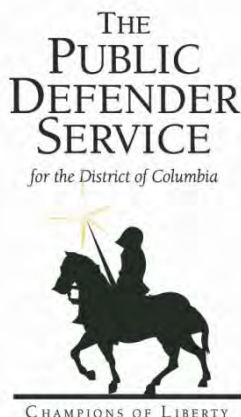
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<sup>3</sup> This is a representative list of injuries that someone may inflict on a baby that, under the current draft, appears either to be a third degree child abuse or not child abuse at all.

<sup>4</sup> Similarly, it is not clear what offense a parent would be committing if the parent intentionally blew PCP smoke into a baby’s face or fed the baby food containing drugs, which did not cause a substantial risk of death or a bodily injury.

# M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: May 11, 2018

Re: Comments on First Draft of Report No. 18,  
Solicitation and Renunciation

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The Public Defender Service objects to the restriction in proposed RCC § 22A-304, Renunciation Defense to Attempt, Conspiracy, and Solicitation, that the defense is only available if the target offense was not committed. PDS recommends that the District of Columbia join the “strong plurality of reform jurisdictions [that] relax the ... requirement that the target of the offense attempt, solicitation, or conspiracy actually be prevented/thwarted.”<sup>1</sup>

Specifically, PDS recommends rewriting subsection (a) of RCC §22A-304 as follows:

(a) DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE. In a prosecution for attempt, solicitation, or conspiracy ~~in which the target offense was not committed~~, it is an affirmative defense that:

(1)(A) The person defendant gave a timely warning to law enforcement authorities; or

(B) The person made a reasonable effort to prevent the commission of the target offense; engaged in conduct sufficient to prevent commission of the target offense;

(2) Under circumstances manifesting a voluntary and complete renunciation of the person's defendant's criminal intent.

The PDS proposal does more to further both the incapacitating dangerous persons and the deterrence purposes of the renunciation defense.<sup>2</sup> For a solo criminal venture, “renouncing” the target offense,

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<sup>1</sup> Report #18, pages 47- 48.

<sup>2</sup> Report # 18, page 49.

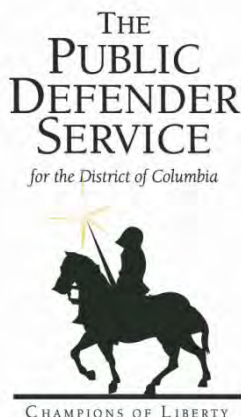
particularly when done under circumstances manifesting a voluntary and complete renunciation of the person's criminal intent, will almost always actually prevent the commission/completion of the target offense. Both the dangerousness and the deterrence purposes are served; the defendant's "reward of remission of punishment"<sup>3</sup> results in society benefitting from less crime. Even where the criminal venture involves more than one person, if the venture would end if one key person decides to stop participating, then the target offense will be actually prevented if that key person renounces. The problem is how to motivate a person to try to prevent or thwart the criminal venture if the venture will likely go forward whether that person continues his participation or not. The greater the chance that one of the [potential] participants will receive "the reward of remission of punishment," the greater the chance society has of benefitting from less crime. Where there is some chance that the crime will not actually be thwarted despite a person's reasonable efforts, the person's motivation to attempt renunciation then depends on the person's perception of his or her chances of being apprehended. If the person can just walk away from the venture, believing there is little chance that his involvement (solicitation or conspiracy or even steps sufficient to comprise attempt) will be prosecuted or maybe even realized by law enforcement authorities, there is more incentive to walk away and less incentive to make efforts to thwart the target offense, particularly by contacting law enforcement. Requiring that a person give timely warning to law enforcement or make other reasonable efforts to prevent the commission of the target offense encourages renunciation, encourages a person to take steps that might be sufficient to prevent the target offense and to take those steps even when they cannot guarantee they will be sufficient. Society benefits more from encouraging a potential participant to take a chance on preventing the crime rather than taking a chance on getting away with the crime (the crime of attempt, solicitation and/or conspiracy).

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<sup>3</sup> Report #18, page 49.

# M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: The Public Defender Service for the District  
of Columbia

Date: May 11, 2018

Re: Comments on First Draft of Report No. 19,  
Homicide

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PDS has the following comments and suggestions for the RCC's homicide offenses.

1. Elimination of Aggravated Murder and Reconsideration of Aggravating Circumstances

PDS proposes that the RCC eliminate the offense of aggravated murder, RCC § 22A-1101(a). One problem with RCC § 22A-1101(a), identified by PDS at the May 2<sup>nd</sup> public meeting of the CCRC, is its inclusion of “in fact, the death was caused by means of a dangerous weapon” as a circumstance element sufficient to raise first degree murder to aggravated murder. The use of a dangerous weapon is exceedingly common in homicides – it is how most murders are committed. According to the Metropolitan Police Department Annual Report for 2016<sup>1</sup>, during the previous five year period, 91% of homicides were committed with a gun or knife. Blunt force trauma accounted for 7% of homicides, the vast majority of which would have also involved the use of an object that would likely meet the definition of “dangerous weapon.” For the remaining 2% of homicides, 1% was committed by strangulation and 1% by other means not specified. Thus the RCC's definition would make between 91 and 98 percent of all homicides in the District an “aggravated murder.” The RCC's goal of creating proportionality between offenses would be defeated if every homicide could be charged as aggravated murder.

Rather than having an offense of aggravated murder, PDS suggests that the RCC retain first degree and second degree murder as in the current Code. PDS questions the need for having any aggravating circumstances to add to the maximum punishment for murder. Both first and second degree murder will already carry high statutory maximum prison sentences, leaving room for judges to exercise their discretion to sentence defendants to greater sentences based on the

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<sup>1</sup> Available at:

[https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202016\\_lowres.pdf](https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202016_lowres.pdf)

particular circumstances of the case or the unique vulnerability of the decedent. Statutes allowing for even greater sentences for murder in particular instances are thus not necessary.

However, in so far as the CRCC believes it needs to include in the RCC certain aggravating circumstances, such as for instance, the killing of a child or of a police officer, PDS suggests that the RCC include a separate enhancement or aggravator provision. While other parts of the RCC incorporate traditional enhancements or aggravators within different offense grades, PDS recommends the RCC treat murder differently. A separate statute for aggravating factors would also provide clarity because as currently drafted many of the aggravating factors listed in RCC § 22A-1101 cannot be logically applied in the sections where they have been assigned. For instance, it is first degree murder when a person acting with “extreme recklessness”<sup>2</sup> causes the death of another<sup>3</sup> after substantial planning.<sup>4</sup> A separate enhancement section would resolve the factual impossibilities included in this drafting.

## 2. Reconsideration of Aggravators

As drafted, the RCC provides an aggravating factor to homicide where the decedent is a minor, an adult age 65 or older, a vulnerable adult, a law enforcement officer, a public safety employee, a participant in a citizen patrol, a transportation worker, a District employee or official, or a family member of a District official or employee. While some of these aggravators are long-standing or included in the Code as stand-alone offenses, for instance the murder of a police officer in the course of his or her duties<sup>5</sup>, the RCC proposes to add the murder of District employees and their family members to the list of possible aggravators. This addition is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list. For example, a dispute at the Fort Totten Waste Transfer Station that leads to the death of a District employee is not categorically more dangerous to the community than an employee’s death at a similar privately-run facility. PDS recommends removing District employees and their family members from this list of possible aggravators. If there is a particular vulnerability that makes the murder of a District employee more dangerous or blameworthy, judges will have sufficient discretion to sentence defendants to the statutory maximum in such instances. Since the statutory maxima will necessarily be high for murder offenses, it will allow for judicial differentiation in sentencing in instances where the defendant’s culpability is heightened because of the decedent’s status.

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<sup>2</sup> “Extreme recklessness” is shorthand for “recklessly, under circumstances manifesting extreme indifference to human life,” the mens rea for second degree murder at RCC § 22A-1101(c).

<sup>3</sup> RCC §§ 22A-1101(b)(2), (c).

<sup>4</sup> RCC § 22A-1101(b)(2)(E).

<sup>5</sup> D.C. Code § 22-2106, murder of law enforcement officer.

The RCC also provides aggravators when the defendant mutilated or desecrated the decedent's body or when the defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death. This type of evidence typically would not be relevant to the question of whether the defendant committed the charged offense and therefore would often be inadmissible in a criminal trial.<sup>6</sup> However, as the RCC is currently drafted, evidence of these aggravating circumstances would have to be presented to a jury and would be presented at the same time as all the other evidence in the case. In cases where the defense asserts that another individual committed the crime or that the defendant was misidentified, the evidence of torture or desecration of the decedent's body would be highly inflammatory and would not add anything to the jury's consideration of the key questions in the case.<sup>7</sup> For this reason, PDS recommends that if the RCC keeps these provisions as aggravators, the RCC should also include a requirement that this evidence can only be introduced and proved at a separate hearing in front of a jury following an initial guilty verdict.

PDS also questions the need for a separate aggravator for homicides perpetrated because the decedent was a witness in a criminal proceeding or had provided assistance to law enforcement. This aggravating circumstance would also be charged as the separate substantive offense of obstruction of justice.<sup>8</sup> Creating an aggravating circumstance that will be amply covered by a separate offense contravenes the CCRC's goal of streamlining offenses and eliminating unnecessary overlap.

### 3. Elevation of Mens Rea in First Degree Murder

PDS recommends that the RCC use the mens rea of purposely in first degree murder. RCC § 22A-1101(b), first degree murder, currently requires a mens rea of knowingly rather than purposely. While the definitions of knowingly and purposely are closely related, purposely is a

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<sup>6</sup> Only relevant evidence is admissible in a criminal trial. For evidence to be relevant, it must be "related logically to the fact that it is offered to prove, ... the fact sought to be established by the evidence must be material ... and the evidence must be adequately probative of the fact it tends to establish." *Jones v. United States*, 739 A.2d 348, 350 (D.C.1999) (internal citations omitted). The trial judge has the discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" within this context means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Mercer v. United States*, 724 A.2d 1176, 1184 (D.C. 1999).

<sup>7</sup> See *Chatmon v. United States*, 801 A.2d 92, 101 (D.C. 2002) (noting that the prosecutor's repeated reference to a photo of the decedent in a pool of blood while asking jurors to come to a decision that they could live with was improper and calculated to enflame the passions of the jury without adding to the proof in the case).

<sup>8</sup> D.C. Official Code § 22-722, obstruction of justice.

higher mental state and requires a “conscious desire” to bring about a particular result.<sup>9</sup> The RCC should use the highest mental state to describe the most serious and severely punished crimes in the Code. The RCC requires purposely as the mental state for aggravated assault (RCC § 22A-1202), child abuse (RCC § 22A-1501), first degree abuse of a vulnerable adult (RCC § 22A-1503), and unlawful obstruction of a bridge to the Commonwealth of Virginia (RCC § 22A-2605). The RCC should not use a lower mens rea for first degree murder.

#### 4. Retention of the Element of Premeditation and Deliberation in First Degree Murder

PDS recommends that first degree murder in the RCC have as an element that the person acted with premeditation and deliberation as is currently required by the Code for first degree murder. RCC § 22A-101(b) removes this element from first degree murder. While the CCRC notes in the commentary that the DCCA has interpreted this element as requiring little more than turning a thought over before reaching the decision to kill,<sup>10</sup> in practice, this element is critical to separating impulsive murders from those committed with some degree of forethought. The distinction has been important for the United States Attorney’s Office in making decisions about charging a homicide as first degree or second degree murder. The element of premeditation and deliberation has appropriately limited the cases that the United States Attorney’s Office brings as first degree murder to those where there is the additional culpability of some form of deliberation. Rash homicides that take place over the course of several angry seconds or that stem from immediate action after or during a dispute may meet the technical definition of deliberation, but are not charged this way. The additional reflection is a meaningful way of differentiating between the offenses of first degree and second degree murder and should not be lightly set aside by the CCRC.

#### 5. Drafting Recommendation for First Degree Murder

##### **RCC § 22A-1101 Murder.**

(b) *First Degree Murder.* A person commits the offense of first degree murder when that person:

- (1) ~~Knowingly~~ Purposely causes the death of another person; ~~or~~
- (2) with premeditation and deliberation; ~~or~~
- (2) ~~Commits second degree murder and either:~~
  - (A) ~~The death is caused with recklessness as to whether the decedent is a protected person;~~
  - (B) ~~The death is caused with the purpose of harming the complainant because of the complainant’s status as a:~~
    - (i) ~~Law enforcement officer;~~

<sup>9</sup> RCC § 22A-206(a), purpose defined.

<sup>10</sup> Report #19, pages 25-26.



- ~~(ii) Public safety employee;~~
- ~~(iii) Participant in a citizen patrol;~~
- ~~(iv) District official or employee; or~~
- ~~(v) Family member of a District official or employee;~~
- ~~(C) The defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;~~
- ~~(D) The defendant mutilated or desecrated the decedent's body;—~~
- ~~(E) The defendant committed the murder after substantial planning;~~
- ~~(F) The defendant committed the murder for hire;~~
- ~~(G) The defendant committed the murder because the victim was or had been a witness in any criminal investigation or judicial proceeding, or because the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;~~
- ~~(H) The defendant committed the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; or~~
- ~~(I) In fact, the death is caused by means of a dangerous weapon.~~

#### 6. Drafting Recommendation for Second Degree Murder

PDS recommends changes to RCC § 22A-1101(c), second degree murder, to accommodate the changes made to first degree murder and the retention of premeditation and deliberation in first degree murder. PDS recommends adding to the definition of second degree murder, murders that are committed knowingly, but without premeditation and deliberation. Many of the District's homicides that are committed with firearms would constitute knowingly causing the death of another. In such instances, where there is not premeditation and deliberation, that individual's mental state much more closely aligns with knowing that death is certain than with being reckless that death may result. Where the conduct is knowing, but without premeditation and deliberation, the offense definition and the instructions that a jury receives should more closely fit the conduct. It would be a fiction to call that mental state in all instances merely one of recklessness. The option of knowingly committing the homicide should exist within second degree murder.

PDS therefore recommends the following language:

(c) *Second Degree Murder*. A person commits the offense of second degree murder when that person:

- (1) Knowingly causes the death of another person; or
- (2) Recklessly, under circumstances manifesting extreme indifference to human life, causes the death of another person; or
- (3) Negligently causes the death of another person, other than an accomplice, in the course of and in furtherance of committing, or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual

abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnapping, or kidnapping]; provided that the person or an accomplice committed the lethal act; and

## 7. Availability of Mitigation Defense

PDS recommends rewriting part of the mitigation defense to recognize that the defendant may act with belief that deadly force was necessary to prevent someone other than the decedent from unlawfully causing death or serious bodily injury. For example, the defendant may have believed (unreasonably) that X was about to kill or seriously injure him; when reaching for a gun, the defendant is jostled so he fatally shoots Y rather than X. Just as a person would still be liable if he with premeditation and deliberation aimed to shoot X but due to poor aim or a defective firearm fatally shot Y instead, a person should still be able to avail himself of the mitigation defense if he causes the death of someone other than the person he believes is threatening death or seriously bodily injury. Further, the change PDS proposes would bring this part of the mitigation defense, at RCC § 22A-1101(f)(1)(B), in line with another, at RCC § 22A-1101(f)(1)(A). As explained in Report # 19, the “‘extreme emotional disturbance’ [that is mitigating pursuant to § 22A-1191(f)(1)(A)] need not have been caused wholly or in part by the decedent in order to be adequate.”<sup>11</sup>

PDS proposes rewriting §22A-1101(f) as follows:

### (f) *Defenses.*

- (1) *Mitigation Defense.* In addition to any defenses otherwise applicable to the defendant’s conduct under District law, the presence of mitigating circumstances is a defense to prosecution under this section. Mitigating circumstances means:
  - (A) Acting under the influence of an extreme emotional disturbance for which there is a reasonable cause as determined from the viewpoint of a reasonable person in the defendant’s situation under the circumstances as the defendant believed them to be;
  - (B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent ~~the decedent~~ another person from unlawfully causing death or serious bodily injury; ....

## 8. Burden of Proof for Mitigation Defense

RCC § 22A-1101(f)(2) frames mitigating circumstances in first and second degree murder as an element or multiple elements that must be disproved by the government if “evidence of mitigation is present at trial.” PDS recommends that RCC §22A-1101(f)(2,) burden of proof for

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<sup>11</sup> Report #19, page 18.

mitigation defense, mirror DCCA case law on the amount of evidence that must be presented to trigger the government's obligation to disprove the existence of any mitigating circumstances. Under current law, a defendant is entitled to a jury instruction such as mitigation for first degree and second degree murder or self defense if "the instruction is supported by any evidence, however weak."<sup>12</sup>

PDS recommends redrafting RCC § 22A-1101(f)(2) as follows:

*Burden of Proof for Mitigation Defense.*

If some evidence of mitigation, however weak, is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt.

9. Manslaughter

For clarity and consistency, PDS recommends that the RCC eliminate the offense of aggravated manslaughter, RCC § 22A-1102(a) and group status based aggravators where the decedent is, for instance a law enforcement officer or public safety employee, in a separate aggravator statute.

PDS believes that manslaughter should remain a lesser included offense of first and second degree murder and therefore would request a specific statutory provision that makes manslaughter a lesser included offense of murder even if the elements of the revised offenses do not align under the *Blockburger* test.<sup>13</sup>

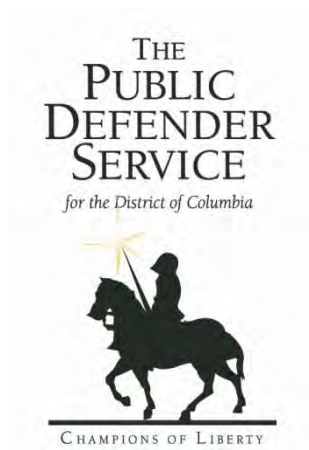
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<sup>12</sup> *Murphy-Bey v. United States*, 982 A.2d 682, 690 (D.C. 2009); see also *Henry v. United States*, 94 A.3d 752, 757 (D.C. 2014) (internal citations omitted) "Generally, when a defendant requests an instruction on a theory of the case that negates his guilt of the crime charged, and that instruction is supported by any evidence, however weak, an instruction stating the substance of the defendant's theory must be given."

<sup>13</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

# M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: The Public Defender Service for the District  
of Columbia

Date: May 11, 2018

Re: Comments on First Draft of Report No. 20,  
Abuse & Neglect of Children, Elderly, and  
Vulnerable Adults

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The Public Defender Service makes the following comments RCC Section 1501, Child Abuse.

1. Age Difference between the Child and the Adult

RCC § 22A-1501(a)-(c), first through third degree child abuse, prohibits abusive acts committed against children by parents, guardians, individuals acting in a parental role and by anyone, regardless of any parental role, who is more than two years older than the child. Under this definition, an 18 year old who fights with a 15 year old may be found guilty of child abuse. This would be the case although the 15 and 18 year old go to school together, take the same classes and play sports together. In this context, 15 and 18 year olds are very much peers, and physical conflicts between them should not be given the label of child abuse. The label does not make sense given the close age of the individuals involved and the comparable vulnerability of the 15 year old. A 15 year old is often as large and as strong as an 18 year old. A 15 year old often has a substantial degree of independence and the ability to seek help from members of his neighborhood or school community. A conviction for child abuse comes with significantly more stigma and probable collateral consequences than a conviction for assault. This is the case in part because the offense of child abuse connotes predatory and violent conduct towards young children who are incapable of defending themselves against adults. When the actors are 15 and 18 and the age difference is a little more than two years, the label of child abuse should not apply. PDS proposes the age difference be four years as it is with child sexual abuse at D.C. Code §§ 22-3008, 22-3009.

PDS therefore suggests the following modification to RCC§ 1501(a)-(c):

(2) In fact:

- (A) that person is an adult at least ~~two~~ four years older than the child; or
- (B) that person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

## 2. Criminalizing the Use of Physical Force that Overpowers a Child

RCC §22A-1501(c), third degree child abuse, criminalizes any use of physical force that overpowers a child. Young children who are so much smaller than adults are easy to overpower with physical force without causing any physical or emotional harm. For instance, a child who is pushing in line, or cutting in line, could be carried to the back of a line by an adult with no relationship to the child. Physically removing a 10 year old to the back of a line in a way that does not cause any injury to the child should not be criminalized as child abuse. That contact may be a fourth or fifth degree assault pursuant to RCC § 22A-1202(e) and (f) and should be charged as such. Charging it as assault will adequately address the conduct without exaggerating the harm to the child by labeling the offense as child abuse.

PDS therefore recommends that the RCC amend third degree child abuse as follows:

(c) *Third Degree Child Abuse.* A person commits the offense of third degree child abuse when that person:

(1)

- (A) In fact, commits harassment per § 22A-XXXX, menacing per § 22A-1203, threats per § 22A-1204, restraint per § 22A-XXXX, or first degree offensive physical contact per § 22A-1205(a) against another person, with recklessness that the other person is a child; or
- (B) Recklessly causes bodily injury to, ~~or uses physical force that overpowers,~~ a child; and

(2) In fact:

- (A) That person is an adult at least ~~two~~ four years older than the child; or
- (B) That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

## 3. Burden of Proof for Parental Discipline Defense

PDS also recommends a change in the RCC's language for the trigger for the reasonable parental discipline defense. RCC § 22A-1501(f)(2) provides that "if evidence is present at trial of the defendant's purpose of exercising reasonable parental discipline, the government must prove the

absence of such circumstances beyond a reasonable doubt.”<sup>1</sup> The question of whether any exercise of parental discipline is reasonable is uniquely within the province of the jury. It is a fact-based inquiry that, according to the District of Columbia Jury Instructions, involves consideration of the child’s age, health, mental and emotional development, alleged misconduct on this and other occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other evidence deemed relevant.<sup>2</sup> Any judicial finding on whether the issue of reasonable parental discipline has been raised should focus on whether there has been any evidence, however weak, that the defendant’s purpose was parental discipline, not on the reasonableness of that discipline. Therefore PDS recommends removing “reasonable” from the burden of proof language.

In addition, for consistency with requests in other provisions, PDS suggests the following language:

(f)(2) Burden of Proof for Parental Discipline Defense. If some evidence, however weak, is present at trial of the defendant’s purpose of exercising ~~reasonable~~ parental discipline, the government must prove the absence of such circumstances beyond a reasonable doubt

#### 4. Merger Provision

In order to limit offense overlap and duplication, PDS recommends that the RCC include a specific merger provision to allow for the merger of offenses prohibiting the abuse and neglect of vulnerable persons and assault offenses.

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<sup>1</sup> Emphasis added.

<sup>2</sup> Criminal Jury Instructions for the District of Columbia, No. 4.100 (5th ed., rev.2017).

## M E M O R A N D U M

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THE  
PUBLIC  
DEFENDER  
SERVICE  
*for the District of Columbia*



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins

Date: July 13, 2018

Re: Comments on First Draft of Report No. 21,  
Recommendations for Kidnapping and  
Related Offenses

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In general, the Public Defender Service for the District of Columbia supports the Criminal Code Reform Commission's approach to reforming the District's kidnapping statute, D.C. Code § 22-2001, by narrowing the offense of "kidnapping" and creating the offense of "criminal restraint." PDS makes the following specific comments.

1. PDS proposes rewriting Criminal Restraint, RCC §22A-1404, to address a number of issues related to how the offense treats families and guardians.
  - A. Criminal restraint needs to be rewritten to clarify that (a)(2)(A), (B), and (C) are for conduct involving adult complainants and (a)(2)(D) is the only alternative available for charging criminal restraint of a person who is a child under the age of 16. This approach is supported by the commentary, which notes that the current kidnapping statute fails to specify and the DCCA has failed to determine "whether a person can commit kidnapping by taking a child with the child's consent, but without the consent of a parent or legal guardian." The commentary goes on to explain, "[h]owever, the RCC criminal restraint statute specifies that a person may commit criminal restraint by interfering with the freedom of movement of a person under the age of 16, if a parent, legal guardian, or person who has assumed the obligations of a parent has not freely consented to the interference, *regardless of whether the person under 16 has provided consent.*"<sup>1</sup> If the consent of the person under 16 can be disregarded, then it should be clear that a person cannot be charged with criminal restraint pursuant to (a)(2)(A), (B), or (C), all of which base liability on whether the defendant had the consent of the person with whose freedom s/he interfered.

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<sup>1</sup> Report # 21, page 35 (emphasis added).

- B. PDS agrees with the Commission’s decision to “set the age of consent for interference with freedom of movement at 16 years.”<sup>2</sup> However, the Commission failed to account for the fact that persons under age 18 are still “children,” both under current D.C. law, see e.g., D.C. Code § 16-2301(3), and as proposed for the RCC, see §22A-1001(23). And children must follow the instructions of their parent(s) or they may be found to be a “child in need of supervision.” D.C. Code § 16-2301(8) defines a “child in need of supervision” as a child who “is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable.”<sup>3</sup> Thus, a 16-year-old cannot decide to live someplace other than where his parent says he must live. A parent who tells her 17-year-old, “Stay in your room or you’ll be sorry,” should not be committing a criminal offense, even if the words are considered a threat to cause bodily injury (assuming the “threat” is to exercise reasonable parental discipline). PDS proposes that the 16 and 17 year olds be able to give or withhold consent regarding their freedom of movement with respect to persons who are not their parent or guardian; however, if a parent or guardian substantially interferes with the freedom of movement of a 16 or 17-year-old, then the conduct should not be criminal restraint.<sup>4</sup>
- C. PDS strongly objects to the elimination of the “parent to a minor exception” to Kidnapping in D.C. Code §22-2001.<sup>5</sup> Understood in the context of the breadth of the kidnapping statute, excepting the conduct of parents to minors is sound policy that recognizes that minors must obey their parents’ lawful commands, perhaps particularly with respect to their freedom of movement. “We’re going on a trip and you’re coming with us.” “Go to your room.” “Do not leave this house.” “You’re living with your grandmother for the summer.” RCC § 22A-1404, as drafted in Report # 21, fails to recognize this relationship. It criminalizes the conduct of parents but provides a defense. PDS proposes that for Criminal Restraint the conduct of parents, with respect to their children under age 18, be excepted from criminal liability as under the current statute.
- D. PDS agrees with the Commission’s recognition that persons age 18 or older may have legal guardians with the legal authority to dictate the freedom of movement of their wards.<sup>6</sup> However, the Commission fails to define “legal guardian” or recognize the variety of “guardianships,” and grants too much authority to “legal guardians” and not enough authority to wards.

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<sup>2</sup> Report # 21, page 35.

<sup>3</sup> D.C. Code § 16-2301(8)(A)(iii).

<sup>4</sup> The conduct of the parent or guardian could still be criminal under the child abuse and neglect statutes.

<sup>5</sup> “Whoever shall be guilty of ...kidnapping... any individual by any means whatsoever, and holding or detaining...such individual ... *except, in the case of a minor, by a parent thereof*, shall, upon conviction thereof, be punished by imprisonment...” D.C. Code § 22-2001 (emphasis added).

<sup>6</sup> See RCC §22A-1404(a)(2)(D) (“When that person is a child under the age of 16 *or a person assigned a legal guardian...*”) (emphasis added).



District law allows for the appointment of a “guardian” to an “incapacitated individual” pursuant to Chapter 20 of Title 21 of the D.C. Code. An “incapacitated individual” is “an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator.”<sup>7</sup> An adult might also be only “an incapacitated individual for health-care decisions.”<sup>8</sup> A “guardian” may be a “temporary guardian,” who is appointed for a finite period of time to serve as an “emergency guardian,” a “health-care guardian,” or a “provisional guardian.”<sup>9</sup> A guardian may also be a “general guardian,” whose guardianship is neither limited in scope nor in time by the court,<sup>10</sup> or a “limited guardian,” whose powers are limited by the court and whose appointment may be for a finite period of time or for an indeterminate period of time.<sup>11</sup> In guardianship proceedings, the court is to “exercise [its] authority . . . so as to encourage the development of maximum self-reliance and independence of the incapacitated individual.”<sup>12</sup> “When the court appoints a guardian, it shall appoint the type of guardianship that is least restrictive to the incapacitated individual in duration and scope. . . .”<sup>13</sup> A general or a limited guardian may “take custody of the person of the ward and establish the ward’s place of abode within or without the District, if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward.”<sup>14</sup> However, no guardian to an incapacitated individual has the power “to impose unreasonable confinement or involuntary seclusion, including forced separation from other persons. . . .”<sup>15</sup>

PDS proposes that the offense of “criminal restraint” follow the framework of the guardianship laws by maximizing the self-reliance and independence of the person, despite the fact that they have a guardian, and do so by recognizing their ability to consent or to withhold consent to the substantial interference with their movement. On the other hand, guardians who have the legal authority to take physical custody of their ward should not be criminally liable for exercising that authority. Relatedly, a guardian with the authority to take physical custody of a person, meaning they have authority to dictate or restrict their ward’s freedom of movement at least to some degree, should have

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<sup>7</sup> D.C. Code § 21-2011(11).

<sup>8</sup> D.C. Code § 21-2011(11A).

<sup>9</sup> D.C. Code § 21-2011(8)(A).

<sup>10</sup> D.C. Code § 21-2011(8)(B).

<sup>11</sup> D.C. Code § 21-2011(8)(C).

<sup>12</sup> D.C. Code § 21-2044(a).

<sup>13</sup> *Id.*

<sup>14</sup> D.C. Code § 21-2047(b)(2).

<sup>15</sup> D.C. Code § 21-2047.01(7).

that authority accorded respect in the criminal code by criminalizing the conduct of a person who substantially interferes with the ward's freedom of movement without the consent of the guardian.

- E. PDS proposes that, rather than making it a defense to a prosecution under what is currently RCC §22A-1404(a)(2)(D) that a person is a "relative" of the complainant, "relatives" be excepted from (a)(2)(D). The result is the same, the "relative" will not be convicted. The difference is whether on the way to that inevitable result, the relative can be charged with a crime, have an arrest record, be subject to pretrial detention or restrictions on his or her life, such as requirements to wear a GPS monitor, to submit to drug testing, to observe a curfew or a stay away for person(s) and/or location(s). In addition, because (a)(2)(D) necessarily involves a person under the age of 16, the conduct which constitutes that offense is always aggravated if the relative is more than 2 years older than the child. Since the aggravated form of the offense can almost always be charged, the burdens and risks of arrest – a worse charge on the arrest record, a greater likelihood of pretrial detention - correspondingly increase. The more fair and merciful approach would be to except the conduct rather than make it a defense.

In light of the above objections and proposals, PDS proposes rewriting the offense definition for criminal restraint as follows:

- (a) *Offense Definition.* A person commits the offense of criminal restraint when that person:
- (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  - (2) In one of the following ways;
    - (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
      - (i) Without that person's consent;
      - (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      - (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    - (B) When that person is 16 or 17 years of age and the defendant is not the parent, legal guardian, or person who has assumed the obligations of a parent to that person:
      - (i) Without that person's consent;
      - (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      - (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately

- would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
- (C) When that person is a child under the age of 16 and the defendant is not a relative or legal guardian of the child, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or
- (D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian.

2. PDS proposes that criminal restraint have a "Good Samaritan" defense for instances when a person substantially interferes with another's freedom of movement because the person has a reasonable belief that such interference is necessary to prevent imminent bodily harm to the other person. For example, a stranger seeing a young child wandering alone might, even knowing he does not have the consent of the child's parent, detain the child while he calls the police for help. Or an adult child of an elderly parent with dementia or Alzheimer's but who is not the "guardian" of their parent might, despite the protestations of the parent, bolt the doors of their shared home to prevent the parent from wandering off in the night and getting lost or wandering into traffic. PDS proposes the following language –

(d) *Defenses.* (1) It is a defense to prosecution under this section that the defendant acted based on a reasonable belief that such action was necessary to protect the complainant from imminent physical harm.

(2) Burden of proof – If evidence, however weak, is present at trial of the defendant's purpose to protect the complainant from imminent physical harm, the government must prove the absence of such circumstances beyond a reasonable doubt.

3. PDS proposes rewriting Kidnapping, RCC §22A-1402, to change how parents and guardians are treated under the offense. As it did for criminal restraint, PDS proposes that guardians of adult wards be treated separately and have their consent tied to the guardian's authority to take physical custody of their ward. PDS also proposes separate sections for persons who are 18 years of age or older, persons who are 16 or 17 years of age, and persons who are children under the age of 16. Although both persons who are 18 years of age or older and 16 and 17 year old are of the age of consent, PDS proposes treating them separately in order to accommodate guardians. Persons who are 18 years of age may or may not have guardians who have the legal authority to take physical custody of them, and that possibility matters for whether the consent of the adult (ward) or the guardian controls. In contrast, 16 and 17 year olds, always have guardians with the legal authority to take them in physical custody; they are generally called "parents." However, PDS supports the decision to make 16 the "age of consent" for freedom of movement. Unlike with criminal restraint, where PDS proposed excepting parents and, in some instances relatives, from criminal liability, PDS recognizes that the "with intent" element in kidnapping sufficiently narrows the criminal conduct. With one exception, PDS does not disagree that a parent,

guardian, or other relative, may not hold their minor child for ransom or reward, use their minor child as a shield of hostage, to facilitate the commission of any felony, etc. However, a parent, guardian, or person who has assumed the obligations of a parent must be free (not criminally liable) to substantially interfere with the freedom of movement with their minor child (under age 18) with the intent to inflict bodily injury when that infliction is in the exercise of parental discipline.

Specifically, PDS recommends that the offense definition of Kidnapping be written as follows:

- (a) *Offense Definition.* A person commits the offense of kidnapping when that person:
- (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  - (2) In one of the following ways;
    - (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,;
      - (i) Without that person's consent;
      - (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      - (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    - (B) When that person is 16 or 17 years of age:
      - (i) Without that person's consent;
      - (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      - (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    - (C) When that person is a child under the age of 16, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or
    - (D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian; and
  - (3) With intent to:
    - (A) Hold the complainant for ransom or reward;
    - (B) Use the complainant as a shield or hostage;
    - (C) Facilitate the commission of any felony or flight thereafter;
    - (D) Inflict bodily injury upon the complainant, except in the exercise of parental discipline by a parent, legal guardian, or person who

has assumed the obligations of a parent against a complainant under the age of 18;

- (E) ~~or to commit~~ Commit a sexual offense as defined in RCC XX-XXXX against the complainant;
- (F) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;
- (G) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or
- (H) Hold the person in a condition of involuntary servitude.

PDS also recommends adding the term “parental discipline” to subsection (c), Definitions, and defining it by reference to the “parental discipline defense” for child abuse at RCC §22A-1501(f).

4. PDS recommends adding a Good Samaritan defense to Kidnapping, using the same language as proposed for Criminal Restraint.
5. PDS objects to aggravating kidnapping or criminal restraint based on the aggravator “with the purpose of harming the complainant because of the complainant’s status.”<sup>16</sup> Conduct against a law enforcement officer, public safety employee, citizen patrol member, or District official or employee is aggravated pursuant to subsection (a)(2)(A), when that person is a “protected person.” The additional aggravator at subsection (a)(2)(B) is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list.

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<sup>16</sup> Subsection (a)(2)(B) of both aggravated kidnapping and aggravated criminal restraint.

## M E M O R A N D U M

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THE  
PUBLIC  
DEFENDER  
SERVICE  
*for the District of Columbia*



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Public Defender Service for the District of  
Columbia

Date: July 13, 2018

Re: Comments on First Draft of Report 22,  
Accomplice Liability and Related  
Provisions

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The Public Defender Service for the District of Columbia makes the following comments on Report #22, *Accomplice Liability and Related Provisions*.

1. RCC § 22A-210 provides that a person is an accomplice in the commission of an offense by another when that person is “acting with the culpability required by that offense.” Report #22 at footnote 5, states that any broader aspect of culpability, such as “proof of premeditation, deliberation, or the absence of mitigating circumstances” is encompassed within culpability when required by the specific offense.

PDS wholeheartedly agrees with footnote 5 and believes it is consistent with and required by *Wilson-Bey v. United States*.<sup>1</sup> PDS is concerned, however, that this view of what culpability encompasses will not be applied if it remains only in a footnote to the commentary. RCC § 22A-201(d), Culpability Requirement Defined states that “culpability requirement” includes each of the following: “(1) The voluntariness requirement, as provided in § 22A-203; (2) The causation requirement, as provided in § 22A-204; and (3) The culpable mental state requirement, as provided in § 22A-205.” It is unclear whether “premeditation, deliberation, or the absence of mitigating circumstances” are “culpability requirements” for principle liability given this definition and also unclear whether, from this definition, premeditation and deliberation and any lack of mitigating circumstances would be necessary for accomplice liability. Without a statutory definition broad enough to encompass premeditation, deliberation, and absence of mitigating circumstances, there is a substantial risk that culpability for accomplice liability would be

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<sup>1</sup> *Wilson-Bey v. United States*, 903 A.2d 818, 822 (2006) (holding that in any prosecution for premeditated murder, whether the defendant is charged as a principal or as an aider or abettor, the government must prove all of the elements of the offense, including premeditation, deliberation, and intent to kill).

watered down. Even if practitioners and judges found footnote 5 to argue from, the narrow culpability requirement definition could be read to supersede a footnote from the commentary. PDS proposes amending the definition of “culpability requirement” to include premeditation and deliberation and any lack of mitigation.

2. RCC § 22A-210(a)(2) allows for accomplices to be held liable when, with the requisite culpability required for the offense, the defendant “purposely encourages another person to engage in specific conduct constituting that offense.” The act of encouraging a criminal offense, even with the intent required for the commission of the offense, extends criminal liability to those who merely utter words in support of an offense but who have no meaningful impact on whether the offense is carried out.

For example, two friends may be walking together after leaving a bar when one friend sees her ex-husband’s car. The ex-wife hates her ex-husband and her friend knows all the reasons behind the hatred. The ex-wife sees a piece of metal on the ground and raises it to smash the windshield of her ex-husband’s car. As she raises the piece of metal, she says to her friend, “I’m going to smash his windshield.” The friend replies “go for it.” Under RCC §22A-2503, criminal damage to property, the friend who said “go for it” would only need to possess a mental state of recklessness to be held liable as an accomplice for criminal damage to property. RCC § 22A-206 states that a person acts with recklessness with respect to a result when “(A) that person is aware of a substantial risk that conduct will cause the result; and (B) the person’s conduct grossly deviates from the standard of care that a reasonable person would observe in the person’s situation.” It is PDS’s understanding from the commentary to Report #22 and from the position of the CRCC that any causation requirement from RCC 22A § 201(d) would not apply to the substantive offense of criminal damage to property. Thus, the friend’s encouraging words, “go for it” do not have to be a but for cause for the criminal damage to property.

It unfair to hold people criminally liable for mere words, even if they are specific, when those words have no meaningful impact on the commission of an offense. The ex-wife was going to smash the window even in the absence of the encouraging words of “go for it.” In such circumstances only one individual should be criminally liable for the conduct. Therefore, for the encouragement prong of RCC 22A-210, PDS recommends that the CRCC insert causation language to prevent punishment for de minimus conduct.

PDS suggests the following revision:

(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

- (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or

(2) Purposely encourages another person to engage in specific conduct constituting that offense and the encouragement is a substantial factor in the commission of the offense.



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** July 13, 2018

**SUBJECT:** First Draft of Report #21. Recommendations for Kidnapping and Related Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #21 - Recommendations for Kidnapping and Related Offenses.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-1401. Aggravated Kidnapping**

The offense definition of aggravated kidnapping includes when a person commits kidnapping with the purpose of harming the complainant because of the complainant’s role in public safety or their status as a District official or employee, or a family member of a District official or employee.<sup>2</sup> The word “harm”, however, is not defined. Merriam-Webster defines harm as

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

<sup>2</sup> RCC § 22A-1401 (a)(2)(B) establishes that one of the ways that a person commits aggravated kidnapping is when they commit kidnapping as defined in RCC § 22A-1402 and who does this “With the purpose of harming the complainant because of the complainant’s status as a [:] Law enforcement officer; Public safety employee; Participant in a citizen patrol; District official or employee; or Family member of a District official or employee...”

“physical or mental damage.”<sup>3</sup> Therefore, one would assume that this word has a broader meaning than the phrase “bodily injury” which is contained in the definition of the underlining offense of kidnapping or that term would have been used in the aggravated assault provision. See RCC § 22A-1402(a)(3)(D). To avoid needless litigation, the Commission should either define the word “harm” or explain in the Commentary the difference between the definitions of “harm” and “bodily injury.”

RCC § 22A-1401(d) states, “Multiple Convictions for Related Offenses. A person may not be sentenced for aggravated kidnapping if the interference with another person’s freedom of movement was incidental to commission of any other offense.”<sup>4</sup> This limitation appears to be included to address the situation where the victim was moved or detained for a brief distance or a brief period of time so that another crime can be committed. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can immediately be robbed). What is left unanswered, however, is the boundaries of this exception. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can be robbed but because a movie lets out the victim is kept in the alley for 20 minutes until everyone walks by.) The Commentary should give examples of what is clearly incidental to the commission of another crime and what is not.<sup>5</sup>

### **RCC § 22A-1402. Kidnapping**

The offense of kidnapping requires that the person interferes with the victim’s freedom of movement in specified ways. Paragraph (a)(2) lists those ways.<sup>6</sup> One of the ways is “With that person’s consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury...” See RCC § 22A-1402 (a)(2)(C). It is not apparent from the text or the Commentary how the government could prove this counterfactual. The

<sup>3</sup> See <https://www.merriam-webster.com/dictionary/harm>

<sup>4</sup> The same limitation on sentencing is contained in the kidnapping, aggravated criminal restraint, and criminal restraint provisions. See RCC § 22A-1402 (e), RCC § 22A-1403 (d), and RCC § 22A-1404 (e).

<sup>5</sup> The same issue arises in the context of RCC § 1403, Aggravated Criminal Restraint, and RCC § 1404, Criminal Restraint. See RCC § 1403(a)(2)(B) and RCC § 1404(a)(2)(C).

<sup>6</sup> RCC § 22A-1402 (a)(2) establishes the ways that a person’s freedom of movement should not be substantially interfered with. They are:

- (A) Without that person’s consent;
- (B) With that person’s consent obtained by causing bodily injury or a threat to cause bodily injury;
- (C) With that person’s consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
- (D) When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person’s parent, person who has assumed the obligations of a parent, or legal guardian;

victim in this situation has been deceived. He or she would have no way of knowing what the person would have done had the deception failed and, so, the government would not have evidence that enables it to meet this offense prong. The Commentary does not shed any light either on how this element would be proved or whether any other Model Penal Code jurisdiction has adopted an element that requires the government to prove what would have happened, but did not.

Additionally, to be convicted of kidnapping the deceived victim, the government must prove the first element of the offense, that is that the person “knowingly interferes to a substantial degree with another person’s freedom of movement.” See RCC § 1402(a)(1). But so long as the deception lasts, it cannot be said that the victim’s freedom of movement was curtailed because the victim chose to be in the location where he or she was.

The same issue arises when the victim is under the age of 16. Paragraph (a)(2) states that a person can commit the offense of kidnapping, “When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person’s parent, person who has assumed the obligations of a parent, or legal guardian.” See RCC § 22A-1402 (a)(2)(D). On page 12 of the Commentary it states, “enticing a child to get into a car and remain in the car as it drives away with the truthful promise of candy at the final destination may constitute kidnapping assuming the defendant also satisfied the intent requirement under subsection (a)(3).”<sup>7</sup> However, to be convicted of kidnapping a child the government must also prove the first element of the offense, that is that the person “Knowingly interferes to a substantial degree with another person’s freedom of movement.” See RCC § 1402(a)(1). But if the child willingly goes into the car and happily stays there then it cannot be shown that the child’s freedom of movement has been interfered with. The child has merely been persuaded to stay in the car.<sup>8</sup>

The offense of kidnapping requires that the person restrains the victim’s movement with a specified intent. Subsection RCC 22A-1402 § (a)(3)(A) specifies that kidnapping includes acting with intent to hold the complainant for ransom or reward. However, the Commentary, on page 11 states, “Holding a person for ransom or reward requires demanding anything of pecuniary

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<sup>7</sup> RCC § 22A-1402 (a)(3) establishes the intent element for kidnapping. They are to:

- (A) Hold the complainant for ransom or reward;
- (B) Use the complainant as a shield or hostage;
- (C) Facilitate the commission of any felony or flight thereafter;
- (D) Inflict bodily injury upon the complainant, or to commit a sexual offense as defined in RCC XX-XXXX against the complainant;
- (E) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;
- (F) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or
- (G) Hold the person in a condition of involuntary servitude.

<sup>8</sup> The same issues outlined in this section apply to the Criminal Restraint provision found in RCC § 22A-1404, Criminal Restraint.

value in exchange for release of the complainant.” The problem is that the word “pecuniary” in the Commentary is too limited. Merriam-Webster defines “pecuniary” as either “consisting of or measured in money” or “of or relating to money.”<sup>9</sup> Therefore, following the explanation in the Commentary, a person who was held until the perpetrators received specified jewelry of sentimental value or other property would not be guilty of kidnapping. The Commentary should be modified to read, “Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant.”

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<sup>9</sup> See <https://www.merriam-webster.com/dictionary/pecuniary>.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** July 13, 2018

**SUBJECT:** First Draft of Report # First Draft of Report No. 22. Accomplice Liability and Related Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #22 - Accomplice Liability and Related Provisions.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-210. ACCOMPLICE LIABILITY**

The text of RCC § 22A-210 should make it clear that an accomplice can be convicted for assisting or encouraging a person to commit an offense even if the principal does not complete all of the elements of the offense and would only be guilty of attempt. RCC § 22A-210(b), (c), and (d) all speak in terms the “commission of an offense.”<sup>2</sup> While the phrase “commission of an

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

<sup>2</sup> RCC § 22A-210 states:

(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

offense” in some sources is defined to include an attempt, in other sources it appears to require a completed offense.<sup>3</sup> Similarly, RCC § 22A-210(d) speaks in terms of establishing that an accomplice may be convicted of an offense even if the person claimed to have “committed the offense” has not been prosecuted or convicted, convicted of a different offense or degree of an offense, or has been acquitted. Subparagraph (d) does not specifically include attempts. A modification of the illustration on page 56 demonstrates the need for clarifying this issue. The illustration and explanation contained in the Report is modified as follows:

a drug dealer asks his sister—who is unaware of her brother’s means of employment—to deliver a package for him to a restaurant and to collect money for the package from the cashier. He credibly tells his sister that the package is filled with cooking spices; however, it is actually filled with heroin. If the sister is subsequently arrested by the police as she is about to deliver the package in transit to the restaurant, the drug dealer cannot be deemed an accomplice to the attempted distribution of narcotics by the sister since the sister cannot herself be convicted of that offense. Although she has engaged in conduct that satisfies the *objective elements* of the attempted offense, the sister nevertheless does not act with the

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- (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
  - (2) Purposely encourages another person to engage in specific conduct constituting that offense.

(b) PRINCIPLE OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist.

(c) PRINCIPLE OF CULPABLE MENTAL STATE EQUIVALENCY APPLICABLE TO RESULTS WHEN DETERMINING DEGREE OF LIABILITY. An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.

(d) RELATIONSHIP BETWEEN ACCOMPLICE AND PRINCIPAL. An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein, although the other person claimed to have committed the offense:

- (1) Has not been prosecuted or convicted; or
- (2) Has been convicted of a different offense or degree of an offense; or
- (3) Has been acquitted.

<sup>3</sup> The phrase “commission of an offense” is defined in one source as “The attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense in some dictionaries, see <https://www.lectlaw.com/def/c065.htm>. However, another source explains, the phrase “commission of an offense” is “The act of doing or perpetrating an offense or immediate flight after doing an offense is called commission of an offense”, see <https://definitions.uslegal.com/c/commission-of-an-offense/>.

required *culpable mental state*, i.e., knowledge (or even negligence) as to the nature of the substance she attempted to deliver and receive cash for. Under these circumstances, the drug dealer can, however, be held criminally responsible for attempted distribution as a principal under a different theory of liability: the “innocent instrumentality rule.”

As demonstrated above, there is no reason why the brother should not be guilty of attempted distribution of the narcotics. The language in RCC § 22A-210 should be modified to clarify accomplice liability for attempts.

The Commentary to RCC § 22A-210(c) makes clear that a person can have accomplice liability through omission.<sup>4</sup> The Commentary states, “Typically, the assistance prong will be satisfied by conduct of an affirmative nature; however, an omission to act may also provide a viable basis for accomplice liability, provided that the defendant is under a legal duty to act (and the other requirements of liability are met).” Footnote 7, on the same page, states “... For example, if A, a corrupt police officer, intentionally fails to stop a bank robbery committed by P, based upon P’s promise to provide A with a portion of the proceeds, A may be deemed an accomplice to the robbery...” The Commentary should distinguish this form of liability from the related, but distinct accomplice liability of a person encouraging another person to commit an offense by omission. For example, if AA, a corrupt police officer, talks his partner A, another corrupt police officer, to intentionally fail to stop a bank robbery committed by P, based upon P’s promise to provide AA with a portion of the proceeds, AA may be deemed an accomplice to the robbery. In this example, AA purposely encouraged A to engage in specific conduct constituting an offense of omission.

RCC § 22A-210(c) states that “[a]n accomplice in the commission of an offense that is divided into degrees based on distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.” As the Report notes,<sup>5</sup> this means an accomplice can be convicted of a grade of an offense that is either higher or lower than that committed by the principal actor where the variance is due to distinctions between the two (or more) actors’ state of mind. However, the example in the Commentary, does not demonstrate this principle.<sup>6</sup> The example demonstrates that an accomplice could be convicted of manslaughter when the principal is convicted of murder. However, manslaughter is not a “degree” of murder, nor is murder described as “aggravated” manslaughter. The question raised by the example, is not merely whether the Commentary should have used as an example an offense that was divided into degrees, but does the principle of culpable mental state equivalences applicable to results also apply between greater and lesser included offenses that are contained in different code provisions? If it does, as the example would suggest, RCC § 22A-210(c) should be split into two subparagraphs: one where the accomplice and principal commit an offense that is divided into

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<sup>4</sup> See page 4.

<sup>5</sup> See page 6.

<sup>6</sup> See footnote 15 on page 6.

degrees based upon distinctions in culpability and another where distinctions in culpability is but one distinction between greater and lesser included offenses.

### **RCC § 22A-211 LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON**

RCC § 22A-211 (a) states that “A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense.”<sup>7</sup> In the last sentence of the first paragraph of the Commentary it states, “Collectively, these provisions provide a comprehensive statement of the conduct requirement and culpable mental state requirement necessary to support criminal liability for causing another person to commit a crime.” The problem is that the text of RCC § 22A-211 does not define the term “legally accountable,” nor does it explicitly state that a person who is legally accountable for the actions of another is guilty of the offense.

RCC § 22A-211 (a) is titled, “USING ANOTHER PERSON TO COMMIT AN OFFENSE.” [emphasis in original] The title is misleading. As drafted, it implies that the person acted with some intentionality in causing another person to act. As the Commentary makes clear, however, a person is legally accountable for the conduct of another – and thus guilty of an offense - even when the person does not intentionally use an innocent or irresponsible person to commit a crime. On page 61 of the Commentary it states:

This general principle of culpable mental state equivalency has three main implications. First, the innocent instrumentality rule does not require proof of intent; rather, “a defendant may be held liable for causing the acts of an innocent agent even if he does so recklessly or negligently, so long as no greater *mens rea* is required for the underlying offense.” For example, P may be held liable for reckless manslaughter if he *recklessly* leaves his car keys with X, an irresponsible agent known to have a penchant for mad driving, if X subsequently kills V on the road, provided that P *consciously disregarded a substantial risk* that such a fatal outcome could transpire, and such disregard was a gross deviation from a reasonable standard of care. [internal footnotes omitted]

In the example given in the Commentary, the person who is liable for reckless manslaughter cannot be said to having “used” the other person to commit a crime.

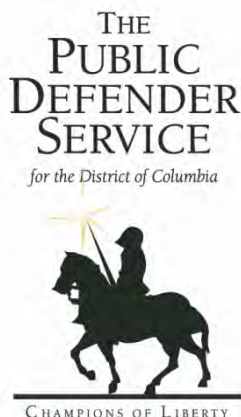
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<sup>7</sup> See page 52.



# M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins

Date: September 11, 2018

Re: Comments on First Draft of Report No. 23,  
Disorderly Conduct and Public Nuisance

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PDS has the following comments about the RCC disorderly conduct and public nuisance offenses.

1. PDS recommends that both disorderly conduct<sup>1</sup> and public nuisance<sup>2</sup> have a third element: “[and] the person knowingly fails to obey a law enforcement officer’s order that the person cease engaging in the conduct.”

The public order and safety benefit of a crime such as disorderly conduct is that it can allow for law enforcement intervention at a low level of harm (or disorder), before the conduct has a chance to escalate into more serious criminal conduct or provoke a criminal response by a third party. The challenge of criminalizing low-level conduct is that it increases the opportunities for negative contacts with law enforcement particularly in communities that many view as over-policed.<sup>3</sup> PDS agrees with the general approach the Commission takes with respect to disorderly conduct and public nuisance but thinks ultimately the Commission’s proposal still allows too much room for over-policing and over-criminalizing the lives of marginalized persons. For example, RCC § 22A-4001 requires that the “apparent danger of bodily injury ... must be unlawful, such as assaultive conduct.”<sup>4</sup> “Horseplay” and other legal group activities would not, according to the Commentary, be disorderly conduct unless the conduct created a likelihood of

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<sup>1</sup> RCC § 22A-4001.

<sup>2</sup> RCC § 22A-4002.

<sup>3</sup> As the D.C. Council Committee on Public Safety and the Judiciary explained “[t]he disorderly conduct [offense] is clearly important to quality of life as well as the public peace” while also noting that the D.C. Office of Police Complaints’ detailed 2003 report on arrests for disorderly conduct “not surprisingly” included a finding that the disorderly conduct statutes were subject to abuse by arresting officers. See Council of the District of Columbia Committee on Public Safety and the Judiciary Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010, at pages 2-3.

<sup>4</sup> Report #23, page 4.

immediate bodily injury to someone not participating in the legal group activity.<sup>5</sup> However, the offense does not actually require that the conduct be unlawful. The crime is recklessly causing another to *reasonably believe* that the conduct is unlawful. While horseplay might be lawful, if the “horseplayers” are aware of a substantial risk that someone observing them will “reasonably believe” that their (lawful) conduct is in fact unlawful, then the “horseplayers” would be guilty of committing “disorderly conduct.” Layer into this the widely accepted notion that certain behavior is often viewed as being “violent” when committed by African-Americans and recognizing that African-Americans are well aware that their innocent conduct creates a “substantial risk” that it will be viewed “reasonably” (as in, a belief commonly held by a majority of persons) as unlawful and potentially injurious to others or their property<sup>6</sup> and it is clear that, despite its best efforts to construct clear and narrow boundaries around this offense, the Commission left the back door unlocked, if not open.

That said, PDS also strongly supports intervention and defusing of situations while they are at a low-level rather than waiting until more serious offenses are committed. Adding an element that the person must fail to obey a law enforcement order that she cease engaging in the conduct creates a better balance between the desirable goals of a disorderly conduct statute to keep the peace and the risks of police abuse and over-criminalization. It allows, actually requires, law enforcement interaction – the order to cease – which will usually be sufficient to defuse a potentially unlawful situation or to establish that the conduct is lawful.<sup>7</sup> Plus, it provides an additional safeguard for the individual before she is subject to arrest and prosecution.

2. PDS recommends eliminating “taking of property” as a means of committing disorderly conduct.” The basic offenses of assault (unlawful bodily injury to another person) and “[criminal] damage to property” only require “recklessly” as a mental state.<sup>8</sup> Theft, however, requires *knowingly* taking the property of another.<sup>9</sup> *Recklessly* engaging in behavior that causes another to reasonably believe there is likely to be an immediate [*reckless*] bodily injury to another or that there is likely to be immediate [*reckless*] damage to property makes sense and is plausible. In contrast, disorderly conduct (taking property) would require that a person

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<sup>5</sup> Id.

<sup>6</sup> See e.g., driving while Black, walking while Black, swimming while Black, selling water while Black, sleeping while Black, barbecuing while Black, waiting for the subway while Black, playing with a toy in a public park while Black, being in one’s own backyard while Black, being in one’s own apartment located above a police officer’s apartment while Black, etc., etc., etc.

<sup>7</sup> If the law enforcement interaction establishes that the conduct is lawful – e.g., the people involved explain they are actually playing rugby – then the law enforcement official will have no basis on which to order the conduct to cease. The officer’s interaction will have established that it would be *unreasonable* to believe there is likely to be immediate and unlawful bodily injury to another person except, exactly at the Commentary explains, in situations where the conduct creates a likelihood of immediate bodily injury to a third party, a person not engaged consensually in the lawful group activity.

<sup>8</sup> See RCC § 22A-1202(f); §22A-2503(a).

<sup>9</sup> See RCC § 22A-2101(a).

*recklessly* engage in conduct that causes another to *reasonably* believe there is likely to be the immediate *knowing* taking of property. Conduct that is “dangerously close” to taking property should be prosecuted as attempt theft. As currently drafted, disorderly conduct (taking of property) either overlaps with attempt theft or criminalizes conduct that is *less than* “dangerously close” to theft. Including “taking of property” as a means to commit disorderly conduct weakens the offenses of theft and attempt theft; there is no point in requiring the knowing taking of property if one can be prosecuted for recklessly making someone believe property will be (knowingly) taken. PDS is concerned, assuming there even is reckless conduct that could create a reasonable belief about a knowing result, that the conduct would necessarily be very minor and ambiguous; so minor and ambiguous that to arrest and prosecute someone for it would be arbitrary and unjust.

3. PDS recommends that both disorderly conduct and public nuisance be jury demandable, regardless of the penalty attached. Because of the First Amendment implications of both offenses as well as the tension they create between preserving public order and over-policing/police abuse, the accountability that a jury provides is critical.
4. PDS recommends rewriting the definition of “lawful public gathering” in the public nuisance offense to narrow its reach.<sup>10</sup> The definition does not require that the gathering itself be public, so it would seem to be unlawful to intentionally interrupt a private gathering. The breadth and vagueness of the catch-all language, “similar organized proceeding,” only reinforces the sweep of this provision. Are weddings “lawful public gatherings”? Is a high school graduation ceremony a “lawful public gathering?” PDS finds this means of committing the public nuisance offense troubling but would consent to a definition that is narrow and specific to funerals, that uses the word “means” instead of “includes,” and that does not include any catch-all language.
5. PDS objects to the definition of “public building” in the public nuisance offense.<sup>11</sup> Although according to the Commentary, subsection (c)(4) is to “clarif[y] that a public building is a building that is occupied by the District of Columbia or federal government” and therefore is not meant to “apply to efforts to dissuade customers from patronizing a privately-owned business,”<sup>12</sup> the definition, by focusing on the physical building and by using the very general term “government”, does not address situations where privately-owned business are co-located in buildings with any D.C. or federal government agency. The Commission clarified at its August 1 public meeting that subsection (c)(4) is “intended to prohibit purposeful (and not incidental) interruptions of [D.C.] Council hearings and similar proceedings, whether they occur at [the Wilson Building] or at an offsite location.”<sup>13</sup> PDS recommends rewriting the definition of “public building” to more clearly convey that narrower intent.

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<sup>10</sup> See RCC § 22A-4002(c)(4).

<sup>11</sup> See RCC § 22A-4002(c)(5).

<sup>12</sup> Report # 23, page 13.

<sup>13</sup> Minutes of Public Meeting, D.C. Criminal Code Reform Commission, August 1, 2018, page 4.

## M E M O R A N D U M

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THE  
PUBLIC  
DEFENDER  
SERVICE  
*for the District of Columbia*



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Public Defender Service for the District of  
Columbia

Date: September 11, 2018

Re: Comments on First Draft of Report No. 24,  
Failure to Disperse and Rioting

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PDS has the following comments about the RCC offenses of failure to disperse and rioting.

1. As reflected in the minutes of the CCRC meeting of August 1, 2018, PDS raised a concern about liability for failure to disperse where the individual does not know that a law enforcement officer has determined that her presence is substantially impairing the law enforcement officer's ability to stop a course of disorderly conduct. At the August 1, 2018 meeting staff clarified that a person must know that she is being ordered to disperse. Staff further noted that the person must be in the immediate vicinity of the course of disorderly conduct and that the officer's assessment about the need for the order to disperse must be objectively accurate. PDS requests that this clarification by staff be included in the commentary of RCC § 22A-4102.
2. RCC § 22A-4101 defines rioting, in part, as the commission of disorderly conduct when the defendant is "reckless" as to the fact that four or more people in the immediate vicinity are simultaneously engaging in disorderly conduct. PDS recommends that the CCRC substitute the mental state of recklessness with knowledge. Requiring that the defendant know that individuals in his immediate vicinity are engaging in disorderly conduct is appropriate given First Amendment concerns about rioting statutes. In the District, it is not uncommon for protests to involve thousands of people or even tens of thousands of people. Under these circumstances, during a mass protest, it may always be the case that a protester is aware of a substantial risk that others are engaging in disorderly conduct and that the standard of care that a reasonable person would observe is to remove himself from the protest.<sup>1</sup> Using a standard of recklessness would over-criminalize potentially constitutionally protected conduct. Just as the CCRC requires knowledge that a participant in the disorderly conduct is using or plans to use a weapon, the CCRC should require actual knowledge that others in the immediate vicinity are engaged in disorderly conduct.

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<sup>1</sup> RCC § 22A-205.

3. PDS recommends eliminating “taking of property” as a means of committing rioting. Under the current RCC definition, an individual commits the offense of rioting when he commits disorderly conduct, reckless as to the participation of four or more people and when the conduct is committed with the intent to facilitate the commission of a crime involving bodily injury to another, damage to property of another, or the taking of property of another. Including taking of property within rioting has the potential of creating unnecessary overlap with the offenses of robbery and theft committed by codefendants. For example, under the current RCC definition of rioting, almost any robbery committed by four or more juveniles could also be charged as rioting. If the CCRC’s inclusion of conduct “involving the taking of property of another” is intended to address crimes such as looting by multiple individuals, that conduct would already be covered by the inclusion of conduct “involving damage to the property of another.” There are few instances when a group of four or more people could commit disorderly conduct and take property of another without also causing damage to property. Removing “the taking of property of another” from the definition would not cause any gaps in liability and would prevent overlap with property crimes committed by codefendants.
4. RCC § 22A-4101(3)(B) defines rioting as criminal conduct committed while “knowingly possessing a dangerous weapon.” PDS recommends that this language be amended to “knowingly using or displaying a dangerous weapon.” This amendment would mirror section (C) of rioting which establishes liability when the defendant “know[s] any participant in the disorderly conduct is using or plans to use a dangerous weapon.”

The possession of a dangerous weapon<sup>2</sup>, such as false knuckles<sup>3</sup> or a knife with a blade over three inches in length, in a pocket, purse, or backpack while committing the offense of disorderly conduct does not increase danger to the community or elevate the fear experienced by bystanders. The possession of a dangerous weapon in a backpack would not be apparent to community members until the weapon is later recovered during a search incident to arrest. In such instances, where the weapon is not used or displayed, the possession of a weapon would be entirely ancillary to the offense of rioting.

The possession of a dangerous weapon in a backpack, purse, or pocket would also be separately punishable as a stand-alone count of weapon possession. To decrease unnecessary overlap, the RCC should limit liability in rioting to occasions when the defendant knowing uses or displays a dangerous weapon.

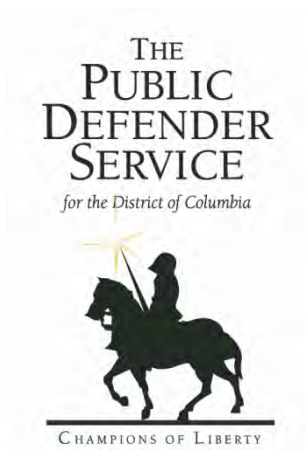
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<sup>2</sup> RCC § 22A-1001 (dangerous weapon defined).

<sup>3</sup> § 22A-1001(14) (prohibited weapon defined).

## M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Public Defender Service for the District of  
Columbia

Date: September 11, 2018

Re: Comments on First Draft of Report No. 25,  
Merger

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PDS has the following comments about the RCC principle of merger.

1. PDS recommends that merger, RCC § 22A-212 be restructured as a rule instead of a presumption. Presumptions are often difficult to apply and require either additional drafting language or appellate interpretation.<sup>1</sup> As currently framed, RCC § 22A-212, establishes rules for merger and an exception when the legislature clearly manifests the intent to allow multiple convictions. However, the use of a presumption for those rules makes them much more difficult to apply. In order to provide clarity for defendants, practitioners, and judges, and to avoid the need for appellate litigation of basic principles, the RCC should reframe the merger provision as a rule.
2. RCC § 22A-212(d)(1) establishes a rule of priority that when two offenses merge, the offense that remains shall be “the most serious offense among the offenses in question.” Although footnote 27 to the Commentary explains what the most serious offense “will typically be,” the phrase is still open to interpretation and argument by the parties in individual cases. Rather than leaving the matter of which offense is most serious to the parties to dispute, PDS recommends that for the purposes of clarity and certainty, the RCC define “most serious offense” as the offense with the highest statutory maximum. Further, the definition should be included in the statute, not relegated to the Commentary.

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<sup>1</sup> See, e.g., D.C. Code § 23-1322 (detention prior to trial); *Blackson v. United States*, 897 A.2d 187, 196 (D.C. 2006); *Pope v. United States*, 739 A.2d 819, 826 (D.C. 1999).

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** September 14, 2018

**SUBJECT:** First Draft of Report #23, Disorderly Conduct and Public Nuisance

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #23 - Disorderly Conduct and Public Nuisance.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-4001. Disorderly Conduct.**

The proposed disorderly conduct statute varies from the current law in many ways. It appears to legalize a certain type of dangerous behavior. As the Comment section notes on page 4, to be disorderly conduct under the proposal, “The apparent danger of bodily injury must be to another person; a person cannot commit disorderly conduct where she poses a risk of harm to only herself.” While we do not disagree with footnote 6 that “a person who is performing a dangerous skateboarding stunt, high wire act, or magic trick in a public square” should not be guilty of this offense, we disagree that “She has not committed disorderly conduct unless it appears likely that her conduct will cause bodily injury to someone other than herself or damage to property.” D.C. Code § 22-1321(a)(3) currently makes it unlawful for a person to “Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

by that person or another person.” So, under current law, a person can commit disorderly conduct where she poses a risk of harm only to herself.

RCC § 22A-4001<sup>2</sup> would exempt police from being the target of all disorderly conduct offenses. Current law only exempts them from being the target of “Direct abusive or offensive language or gestures at another person ... in a manner likely to provoke immediate physical retaliation or violence by that person or another person.” This was because the Council acknowledged the special training that police should have. It does not exempt them from being the victim of “Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person’s immediate possession is likely to be harmed or taken” or “Incite or provoke violence where there is a likelihood that such violence will ensue” e.g. It would be disorderly conduct for a person to incite a mob to hurt a police officer by chanting, “stone the cop, kill the cop” when there were rocks nearby.

As to the current state of the law concerning the exemption of police from being the target for disorderly conduct offenses, OAG disagrees with the conclusion in the Relation to Current District Law portion of the Commentary that the proposal would merely clarify existing law. On page 7 the report says D.C. Code § 22-1321 (a)(1) and (a)(2) are “silent as to whether they cover conduct directed at law enforcement officers and no District case law addresses this issue.” True, (a)(1) and (a)(2) do not specifically reference law enforcement officers, but their plain terms unequivocally cover them, just as they unequivocally reach other groups that aren’t specifically mentioned (*e.g.*, tourists). Paragraph (a)(1) is satisfied by reasonable fear to “another person,” which logically includes law enforcement officers. And (a)(2) refers to incitement of provocation of violence, without regard to the identity of the potential victim. It is only (a)(3), dealing with abusive or offensive language or gestures, that carves out police officers – which is no more than what the legislative history the report cites says. On page 8 of the Committee Report it states, in relevant part, the following:

Subsection (a) proscribes breach of the peace; it prohibits conduct and language (e.g., fighting words) that is likely to provoke an outbreak of violence (e.g., a

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<sup>2</sup> The offense portion of RCC § 22A-4001 is as follows:

- (a) A person commits disorderly conduct when that person:
  - (1) Recklessly engages in conduct that:
    - (A) Causes another person to reasonably believe that there is likely to be immediate and unlawful:
      - (i) Bodily injury to another person;
      - (ii) Damage to property; or
      - (iii) Taking of property; and
    - (B) Is not directed at a law enforcement officer in the course of his or her official duties;
  - (2) While that person is in a location that, in fact, is:
    - (A) Open to the general public; or
    - (B) A communal area of multi-unit housing.



fight) ... The Committee Print rejects language proposed by OAG/MPD/USAO for paragraph (3) of this subsection because it would undercut an important purpose of the language: that the crime of using abusive or offensive language must focus on the likelihood of provoking a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse that might provoke or offend the ordinary citizen. (See *Shepherd v. District of Columbia*, 929 A.2d 417,419 (D.C. 2007)). The law should have a bright line: that offensive language directed at police officers is not disorderly conduct. Further, it seems unlikely at best that the use of bad language toward a police officer will provoke immediate retaliation or violence, not by him, but by someone else (see *Comments of the OAG, MPD, and USAO* attached to this report). [emphasis added]<sup>3</sup>

When the Council enacted the legislation it created that bright line in the part of the disorderly conduct statute that relates to “Direct abusive or offensive language or gestures at another person” and included the limitation on police officers only in that offense. RCC § 22A-4001 does not clarify the limitation concerning police officers. It expands it.<sup>4</sup>

### **RCC § 22A-4002. Public Nuisance.**

RCC § 22A-4002 provides that:

- (a) *Offense.* A person commits public nuisance when that person:
- (1) Purposely engages in conduct that causes an unreasonable interruption of:
    - (A) a lawful public gathering;
    - (B) the orderly conduct of business in a public building;
    - (C) any person’s lawful use of a public conveyance; or

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<sup>3</sup> The proposal by “OAG/MPD/USAO” appeared in an attachment to a letter written to Mr. Silbert of the Council for Court Excellence. The topic heading of that section was “Abusive or offensive words – Proposed D.C. Official Code § 22-1321(a)(3)” and the recommended change only applied to that provision (which was the only provision that had a law enforcement carve out). See page 89 of the legislative history for the Disorderly Conduct Amendment Act of 2010. So, when the Council rejected our proposal, they were necessarily only talking about the proposed rewording of (a)(3) concerning law enforcement officers in the context of abusive or offensive words.

<sup>4</sup> Given that the Council enacted D.C. Code § 22-1321 (a)(1), (2), and (3) at the same time and the Council only exempted law enforcement officers from (a)(3), it is unclear why the Commission is even delving into the legislative history to try and glean the Council’s intent. Even the Court of Appeals does not look to legislative history when the plain terms of the statute does not produce a result that is "demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571(1982). “[I]n absence of persuasive evidence to the contrary, [this Court is] not empowered to look beyond the plain meaning of a statute's language in construing legislative intent.” *United States v. Stokes*, 365 A.2d 615, 618 (D.C. 1976). The current disorderly conduct statute is not ambiguous on this point.

- (D) any person’s quiet enjoyment of his or her residence between 10:00 pm and 7:00 am;
- (2) While that person is in a location that, in fact, is:
  - (A) Open to the general public; or
  - (B) A communal area of multi-unit housing.<sup>5</sup>

One of the ways to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of business in a public building. See paragraph (a)(1)(B). The term “public building” is defined as “a building that is occupied by the District of Columbia or federal government.” See paragraph (c)(5). However, the term “occupied” is not defined. While it is clear that this offense applies to a person who disrupts the orderly conduct of public business, it is unclear which of the following locations are considered occupied by the government: a building that is owned by the public, where government offices are located, to any location where the public is invited and government business is held, or all of these locations. The focus of the prohibition, however, is in ensuring that public business can take place without undue interruption. It should not matter, therefore, where the location of the public business is held. In order to clarify and simplify this offense, we suggest that paragraph (B) be rewritten to say, “the orderly conduct of public business.” The offense would then be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of public business.” The term “public business” could then be defined as “business conducted by the District of Columbia or federal government.”

RCC § 22A-4002 (a)(1)(c) states that a person commits this offense when the person purposely engages in conduct that causes an unreasonable interruption of any person’s lawful use of a public conveyance. It is unclear if this formulation is more narrow than current law. D.C. Code § 22-1321 (c) states, “It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct with the intent and effect of impeding or disrupting the lawful use of a public conveyance by one or more other persons.” [emphasis added] So, under current law a person may be guilty of this offense if they stand in front of the bus and refuse to let the

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<sup>5</sup> Paragraph (c) lists the definitions for words and terms used in this offense. It states:

- (1) The term “purposely,” has the meaning specified in § 22A-206;
- (2) The term “bodily injury” has the meaning specified in § 22A-1001;
- (3) The term “property” has the meaning specified in § 22A-2001;
- (4) The term “lawful public gathering” includes any religious service, funeral, or similar organized proceeding;
- (5) The term “public building” means a building that is occupied by the District of Columbia or federal government;
- (6) The term “public conveyance” means any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat; and
- (7) The phrase “open to the general public” excludes locations that require payment or permission to enter or leave at the time of the offense.

bus continue on its route. The person is clearly “disrupting the lawful use of a public conveyance.” But is that person “caus[ing] an unreasonable interruption of any person’s lawful use of a public conveyance”? While the bus may be stopped, is a person’s use of the conveyance interrupted? The Comment does not help to explain the drafter’s intent. In fact, it appears to limit the scope even further. That comment states “The accused must have the intent and effect of diverting a reasonable passenger’s pathway.”<sup>6</sup> Nowhere in the current law or in the actual language of RCC § 22A-4002 (a)(1)(C) is this offense limited to pathways.

Another way to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of any person’s quiet enjoyment of his or her residence between 10:00 pm and 7:00 am. As the Comments note, this provision replaces D.C. Code § 22-1321(d). However, that provision is limited by paragraph (a) (2) which requires that the person be in a location that is, in fact, open to the general public or is a communal area of multi-unit housing when they engage in their conduct. See paragraph (a)(1)(D).<sup>7</sup> There is no reason for this limitation. In D.C. Code § 22-1321, the requirement that the disorderly conduct occur in a place that is open to the general public or in the communal areas of multi-unit housing only applies to the offenses that are covered by the disorderly conduct provision in RCC § 22A-4001.<sup>8</sup> There is no reason to extend this limitation to the parts of the disorderly conduct offense that is covered by the public nuisance provision of RCC § 22A-4001.<sup>9</sup>

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<sup>6</sup> See the last sentence on page 13 of the Report.

<sup>7</sup> Paragraph (a)(1)(D) states, “While that person is in a location that, in fact is ... Open to the general public... or ... a communal area of multi-unit housing,” [emphasis added]. For purposes of this analysis, we assume that the “that person” refers to the person who commits the public nuisance and not the person referred to in the immediately preceding paragraphs (i.e. “(C) any person’s lawful use of a public conveyance; or (D) any person’s quiet enjoyment of his or her residence...”).

<sup>8</sup> D.C. Code § 22-1321 (a) provides that:

In any place open to the general public, and in the communal areas of multi-unit housing, it is unlawful for a person to:

- (1) Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person’s immediate possession is likely to be harmed or taken;
- (2) Incite or provoke violence where there is a likelihood that such violence will ensue; or
- (3) Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence by that person or another person. [emphasis added]

<sup>9</sup> As noted in the text, both the disorderly conduct and the public nuisance provisions contain the requirement the person be in a location that is open to the general public. However, the definitions of what “open to the general public” is different in these two offenses. Subparagraph (c)(4) of the disorderly conduct provision states “The phrase ‘open to the general public’ excludes locations that require payment or permission to enter or leave.” Subparagraph (c)(7) of

The possibility of arrest and prosecution under D.C. Code § 22-1321(d) has been an effective tool in quieting people who in their own house or apartment listen to their stereos, play musical instruments, or host parties that unreasonably annoy or disturb one or more other persons in their residences. In fact, D.C. Code § 22-1321(d) has been touted as the only effective tool used to combat noise that disrupts people's ability to enjoy their homes at night.<sup>10</sup>

There are other instances where the limitation of the location of the person who is engaging in the conduct that causes unreasonable interruptions, under (a)(2), is irrelevant. For example, "A person commits a public nuisance when that person [p]urposely engages in conduct that causes an unreasonable interruption of ... a lawful public gathering..." See (a)(1)(A). Paragraph (c) (4) defines a "lawful public gathering as "any religious service, funeral or similar organized proceeding." It does not matter whether a person who wants to disrupt a funeral service is standing on a corner that is open to the public or is standing on the roof of a private building across the street when they use a megaphone to unreasonable interrupt the public gathering.

The revised public nuisance statute also eliminates urinating and defecating in a public place as a disturbance of the public peace offense. D.C. Code § 22-1321(e). OAG supports decriminalization. However, while public urination and defecation would be better handled as a civil infraction punishable by a civil summons and a fine, the District should seek to develop a robust civil infraction enforcement system.

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the public nuisance provision, on the other hand, states, "the phrase 'open to the general public' excludes locations that require payment or permission to enter or leave at the time of the offense." [emphasis added] It is unclear whether the difference was intentional and if it was why these two related offenses would vary on a basic element.

A separate issue with the definitions of "open to the general public" cited above, is that the phrase only gives a slice of a definition, by identifying a specific thing that's excluded from the definition ("excludes locations that require payment..."). Ordinarily, a definition should be exhaustive, covering the realm of what the term includes as well as excludes.

<sup>10</sup> The Criminal Code Reform Commission may want to listen to the hearing on Bill 22-839, the "Amplified Noise Amendment Act of 2018" which was held on July 2, 2018. Although the hearing was focused on why the noise regulations contained in the DCMR are inadequate to address various noise problems, Councilmembers and witnesses were in near agreement that D.C. Code § 22-1321 (d), as written, was the only effective tool in addressing noise issues.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** September 14, 2018

**SUBJECT:** First Draft of Report #24, Failure to Disperse and Rioting

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #24 - Failure to Disperse and Rioting.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-4102. Failure to Disperse.**

The elements portion of the failure to disperse provision is as follows:

- (a) *Offense.* A person commits failure to disperse when that person:
- (1) In fact:
    - (A) Is in the immediate vicinity a course of disorderly conduct, as defined in § 22A-4001, being committed by five or more persons;
    - (B) The course of disorderly conduct is likely to cause substantial harm to persons or property; and
    - (C) The person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct; and
  - (2) The person knowingly fails to obey a law enforcement officer's dispersal order;

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

## (3) When the person could safely have done so.

One way that this offense can be committed is when a person “[is] in the immediate vicinity [of]<sup>2</sup> a course of disorderly conduct...being committed by five or more persons...” See (a)(1)(A) above. On page 4, footnote 3, it states that the phrase “immediate vicinity,” “as in the disorderly conduct statute, . . . refers to the area near enough for the accused to see or hear others’ activities.”<sup>3</sup> If this footnote is meant to articulate a specific definition for “immediate vicinity,” that definition should be in the text (as it should be in the rioting statute).<sup>4</sup>

As noted above, one element of this offense may be “[t]he person’s continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct...” [emphasis added] The Commentary notes, on page 4, that “Substantial impairment is more than trivial difficulty.” There is a footnote to that statement that reads, “For example, the need for a law enforcement officer to walk around a peaceable demonstrator in order to reach the place where the group disorderly conduct is occurring would not alone amount to substantial impairment.” The problem is that the word “substantial” is not defined in the proposal. It is a long way from “more than trivial difficulty” to “substantial.” If the Commentary correctly captures the level of police impairment, then either the word “substantial” should be defined as “nontrivial” or the phrase in the Commentary should be substituted in the text of the offense.

Pursuant to paragraph (d), the “Attorney General for the District of Columbia shall prosecute violations of this section.” We agree with this designation but would like to avoid needless litigation concerning the Council’s authority to give prosecutorial authority to OAG. The penalty provision for the failure to disperse offense states, “Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.” To avoid needless litigation over the history of this provision, whether it is a police regulation or a penal statute in the nature of police or municipal regulations, and its interplay with D.C. Code § 23-101, OAG recommends that the penalty provision be redrafted to state, “Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X] or a maximum fine of [X].”

In the Explanatory Note, and elsewhere in the Commentary it states, “The offense codifies in the D.C. Code longstanding authority exercised under DCMR 18-2000.2 (Failure to obey a lawful

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<sup>2</sup> The text of paragraph (a)(1)(A) states, “Is in the immediate vicinity a course of disorderly conduct ...” This may be a typo. We assume that it was supposed to read, “Is in the immediate vicinity of a course of disorderly conduct ...”

<sup>3</sup> The footnote should reference the rioting statute (RCC § 22A-4102(a)(2)), not the disorderly conduct statute (which doesn’t use the phrase).

<sup>4</sup> The term “immediate vicinity”, as noted in the text, is used in, but not defined in the redrafted rioting offense. Footnote 26 in the Commentary does state, “The term “immediate vicinity” in the revised rioting statute refers to the area near enough for the accused to see or hear others’ activities” and then says, “. See *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).” The Commission should include a definition in both the failure to disperse and rioting offenses based upon this footnote.

police order) in the context of group disorderly conduct.”<sup>5</sup> It must be noted, that the regulation that this offense is codifying only relates to vehicular or pedestrian traffic. As the elements of the offense does not include reference to vehicular or pedestrian traffic, it appears to be broader in scope than the provision that it purports to be replacing. To the extent that it does not subsume the existing regulation, the explanation should be expanded and affirmatively state that the enactment of this provision is not intended to repeal that regulation. Examples of offenses covered by the existing regulation include when officers tells a woman who is double parked to move her vehicle and she does not, asks a man to partially roll down his window so that the officer can test for a tint infraction and he does not, or when an officer sees a woman lift the security tape labeled “POLICE LINE DO NOT CROSS” and she refuses to leave the area when told to do so by a police officer.

In the explanation of subsection (a)(1)(C) in the Commentary, it states, “The actor’s engagement in conduct that is protected by the First Amendment, Fourth Amendment, or District law is not a defense to failure to disperse because such rights are outweighed by the need for law enforcement to effectively address group disorderly conduct.”<sup>6</sup> While OAG agrees with this statement, at least as far as it speaks of the First Amendment and District law, the Fourth Amendment protects against unreasonable searches and seizures, as such, it is not apparent why it is referenced here.

### **RCC § 22A-4101. Rioting.**<sup>7</sup>

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<sup>5</sup> The regulation states, “No person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians and to the operators of vehicles.”

<sup>6</sup> The Fourth Amendment to the U.S. Constitution states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

<sup>7</sup> The offense portion of RCC § 22A-4101, rioting, is as follows:

- (a) A person commits rioting when that person:
  - (1) Commits disorderly conduct as defined in § 22A-4001;
  - (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct;
  - (3) And the conduct is committed:
    - (A) With intent to commit or facilitate the commission of a crime involving:
      - (i) Bodily injury to another person;
      - (ii) Damage to property of another; or
      - (iii) The taking of property of another;
    - (B) While knowingly possessing a dangerous weapon; or

Paragraph (a) states that a person commits rioting when a person “(1) Commits disorderly conduct ... (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct ... (3) And the conduct is committed . . .” [emphasis added] We read this sentence to mean that “the conduct” in subparagraph (a)(3) refers to the person’s conduct in (a)(1) and not the group conduct in (a)(2) notwithstanding that the reference to “group conduct” appears between these two iterations. To clarify this point we recommend that subparagraph (3) be redrafted to read “And the person’s conduct is committed...”

One way that this offense can be committed is when a person commits disorderly conduct, reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct and the conduct is committed with intent to commit or facilitate the commission of a crime involving bodily injury to another person. [emphasis added] See (a)(3)(A)(i). As to the offense “involving bodily injury to another person”, the question arises whether this other person must be someone other than the person who is committing the disorderly conduct, the four or more other persons who are also committing disorderly conduct, or both. We agree that the offense of rioting should not include situations where the person who is committing disorderly conduct, with others, hurts himself. We want to be clear, in addition, that the text was not meant to exclude situations where a person intends to commit a crime involving bodily injury to someone else who is also being disorderly. We note that the Comment would not require such a reading.<sup>8</sup> Take for example the situation where there is meeting of international finance ministers in the District and protests and counter-protests occur. These protestors represent different and contradictory perspectives on the direction of world finance, just as the counter-protestors do. A subset of the protestors, say anarchists become disorderly, a different subset, say a group supporting funding a repressive country’s regime, also becomes disorderly, and a group of the anarchists decide to injure a few of the regime protestors. There is no reason why the offense of rioting should not apply to these anarchists.

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(C) While knowing any participant in the disorderly conduct is using or plans to use a dangerous weapon.

<sup>8</sup> See Comment on page 10 that “‘Another person’ means any person who is not a participant in the rioting.” So, another person may include a person who is disorderly, but not rioting.



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** September 14, 2018

**SUBJECT:** First Draft of Report #25, Merger

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #25 - Merger.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**§ 22A-212. Merger of Related Offenses.**

Section 22A-212 makes changes to District merger law as it has evolved under case law. On page 10 of the Commentary it states, “Subsections (a)-(d) of RCC § 212 replace this judicially developed approach with a comprehensive set of substantive merger policies. Many of these policies are based on current District law, and, therefore, are primarily intended to clarify the mechanics of merger analysis for the purpose of enhancing the consistency and efficiency of District law. However, a few of these policies broaden the District’s current approach to merger for purposes of enhancing the proportionality of the D.C. Code.”

Acknowledging that the current scope of the RCC does not include a redrafting of every District Code offence, the question not specifically addressed by the merger provision or its Commentary

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

is how this provision should be applied to merger questions where a defendant has been found guilty of both an RCC offense and another criminal offense that has not yet been redrafted.

While it is clear that RCC § 22A-103's provision that "Unless otherwise provided by law, a provision in this title applies to this title alone." would clearly mean that the RCC's merger provision would not apply in situations where the court is examining whether two non-RCC offenses merge, the text of 22A-103's would also seem to apply to situations where the court is considering whether a mixed RCC and non-RCC offense merge. To avoid litigation on this point, the Commission should clarify its position on this issue in a subsequent Report.

RCC § 22A-212 (a) states that there is a presumption for merger in a number of circumstances. One of these is where "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense..." In the Commentary, on page 6, it states, "This principle applies when the facts required to prove offenses arising from the same course of conduct are "inconsistent with each other as a matter of law."<sup>2</sup> OAG believes that this clarification is too central to the analysis to be left in the Commentary and that it should be moved to the text of the merger provision. It should state, "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law."

Paragraph (d) establishes a rule of priority based upon the relative seriousness of the offenses as to which offense should remain when offenses merge. In the Commentary, on page 9, the Report says, "where, among any group of merging offenses, one offense is more serious than the others, the conviction for that more serious offense is the one that should remain." The term "serious", however, is not defined in the text. Footnote 27 offers something that can be used as definition.<sup>3</sup> We recommend incorporating the language of this footnote into the text of the merger provision.

OAG agrees with intent of paragraph (e), final judgment of liability, that no person should be subject to a conviction until after "[t]he time for appeal has expired; or ... [t]he judgment appealed from has been affirmed."<sup>4</sup> [emphasis added] We make one technical suggestion. As the Court of Appeals may affirm, affirm in part, or remand, we suggest that paragraph (e)(2) be amended to say, "The judgment appealed from has been decided."

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<sup>2</sup> The Commentary cites to *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States*, 407 F.2d 1199, 1223 (1967) (en banc)) for this proposition.

<sup>3</sup> Footnote 27 states, "The most serious offense will typically be the offense that is subject to the highest offense classification; however, if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense is "most serious" for purposes of subsection (d)."

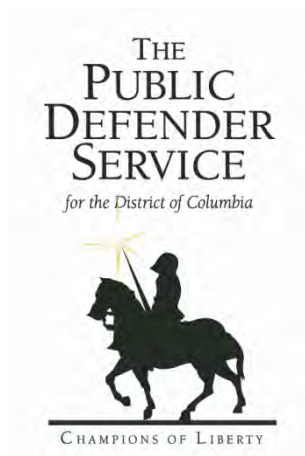
<sup>4</sup> This provision states:

FINAL JUDGMENT OF LIABILITY. A person may be found guilty of two or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:

- (1) The time for appeal has expired; or
- (2) The judgment appealed from has been affirmed.

## M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Public Defender Service for the District of  
Columbia

Date: December 20, 2018

Re: Comments on First Draft of Report 26,  
Sexual Assault and Related Provisions

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The Public Defender Service makes the following comments on Report #26, Sexual Assault and Related Provisions.

1. RCC § 22A-1301(9) and (11) define the phrases “person of authority in a secondary school” and “position of trust with or authority over.” Rather than creating a limited and precise definition, in these two instances the RCC use the word “includes” to describe the scope of the legal terms. In other instances in this chapter and in other chapters, the RCC uses the word “means” when defining a term or statutory phrase. The use of the word “includes” falls short of Due Process requirements to provide notice of criminal offenses.<sup>1</sup> It also fails to correct existing ambiguity in D.C. Code § 22-3009.03 and 22-3009.04. Precise definitions in these two instances are particularly important because the terms relate to sexual offenses that are criminalized only because of the status of the complainant or the relationship between the complainant and the defendant. In the absence of the prohibited relationship between the defendant and the complainant, these interactions may be consensual and legal.
2. PDS makes several recommendations for the definition of “person of authority in a secondary school” and for other terms in RCC § 22A-1305(a) and (b).

With respect to RCC § 22A-1301(9), person of authority in a secondary school, PDS recommends the following language.

(9) “Person of authority in a secondary school” ~~includes~~ means any teacher, counselor, principal, or coach in a secondary school attended by the complainant or where the complainant receives services or attends regular programming.

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<sup>1</sup> See, e.g., *McNeely v. United States*, 874 A.2d 371, 379 (D.C. 2005).

In addition to being more precise, the RCC’s definition should correspond to the harm it seeks to prevent. The term “person of authority in a secondary school is used in RCC § 22A-1305, Sexual Exploitation of an Adult. RCC § 22A-1305(a)(2)(A) and RCC § 22A-1305(b)(2)(A) prohibit sexual acts or contact where the defendant is a person of authority in a secondary school and the complainant is under age 20 and “is an enrolled student in the same school system.” Consent is not a defense to RCC § 22A-1305.

“Same school system” is not defined in RCC § 22A-1305. As such, it appears that it would prohibit otherwise consensual sexual contact between any 19 year old enrolled at a DCPS school and most DCPS employees. It would prohibit a consensual sexual relationship between a 19 year old student at Wilson High School and a 23 year old athletics coach at Brookland Middle School. RCC § 22A-1305 would hold the coach criminally liable, and would likely require ten years of sex offender registration although nothing about the “complainant’s” status as a student in the same school system played a role in the consensual relationship. Across the District, DCPS employs more than 7,000 individuals.<sup>2</sup> Prohibiting consensual relationships between adults because of the defendant’s status as a DCPS employee goes too far. Under circumstances where the complainant is legally capable of consent, there is no allegation of non-consent, and there is no inherently coercive environment created by the complainant’s status as a student at one school and the defendant’s status as an employee at another, the RCC should not criminalize the conduct.

The term “same school system” may also be under inclusive. Nearly half of the District’s students attend charter schools. Each charter school organization forms its own local education agency. Under this definition a relationship between a coach at one charter school and a student at another unrelated charter school would not fall under RCC § 22A-1305 even if the two charter schools have a close relationship and the student participates in sports at both schools.<sup>3</sup> A definition that requires a closer connection between the student and the school employee would resolve this.

RCC §22A-1305(a) and (b) should criminalize consensual relationships between adults, or teens age 16 and older, only where the circumstances are truly coercive because of the defendant’s power within the school. A definition that limits liability to relationships where the student and the defendant are assigned to the same school, not just the same school system, appropriately draws the line at preventing coercion but not being overly broad.

Within the RCC § 22A-1305, the age of consent for sexual conduct with persons of authority in secondary schools should be set at 18 instead of 20, as currently proposed. It makes sense to add protections for youth age 16 and 17 given the potential for coercion in a school setting and the potential for consent derived from the pressures of that setting. However, once a student reaches age 18, he or she should be free to engage in consensual sexual conduct with others, including individuals who may have positions of authority within the school setting. Those relationship may very well violate employee norms and in

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<sup>2</sup> <https://dcps.dc.gov/page/dcps-organization>.

those instances should lead to the serious sanction of job loss, but they should not result in criminal liability. Relationships between students and school personnel can be prosecuted under RCC § 22A-1303(b), second degree sexual assault, when the power differential or other actions taken by the defendant result in the coercion of the student.<sup>4</sup>

3. With respect to RCC § 22A-1301(11), “position of trust with or authority over,” PDS recommends the following changes.

(11) “Position of trust with or authority over” ~~includes~~ means a relationship with respect to a complainant of:

- (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;
- (B) A legal or de facto guardian or any person, more than 4 years older than the ~~victim-complainant~~, who resides intermittently or permanently in the same dwelling as the complainant;
- (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the act; and
- (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution where the complainant is an active participant or member, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program where the complainant is an active participant or member, ~~including~~ meaning a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff that has regular contact with the complainant in the above settings.

These recommendations mirror PDS’s recommendations for RCC § 22A-1305. The term position of trust or authority is used in the RCC provisions that criminalize sexual abuse of a minor and in sentencing enhancements. A position of trust and authority should be more than a label based on the defendant’s employment or status. The definition should capture situations where the defendant’s close relationship to the complainant or minor allow for an abuse of trust or additional harm.

4. PDS makes the following recommendations for revisions to the definition of coercion at RCC § 22-1301(3).

The RCC definition of coercion is employed primarily in second and fourth degree sexual assault, RCC § 22A-1303(b) and (d). As currently drafted the defendant must knowingly cause the complainant to submit to or engage in a sexual act or contact through some coercive conduct as defined in RCC §22-1301(3). While the requirement that the

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<sup>4</sup> RCC § 22-22A-1301(3) defines coercion as threatening, among other things, to take or withhold action as an official, or to cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

defendant knowingly caused the sexual act or conduct through coercion provides some strength to the offense definition, the RCC definition of coercion allows seemingly minor conduct to qualify as coercion. This will require jurors to decide the causal question of the connection between the alleged coercion and the sexual act rather than more appropriately limiting the charges that may be brought under a coercion theory.

The current RCC definition includes sexual acts coerced by threats of ridicule. Ridicule should not be included within the specific definition of coercion. Without more, there is insufficient reason to believe that the threat of ridicule would cause a complainant to perform or submit to a sexual act. Where the ridicule is serious or where the defendant knows that the complainant is particularly vulnerable due to his or her background or particular circumstances, the conduct will fall within the catchall provision of coercion, RCC § 22A-1301(3)(G). Similarly, a threat to cause hatred or contempt of a deceased person should be considered coercive only when it meets the standard of RCC § 22A-1301(G) and should not be a standalone provision of coercion. A watered down definition of coercion brings the possibility of arrests and pretrial incarceration for circumstances that are not sufficiently serious to compel the submission of a reasonable person in the same circumstances.

PDS also has concerns about how the RCC addresses coercion in the context of controlled substances and prescription medication.<sup>5</sup> Generally speaking, this sub-definition of “coercion” needs to focus more precisely on what makes the conduct “coercive” or what makes a person feel *compelled* to submit to or engage in a sexual act or sexual contact. The conduct that makes engaging in a sexual act or sexual contact *compulsory* must be as serious as the other conduct proscribed in the definition, such as threatening to commit a criminal offense against the person.<sup>6</sup> According to the commentary, this sub-definition was modeled on the current definition of “coercion” in the human trafficking chapter of the D.C. Code.<sup>7</sup> That definition refers to controlling a person’s access to “an addictive or controlled substance.”<sup>8</sup> PDS recommends that “coercion” should be about restricting access to an addictive substance (that is also a controlled substance), not merely about restricting access to a controlled substance. What makes restricting access to a substance coercive or compelling conduct is that the substance is one to which the person is addicted. It would not be coercive to restrict a person’s access to cocaine *unless the person is addicted to cocaine*. As the Commission notes, limiting a person’s access to alcohol, which is an addictive substance, “is not as inherently coercive as limiting a person’s access to a controlled substance, as it is relatively easy to obtain alcohol by other means.”<sup>9</sup> PDS agrees with the point but posits that the Commission drew the wrong conclusion from it. Restricting access to alcohol is not “inherently” coercive and, unless one is addicted to it, neither is restricting a person’s

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<sup>5</sup> RCC § 22A-1301(3)(F).

<sup>6</sup> See RCC § 22A-1301(3)(A).

<sup>7</sup> Report #26, page 10.

<sup>8</sup> See D.C. Code § 22-1831(3)(F).

<sup>9</sup> Report #26, page 10, footnote 40.

access to a controlled substance. More to the point, restricting a person's access to alcohol is not coercive at all *precisely because* it is relatively easy for a person to obtain alcohol by other means. A person faced with the demand, "have sex with me or I won't give you this beer," is unlikely to feel compelled to submit to the sexual act, as the person can easily get beer elsewhere. A person faced with the demand, "have sex with me or I won't give you this heroin," is also unlikely to feel compelled to submit to the sexual act if (A) the person is not addicted to heroin and (B) the person can get heroin from another source. Thus, to be "coercive" restricting access should be about restricting access to a controlled substance to which the person is addicted and should be about more than a mere refusal to sell, exchange, or provide. Finally, PDS asserts that the coercive or compelling conduct involving addictive substances and prescription medication is the same. It is not clear what the difference would be between "limiting access to a controlled substance" and "restricting access to prescription medication" and it is certainly not clear that there should be a difference.

The term "limit access" is too broad to truly reach coercive acts. Limit access would seem to include the defendant not sharing his own controlled substances, to which the complainant has no right. It also criminalizes as second and fourth degree sexual abuse commercial sex where the currency is controlled substances. For instance, it should not be second degree sexual abuse if the defendant requires a sexual act as payment for controlled substances. The conduct of limiting access by refusing to sell drugs unless the complainant performs a sexual act should fall squarely within commercial sex and should not be second or fourth degree sexual abuse. With respect to prescription medication, it should be clear that the coercive conduct is limiting a person's access to their own prescribed medicine. A pharmacist refusing to fill a prescription unless a sexual act is performed in exchange is engaging in prostitution, not attempted sexual assault. Because there are other pharmacies, a person who is unwilling to pay that price for his or her prescribed medication, is not being compelled to engage in the sexual act. However, restricting a person's access to their own medicine would in many circumstances be coercive.

PDS recommends the statutory language below.

- (3) "Coercion" means threatening that any person will do any one of, or a combination of, the following:
- (A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
  - (B) Accuse another person of a criminal offense or failure to comply with an immigration regulation;
  - (C) Assert a fact about ~~another person~~ the complainant, ~~including a deceased person~~, that would tend to subject ~~that person~~ the complainant to hatred, or contempt, ~~or ridicule~~, or ~~to~~ would substantially impair that person's credit or business repute;
  - (D) Take or withhold action as an public official, or cause a public official to take or withhold action;
  - (E) Inflict a wrongful economic injury;

- (F) Restrict ~~Limit~~ a person's access to a controlled substance, as defined in D.C. Code 48-901.02, to which the person is addicted and ~~controlled substance~~ or restrict a person's access to that person's prescription medication; or
- (G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

In addition to the drafting changes above, PDS recommends that the following language be added to the commentary: Restricting a person's access to a substance to which the person is addicted is not the same as refusing to sell or provide an addictive substance or refusing to fill a person's prescription. Nor is restricting a person's access the same as suggesting a sexual act or sexual contact as a thing of value in exchange for a controlled substance to which the person is addicted or for prescription medication. Such suggestion, and such exchange, may constitute prostitution or soliciting prostitution, but it is not, standing alone, coercion for the purposes of second and fourth degree sexual abuse.

5. PDS recommends a minor modification to RCC § 22A-1303. RCC § 22A-1303(a)(C)(i) prohibits administering an intoxicant without the claimant's effective consent "with intent to impair the complainant's ability to express unwillingness." The RCC should explicitly add: "with intent to impair the complainant's ability to express unwillingness to participate in the sexual act." The above recommendation clarifies the phrase "ability to express unwillingness" and ensures that the motive in providing the intoxicant is connected to the sexual assault.
6. RCC § 22A-1303(f) provides for penalty enhancements for sexual offenses based on the characteristics of the complainant and/or the defendant. PDS objects to the use of enhancements generally. Sexual offenses carry lengthy terms of incarceration. The Sentencing Guidelines provide wide ranges of guidelines-compliant sentences for sex offenses. Given the high statutory maxima and the wide ranges available under the Sentencing Guidelines, sentencing enhancements are not necessary to guide judicial discretion. Judges will examine the facts of each case and sentence appropriately. Defendants convicted of sexual crimes against children younger than 12 will typically receive longer sentences without the effect of any enhancement because the facts of the case will warrant a longer sentence. Sentencing enhancements do not serve a meaningful purpose in guiding judicial discretion and if they are assigned a mandatory minimum or a particular offense severity group on the Sentencing Guidelines they may inappropriately cabin judicial discretion to sentence based on the particular facts of the case.

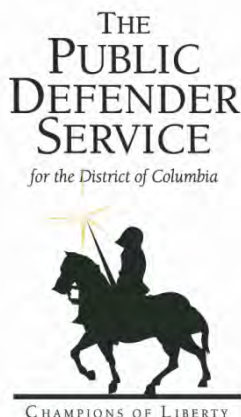
If the RCC retains sentencing enhancements, PDS recommends re-evaluating the purpose of RCC § 22A-1303(f)(4)(E) which provides for a penalty enhancement where "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, under 65 years old." If the intent is to focus on the unique vulnerabilities of the complainant, the age should be raised to over age 75. If the intent of the RCC is to punish young defendants who may take advantage of an individual who is over age 65, then the enhancement should also provide for an age gap. In that instance, RCC § 22A-1303(f)(4)(E) should read: "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, at least ten years younger than the complainant."



RCC § 22A-1303(C) adds a sentencing enhancement for instances where the “actor recklessly disregarded that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least two years older than the complainant.” PDS objects to this sentencing enhancement in particular. It does not address a particular harm and draws lines that may be entirely arbitrary. A sexual assault of a 17 year old by a 19 year old may be no different than a sexual assault of an 18 year old by a 21 year old. The age distinction drawn in the RCC in many instances will have no correlation to the particular harm of this conduct as opposed to other similar conduct. Sexual assault has devastating consequences for all and arbitrarily drawing this additional age-based line does not enhance the proportionality of punishment or meaningfully distinguish between the harms inflicted. As stated above, judges will have sufficient sentencing discretion to appropriately consider the particular harms caused and the circumstances of the defendant.

7. RCC § 22A-1306, sexually suggestive contact with a minor, prohibits instances where “with the intent to cause the sexual arousal or sexual gratification of any person knowingly... (D) [the actor] touches the actor’s genitalia or that of a third person in the sight of the complainant.” As written the RCC criminalizes a minor’s incidental viewing of sexual activity as a result of sharing a room or a home with others. RCC § 22A-1306(a)(2)(D) would criminalize a sibling masturbating or parents engaging in consensual sex in a room shared with a minor. The unintentional result is to criminalize typical conduct that occurs in households without private space for each individual. RCC § 22A-1306(a)(2)(D) should include an intent element that is related to the minor child. PDS proposes: “[the actor] touches the actor’s genitalia or that of a third person in the sight of ~~complainant~~ a minor child with the intent to gratify the actor’s sexual desire with respect to the minor child or to humiliate or degrade the minor child.”

# M E M O R A N D U M



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: December 20, 2018

Re: Comments on First Draft of Report No. 27,  
Human Trafficking and Related Statutes

PDS has the following comments about RCC human trafficking and related offenses.

1. PDS recommends making the same changes to the definition of “coercion” as the term is used in the human trafficking chapter that PDS proposed for “coercion” for the sexual assault chapter.
2. PDS objects to the term “harbor” where it is used in Trafficking in Labor or Services,<sup>1</sup> Trafficking in Commercial Sex,<sup>2</sup> Sex Trafficking of Minors,<sup>3</sup> and Sex Trafficking Patronage.<sup>4</sup> Although it is used in the current D.C. Code,<sup>5</sup> that use is grammatically incorrect; the Revised Criminal Code should not perpetuate the misuse of the term. A “harbor” is a place of refuge. “To harbor” means to provide shelter or sanctuary. While we may speak of “harboring a fugitive” or “harboring a criminal,” that is not an incorrect use of the term. Harboring a fugitive means to provide shelter for a fugitive. From the fugitive’s perspective, the shelter is a “place of refuge;” it is simply that society does not want fugitives or criminals to have a place of refuge. In contrast, society likely supports persons and organizations that provide places of refuge to victims of trafficking.<sup>6</sup> PDS recommends replacing “harbor” with the term “house.”

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<sup>1</sup> RCC § 22A-1605(a)(1).

<sup>2</sup> RCC § 22A-1606(a)(1).

<sup>3</sup> RCC § 22A-1607(a)(1).

<sup>4</sup> RCC § 22A-1610(c)(2).

<sup>5</sup> For example, it is used at D.C. Code § 22-1833, Trafficking in labor or commercial sex acts, and at D.C. Code § 22-2704, Abducting or enticing a child from his or her home for purposes of prostitution, harboring such a child.

<sup>6</sup> See e.g., “Apple wins Stop Slavery Award, touts new initiative to hire human trafficking victims at retail stores,” <https://appleinsider.com/articles/18/11/14/apple-wins-stop-slavery-award-touts-new-initiative-to-hire-human-trafficking-victims-at-retail-stores>.

3. PDS recommends changing the offense titles so the title better conveys the relative seriousness of the conduct. Forced labor or services and forced commercial sex make liable the person or the accomplice who, by means of coercion or debt bondage, causes another to engage in labor or services or in commercial sex. Whether or not the forced labor or services or forced commercial sex is part of a larger criminal enterprise, this conduct is at the core of the offense and is the most serious. The public perception of “trafficking” is that it is particularly serious, a form of modern-day slavery. Labeling the core offense as “forced commercial sex” and the supporting conduct as “trafficking” is precisely backwards. Thus, PDS recommends that “Forced Labor or Services” should be retitled to “Labor or Services Trafficking” and “Forced Commercial Sex” should be retitled to “Commercial Sex Trafficking.” Further, “Trafficking in Labor or Services,” “Trafficking in Commercial Sex,” “Sex Trafficking of Minors” should be retitled to “Assisting Labor or Services Trafficking,” “Assisting Commercial Sex Trafficking,” and “Assisting Sex Trafficking of Minors” respectively.
  
4. PDS recommends rewriting RCC § 22A-1605, Assisting Labor or Services Trafficking (formerly Trafficking in Labor or Services), and RCC § 22A-1606, Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex). The offenses criminalize conduct performed in aid of forced labor or services or forced commercial sex. As the Advisory Board discussed extensively with the Commission at the December 19, 2018 public meeting, there is a great danger that the offense will be written too broadly and criminalize persons who contribute minimally to the crime and have no vested interest in the success or outcome of the crime. Examples we discussed include the cab driver who drives someone he knows is a “trafficking victim” to the grocery store; the cab driver who one time drives someone she knows is being trafficked to a brothel; a pizza delivery person with a standing order to deliver pizza to a place the person knows houses trafficking victims; a hotel maid who cleans the room knowing it was a place where commercial sex trafficking took place. PDS strongly argues for a narrow offense and has a number of drafting recommendations. First, PDS agrees with the suggestion made during our Advisory Board discussion that the greatest concern is with persons who assist trafficking by housing, hoteling,<sup>7</sup> transporting, recruiting, and enticing. PDS therefore recommends narrowing the offense to criminalize only that conduct. Second, the offenses, including the penalties, and the commentary should make clear the seriousness of the offense and the culpability of the actors relative to each other. As stated above at PDS comment (3), labor or services trafficking or commercial sex trafficking, that is actually causing a person to engage in labor, services, or commercial sex by means of coercion or debt bondage, is the most serious conduct. A person who engages in conduct, such as transporting a person, *with the purpose* of assisting in the commission of the trafficking is liable as an accomplice and may be punished accordingly. Less serious, but still culpable, is an actor who knowingly recruits, entices, houses, hotels, or transports a person *with the intent* that the person be caused to engage in labor, services or commercial sex by means of coercion or debt bondage. “With intent” requires purpose or knowledge so it allows for a conviction based on a lower mental state than accomplice liability would require. But it solves the problem discussed at the December 19, 2018 Advisory Board meeting that the assisting offenses as currently drafted allow for criminal liability for an actor

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<sup>7</sup> Though not commonly used as a verb, the Oxford English Dictionary confirms that “hotel” can be a verb.

who transports a person and who is aware of a substantial risk (or even knows) that the person is being trafficked, but the transportation does not aid the commission of the trafficking.

PDS recommends rewriting the offense elements of Assisting Labor Services Trafficking and Assisting Commercial Sex Trafficking as follows:

- (1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports, ~~provides,~~ ~~obtains, or maintains by any means,~~ another person;
- (2) With intent that the person be caused to provide [labor or services][commercial sex];
- (3) By means of coercion or debt bondage.

For the same reasons, PDS recommends rewriting the offense elements of RCC § 22A-1607, Assisting Sex Trafficking of Minors, as follows:

- (1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports, ~~provides, obtains,~~ ~~or maintains by any means,~~ another person;
- (2) With intent that the person be caused to engage in a commercial sex act;
- (3) With recklessness as to the complainant being under the age of 18.

5. With respect to the RCC offenses of Commercial Sex Trafficking (formerly Forced Commercial Sex), Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex), and Assisting Sex Trafficking of Minors (formerly Sex Trafficking of Minors), PDS recommends clarifying that the provision or promise of something of value necessary to make the sex act “commercial” must be provided or promised by someone other than the actor who is “forcing” the commercial sex by coercion or debt bondage. This is necessary to distinguish those offenses from sexual assault. To understand how the offenses could currently overlap, imagine the following scenario: Actor restricts complainant’s access to complainant’s insulin by hiding it. Actor says, “I’ll give you your insulin back if you have sex with me.” If complainant complies, that would be second degree sexual assault by coercion.<sup>8</sup> PDS is concerned that, as currently drafted, the RCC forced commercial sex statute could be interpreted to also criminalize that conduct because the actor would be causing the complainant, by means of coercion, to engage in a sexual act that was made “commercial” by being in exchange for the insulin, a thing of value. The difference between sexual assault and forced commercial sex is that it is a third person who is giving something of value in exchange for the sexual act or sexual contact and that thing of value is different from that which is being used to coerce the complainant’s compliance. PDS recommends rewriting Forced Commercial Sex as follows:

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<sup>8</sup> See RCC § 22A-1303(b)(2)(A).

~~A person~~ An actor or business commits the offense of commercial sex trafficking ~~forced commercial sex~~ when that ~~person~~ actor or business:

- (1) Knowingly causes a person to engage in a commercial sex act with another person;
- (2) By means of coercion or debt bondage.

Assisting Commercial Sex Trafficking and Assisting Sex Trafficking of Minors should be rewritten similarly. For the same reason, Sex Trafficking Patronage should be modified to distinguish it from sexual assault. First Degree Sex Trafficking Patronage should be written as follows:

~~A person~~ An actor commits the offense of first degree sex trafficking patronage when that ~~person~~ actor:

- (1) Knowingly engages in a commercial sex act;
- (2) When coercion or debt bondage was used by another person or a business to cause the person to submit to or engage in the commercial sex act;
- (3) With recklessness that the complainant is under 18 years of age.

Second and third degree sex trafficking patronage should be rewritten similarly.

6. With respect to RCC § 22A-1608, Benefitting from Human Trafficking, the RCC Commentary states that the offense “criminalizes knowingly obtaining any benefit or property by participating, other than through the use of physical force, coercion or deception, in an association of two or more persons...”<sup>9</sup> PDS questions where in the offense elements it is clear that the participation must be “other than through the use of physical force, coercion or deception.” PDS recommends rewriting the offense to state more clearly the exclusion of the use of physical force, coercion or deception.
7. PDS recommends rewriting RCC § 22A-1608, Benefitting from Human Trafficking, to allow for greater differentiation between offender culpability. The only distinction between the two degrees of benefitting is whether the group, in which the actor participates, is engaged in forced commercial sex (first degree) or forced labor or services (second degree). Thus, the person who is a “kingpin” in a group and who gains significant benefits from their participation is treated the same as the person whose participation in the group is sufficiently marginal that they are only disregarding a substantial risk that the group participates in the forced commercial sex or labor or services. PDS recommends increasing the mental state for first and second degree to knowing that the group has engaged in conduct constituting forced commercial sex (first degree) or forced

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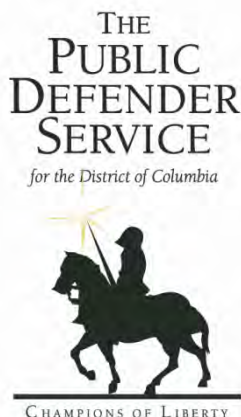
<sup>9</sup> Report #27, page 49. The report also says “Subsection (a)(2) [of RCC § 22A-1608] specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons.” *Id.*

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labor or services (second degree). PDS further proposes creating a third degree benefitting from human trafficking offense that encompasses both forced commercial sex and forced labor or services and that has the mental state of “recklessness” with respect to the forced conduct in which the group engages.

# M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: December 20, 2018

Re: Comments on First Draft of Report No. 28,  
Stalking

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PDS has the following comments about the RCC offense of stalking.

1. PDS objects to the negligence mental state in the proposed stalking offense.<sup>1</sup> As currently proposed, a person commits stalking if the person purposely engages in a pattern of conduct directed at an individual and does so either (A) with intent to cause the individual to fear for his or her safety or with intent to cause the individual to suffer significant emotional distress or (B) negligently causing the individual to fear for his or her safety or to suffer significant emotional distress. Particularly because the purpose of the person’s conduct (necessary to establish it as a pattern) need not be nefarious – for example, “a person might persistently follow someone with the goal of winning their affection”<sup>2</sup> – a negligence mental state standard is too low. Increasing the mental state to “recklessly,” as PDS recommends, makes the second way of committing the offense on par with the first way. That a person’s conduct is done with an awareness of a substantial risk that her conduct is causing the individual to fear for his safety is of similar seriousness as a person’s conduct being done with the intent to cause such fear (whether or not it actually does). Allowing a conviction based only on proof that the person, who may otherwise have a benign or beneficent purpose, *should have been* aware that her conduct was causing the individual to fear for his safety would allow a conviction based on conduct that is of significantly lower culpability than the intentional conduct, yet the offense does not define them as different degrees.
2. PDS recommends increasing the separate occasions of conduct required to establish a pattern from two to three.<sup>3</sup> As the commentary explains, stalking concerns “longer-term apprehension,” in contrast to breach of the peace statutes like disorderly conduct, rioting, and public nuisance

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<sup>1</sup> See RCC § 22A-1801(a)(2)(B).

<sup>2</sup> Report #28, page 5, footnote 2.

<sup>3</sup> See RCC §22A-1801(d)(3).

which create “momentary fear of an immediate harm.”<sup>4</sup> Requiring three occasions to establish a “pattern of conduct” does more to assure that the harm being punished is “longer-term apprehension” and better distinguishes between conduct that constitutes stalking and conduct that would constitute a breach of the peace.

3. PDS recommends rewriting the definition of “financial injury” to limit “attorney’s fees” at subsection (F) to only those attorney’s fees “incurred for representation or assistance related to” the other forms of financial injury listed at (A) through (E). This is consistent with the objection and proposal PDS made on the definition of “financial injury” in its November 3, 2017 comments on Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions.
4. PDS appreciates the effort to protect the conduct of attorneys and private investigators acting within the reasonable scope of their official duties from prosecution pursuant to the revised stalking statute.<sup>5</sup> The list of excluded professionals is inadequate, however, to cover investigators employed by the Public Defender Service or by private attorneys appointed to represent indigent defendants pursuant to the Criminal Justice Act. PDS and CJA investigators are not “licensed private investigators.” In addition, PDS and law school programs rely on college and law student interns to perform investigative tasks. PDS strongly urges rewriting the excluded professions list as follows: “(A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, person acting as an agent of an attorney, process server, *pro se* litigant, or compliance investigator...”
5. PDS agrees with the explanation of “physically following” that is in the commentary.<sup>6</sup> PDS recommends including the term in the definitions subsection of the statute and using the explanation from the commentary. Specifically, PDS recommends adding to subsection (d) the following: “The term ‘physically following’ means to maintain close proximity to a person as they move from one location to another.”
6. PDS suggests deleting footnote 10.<sup>7</sup> The Do Not Call Registry is not a good example of a government entity that might be the indirect source of notice to the actor to cease communications with the complainant. The Do Not Call Registry is for telemarketing calls only; it does not restrict calls from individuals.<sup>8</sup>
7. PDS recommends that the commentary clarify that the actor must know that the notice to cease communication is from the individual, even if the notice is indirect. The commentary should be clear that if the actor does not know that the person delivering the message to cease communicating with the individual is authorized to deliver such message on the individual’s

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<sup>4</sup> Report #28, page 10, footnote 40.

<sup>5</sup> See RCC § 22A-1801(e)(3).

<sup>6</sup> Report #28, pages 5-6.

<sup>7</sup> Report #28, page 6.

<sup>8</sup> Incidentally, the Registry does not restrict calls from charities or debt collectors either.



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behalf, then the message does not qualify as the “notice” required by the offense. For example, the former paramour receives a message from the new paramour to stop calling and texting the individual will not satisfy the requirement that the actor (former paramour) “knowingly received notice from the individual” unless the actor knows that the new paramour is authorized to deliver the message to cease communications.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** December 21, 2018

**SUBJECT:** First Draft of Report #26, Sexual Assault and Related Provisions

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #26 - Sexual Assault and Related Provisions.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-1301 (2), definition of bodily injury.**

RCC § 22A-1301 (2) states that bodily injury “means significant physical pain, illness, or any impairment of physical condition.” It is unclear from the text and the Commentary if the word “significant” is meant to modify only physical pain or whether it is meant to modify illness as well. Because of the wording of the definition of “bodily injury” in D.C. Code § 22-3001 (2), OAG assumes that the drafter’s meant that bodily injury “means illness, significant physical pain, or any impairment of physical condition.” OAG makes this assumption because the phrase “bodily injury”, in DC Code § 22-3001(2), is defined as and “... injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.” Note that there are no modifiers that apply to the words “disease” or “sickness” in the current law. However, if the drafter’s meant the word “significant” to modify both words, then the definition should be

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

rewritten to say that it “means significant physical pain, significant illness, or any impairment of physical condition.” The Commentary should then explain why it made that choice.

**RCC § 22A-1301 (8), definition of effective consent, and, RCC § 22A-1301 (3), definition of coercion.**

As written, an actor who threatens a complainant that they will expose or publicize a fact, whether true or false, that will subject the complainant to embarrassment cannot be charged with a sexual assault if the complainant acquiesces. In order to determine if a person has given “effective consent” in this context, we need to determine if the person was coerced. RCC § 22A-1301 (8) states that effective consent “means consent obtained by means other than physical force, coercion, or deception.” RCC § 22A-1301 (3) defines coercion. One way that a person may be coerced is if the actor threatens the complainant that they will “assert a fact about another person, ... that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person’s credit or repute...”<sup>2</sup> The word “embarrassment” is notably missing from that list. However, the Council, as recently as December 4, 2018 recognized that persons may submit to unwanted sex rather than have something embarrassing made public when it passed the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018. In the legislation, a person commits the offense of blackmail if they threaten to “[e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation... or distribute a photograph, video, or audio recording, whether authentic or inauthentic, tending to subject another person to hatred, contempt, ridicule, embarrassment or other injury to reputation...” [emphasis added]<sup>3</sup>

The definition of “coercion” in paragraph (G) includes “Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.” For clarity, this phrase should explicitly

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<sup>2</sup> The full definition of coercion is much broader. RCC § 22A-1301 (3) states that coercion “means threatening that any person will do any one of, or a combination of, the following:

- (A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
- (B) Accuse another person of a criminal offense or failure to comply with an immigration law or regulation;
- (C) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person’s credit or repute;
- (D) Take or withhold action as an official, or cause an official to take or withhold action;
- (E) Inflict a wrongful economic injury;
- (F) Limit a person’s access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person’s access to prescription medication; or
- (G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and the same circumstances to comply.”

<sup>3</sup> See lines 24 through 32 of the engrossed original of the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018 and the accompanying committee report.

<http://lims.dccouncil.us/Legislation/B22-0472?FromSearchResults=true>

refer to another person. In other words, the phrase “same background and in the same circumstances” should have an object to which it refers. We suggest that the paragraph be rewritten to say, “Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply”

### **RCC § 22A-1303, Sexual assault.**

RCC § 22A-1303, and many of the other related provisions, ascribes the mental state of “knowingly” to many of the elements of the offense. As noted on page 58 of the Report, a consequence of using this mental state is that there will be a change in District law such that a person would be able to use self-induced intoxication as a defense.<sup>4</sup> While understanding why the Commission chose to use the mental state of knowingly in these offenses, a person should not be able to decide to rape, or otherwise sexually abuse, someone; consume massive amounts of alcohol to get up the nerve to do it; consummate the rape; and then be able to argue, whether true or not, that at the time of the rape he lacked the mental state necessary to be convicted of the offense. If the Commission is going to use this mental state, then the Commission should create an exception that accounts for this situation. This exception would be similar to what the Commission is already proposing in § 22A-208 (c) concerning willful blindness.<sup>5</sup>

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<sup>4</sup> The relevant portion of this discussion is found on pages 58 and 59 of the Report. There it states:

Second, as applied to first degree and third degree of the revised sexual assault statute, the general culpability principles for self-induced intoxication in RCC § 22A-209 allow an actor to claim that he or she did not act “knowingly” or “with intent” due to his or her self-induced intoxication. The current first degree and third degree sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a “general intent” crime for purposes of an intoxication defense, and similarly logic would appear to apply to third degree sexual abuse. This case law precludes ~~preclude~~ an actor from receiving a jury instruction on whether intoxication prevented the actor from forming the necessary culpable mental state requirement for the crime. This DCCA case law would also likely mean that an actor would be precluded from directly raising—though not necessarily presenting evidence in support of—the claim that, due to his or her self-induced intoxicated state, the actor did not possess any knowledge or intent required for any element of first degree or third degree sexual abuse. In contrast, under the revised sexual assault statute, an actor would both have a basis for, and would be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the actor from forming the knowledge or intent required to prove the offense. Likewise, where appropriate, the actor would be entitled to an instruction which clarifies that a not guilty verdict is necessary if the actor’s intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue the revised sexual assault statute. [internal footnotes omitted] [strikeout added for clarity]

<sup>5</sup> RCC § 22A-208 (c) states “IMPUTATION OF KNOWLEDGE FOR DELIBERATE IGNORANCE. When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if ... The person was reckless as to whether the circumstance existed;

RCC § 22A-1303 (a)(2) makes it a first degree sexual assault when a person causes someone to submit to a sexual act “... (A) By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant.” It is unclear whether the drafters meant for the phrase “force that overcomes, restrains, or causes bodily injury to the complainant” to modify “physical force” or also modifies the use of “a weapon.” OAG believes that when a person uses a weapon to cause a victim to engage in a sexual act it should be a first degree sexual assault, without having to prove the effect of the use of the weapon on the complainant; it should be assumed. For the sake of clarity, paragraph (A) should be redrafted.<sup>6</sup>

RCC § 22A-1303 (a)(2)(C)(ii) makes it a first degree sexual assault when a person causes someone to submit to a sexual act by drugging the complainant when the substance in fact renders the complainant “... (ii) Substantially incapable, mentally or physically, of appraising the nature of the sexual act; or (iii) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual act.” There are two issues with the way that this is phrased. First, it is unclear in subparagraph (ii) what the word “physically” adds. In other words, after a person has been drugged, what is the difference between a person being substantially incapable “mentally” of appraising the nature of the sexual act and a person being substantially incapable “physically” of appraising the nature of the sexual act? The second issue is that these two statements do not reach the situation where a victim is drugged, can still appraise the nature of the sexual act and can communicate that he or she is unwilling to engage in a sexual act, but is physically unable to move anything but their mouth. The provision should clarify that first degree sexual assault covers a person who has sex with a victim after administering a drug that physically incapacitates the victim, though allowing the victim to think and speak.

### **RCC § 22A-1305, Sexual Exploitation of an Adult.**

In paragraph (a)(2)(C) the subparagraph criminalizes sexual acts between a complainant and “member of the clergy” under specified circumstances. The phrase “member of the clergy” is not defined. To improve clarity and avoid needless prosecutions and litigation the Commission should define this term. The Commission could base its definition of “member of the clergy” on the list of clergy that appears in D.C. Code § 22-3020.52. This is the Code provision that requires “any person” to report information concerning child victims of sexual abuse but exempts “a priest, clergyman, rabbi, or other duly appointed, licensed, ordained, or consecrated minister of a given religion in the District of Columbia, or a duly accredited practitioner of Christian Science in the District of Columbia” when those persons are involved in a confession or penitential communication.

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and ... The person avoided confirming or failed to investigate whether the circumstance existed with the purpose of avoiding criminal liability.”

<sup>6</sup> The Commission could redraft subparagraph (A) so that it follows the basic structure of subparagraph (B). It would look as follows:

“(A) By using:

(i) A weapon; or

(ii) Physical force that overcomes, restrains, or causes bodily injury to the complainant...”

### **RCC § 22A-1307, Enticing a minor.**

One way that a person can commit the offense of enticing a minor is to knowingly persuade or entice, or attempt to persuade or entice, “the complainant to go to another location in order to engage in or submit to a sexual act or conduct.” RCC § 22A-1307(a)(1)(B). As written, it is unclear if the phrase “in order to” refers to the actor’s motivations or is part of what the actor must communicate to the complainant. The Commentary should clarify that “in order” refers to the actor’s motivation for the communication to get the complainant to go to another location, not that the actor has to communicate to the complainant that a sexual act or contact is the reason for going to another place.

Pursuant to RCC § 22A-1307 (a)(2) a person can commit this offense when “The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and ... (C) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age, and the actor recklessly disregards that complainant purports to be a person under 16 years of age.” There is a problem, however, with how this subparagraph is structured. Paragraph (C) is still subject to the overarching lead in language, so this law-enforcement language still doesn’t apply unless the actor is 4 years older than the complainant. If the intent is to include any situation where an actor tries to entice a law enforcement officer who purports to be under 16 the provision should be restructured. For example, the Commission could redraft this provision to read:

(2)(A) The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and:

- (1) The actor recklessly disregards that the complainant is under 16 years of age; or
  - (2) The actor recklessly disregards that the complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant; or
- (B)(1) The actor, in fact, is at least 18 years of age,
- (2) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age; and
  - (3) The actor recklessly disregards that complainant purports to be a person under 16 years of age.

### **RCC § 22A-1308, Arranging for sexual conduct of a minor.**

While in general, OAG does not object to RCC § 22A-1308, the limitation on this offense is that “The actor and any third person, in fact are at least 18 years of age and at least four years older than the complainant” conflicts with the requirement that the actor recklessly disregards that the “complainant purports to be a person under 16 years of age, while, in fact, the complainant [is] a law enforcement officer.”

The relevant part of the provision is as follows:

“(a) Arranging for Sexual Conduct with a Minor. An actor commits the offense of arranging for sexual conduct with a minor when that actor:

- (1) Knowingly arranges for a sexual act or sexual contact between:
  - (A) The actor and the complainant; or
  - (B) A third person and the complainant; and
- (2) The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant; and
- (3) The actor recklessly disregards that:
  - (A) The complainant is under 16 years of age;
  - (B) The complainant is under 18 years of age, and the actor knows that he or she or the third person is in a position of trust with or authority over the complainant; or
  - (C) The complainant purports to be a person under 16 years of age, while, in fact, the complainant a law enforcement officer.

The following example demonstrates the problem. Say the Actor is 20 years old and the complainant is an undercover police officer pretending to be 14 years of age. Notwithstanding that there is a mental state in subparagraph (3)(c) that requires that “The actor recklessly disregards that... The complainant purports to be a person under 16 years of age, while, in fact, the complainant [is] a law enforcement officer...”, arguably we never get to that mental state. That’s because the mental state concerning the law enforcement officer is never reached because we can’t jump the hurdle, in paragraph (a)(2) that “The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant...”

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** December 21, 2018

**SUBJECT:** First Draft of Report #27, Human Trafficking and Related Statutes

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of First Draft of Report #27 - Human Trafficking and Related Statutes.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A-1601 (2)(D), definition of Coercion.**

RCC § 22A-1601 (2)(D) states that the definition of the word “coercion” includes when a person “Take[s] or withhold[s] action as an official...” The word “official” is not defined in the text nor is it specifically addressed in the Commentary. OAG assumes that the word was chosen to refer to government action and not to the official action of a corporation or other organization. It is unclear, however, whether the term should be read broadly as “takes or withholds government action” or more narrowly as “takes or withholds District government action.” Because all government action is “official, we recommend that the definition be rewritten to refer to “government action” rather than “official action.” We believe that this will aid clarity.

**RCC § 22A-1602, Limitations on liability and sentencing for RCC Chapter 16 offenses.**

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.



Paragraph (b) lists the “Exceptions to Liability.” It states:

Any parent, legal guardian, or other person who has assumed the obligations of a parent who requires his or her child under the age of 18 to perform common household chores under threat of typical parental discipline shall not be liable for such conduct under sections 22A-1603, 22A-1605, and 22A-1609 of this Chapter, provided that the threatened discipline did not include:

- (1) Burning, biting, or cutting;
- (2) Striking with a closed fist;
- (3) Shaking, kicking, or throwing; or
- (4) Interfering with breathing.

There are a few problems with this formulation. As drafted, the paragraph implies that burning, biting, or cutting, etc. are typical forms of parental discipline.<sup>2</sup> Second, the term “typical” is not defined. Surely it should not mean that merely because a number of people do something harmful that it would qualify as an exception for liability. For example, just because it may be “typical” in some places for parents to neglect their child, see D.C. Code § 16-2301(9), those neglectful actions should not be an exception to liability when they are used as parental discipline. Finally, subparagraphs (1)-(4) are stated as an exclusive list. There are, however, other harms, including neglect, that a parent may typically inflict on a child that should also be excluded.<sup>3</sup>

### **RCC § 22A-1603, Forced labor or services.**

Paragraph (b) establishes the penalties for the offense of forced labor or services. Though businesses can be convicted of this offense, the penalty structure is the same as for offenses that can only be charged against a person. As businesses cannot be subject to incarceration and as their collective motivation for this offense is financial, there should be a separate fine penalty structure for businesses that is substantial enough to act as a deterrent.

Paragraph (c) provides for a penalty enhancement when it is proven that “The complainant was held or provides services for more than 180 days.” This sentence should be redrafted to make it clear that the enhancement should apply when the combined period of time that a person is held

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<sup>2</sup> The paragraph can be read to say “Any parent... who requires his ... child ... to perform common household chores under threat of typical parental discipline shall not be liable for such conduct provided that the threatened discipline did not include... [b]urning, biting, or cutting...;” [emphasis added]

<sup>3</sup> Similarly, in RCC § 22A-1603 (e) the drafters use the word “ordinary.” It is unclear what that term means in the context of that paragraph.

and forced to provide services – together – total more than 180 days.<sup>4</sup> The same comment applies to the penalty enhancement for RCC § 22A-1603 Forced commercial sex.

### **RCC § 22A-1607, Sex trafficking of minors.**

It is unclear how the penalty provision in paragraph (b) should be read with the offense penalty enhancements in paragraph (c).<sup>5</sup> For example, in determining the penalty for a repeat offender who holds the complainant for more than 180 days, do you apply the penalty enhancement in RCC §§ 22A-805 and then go to up one class or do you go up one class and then apply the enhancement in RCC §§ 22A-805?<sup>6</sup>

### **RCC § 22A-1608, Benefiting from human trafficking.**

RCC § 22A-1608 (a)(2) states that the offense of first degree benefiting from human trafficking includes, as an element, “By participation in a group of two or more persons.” It is unclear if whether this element is met when a business of two people are engaged in human trafficking. In other words, because its two people that participate is this element met? Or, because it is one business, albeit with two people, is this element not met?<sup>7</sup>

The Commentary to RCC § 22A-1608 (a)(2) states, “Subsection (a)(2) specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons.” Subsection (a)(2) does not contain this limitation. See text in previous paragraph.

### **RCC § 22A-1609, Misuse of documents in furtherance of human trafficking.**

RCC § 22A-1609(a)(2) includes as an element of the offense that the person or business acted “With intent to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person’s liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person.” [emphasis added] OAG recommends deleting the phrase “without lawful authority.” The inclusion of the “without lawful authority” clause assumes that there are situations that it would be justified to, “With intent to prevent or restrict, or attempt to prevent or restrict the person’s liberty to move or travel in order to maintain the labor, services,

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<sup>4</sup> For example, the enhancement should apply to someone who holds a person in their basement for 90 days “while training them” and then forces them to provide services for the next 91 days.

<sup>5</sup> Paragraph (b) states, “Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.” Paragraph (c) states, “The penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, the complainant was held or provides commercial sex acts for more than 180 days.”

<sup>6</sup> This may be a global issue that applies to all penalty provisions where there are both general enhancements and offense specific enhancements.

<sup>7</sup> The same questions apply to element (b)(2) in the offense of second degree benefiting from human trafficking.

or performance of a commercial sex act by that person.” We submit that that would never be the case. The Commentary does not explain why the phrase “without lawful authority” is necessary.

### **RCC § 22A-1609, Forfeiture.**

It is unclear whether the forfeiture clause in RCC § 22A-1609 follows the holding in *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (DC 1998). In that case, the government sought forfeiture of a vehicle valued at \$15,500 that was owned by a person who was arrested for solicitation of a prostitute. The Court held that “the Constitution prevents the utilization of civil forfeiture as a penalty for the commission of an offense where the value of the property forfeited stands in gross disproportion to the gravity of the offense. Such a disproportion exists in the case at bar and the attempted forfeiture therefore violates the Excessive Fines Clause of the Eighth Amendment.”

### **RCC § 22A-1613. Civil Action.**

RCC § 22A-1613 permits victims of offenses prohibited by § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 may bring a civil action in the Superior Court. The provision should explicitly state that the defendant in the civil action must be a person who can be charged as a perpetrator of one of those offenses.

RCC § 22A-1613 (b) contains the following provision. “(b) Any statute of limitation imposed for the filing of a civil suit under this section shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a violation of § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 or until a minor plaintiff has reached the age of majority, whichever is later.” OAG believes that a person who was a minor should have an opportunity to sue on their own behalf. As written, just as the minor was able to sue, because they reached the age of majority, they would be precluded from suing because they reached the age of majority. Instead, OAG suggests that the Commission adopt the language used in the engrossed original of B22-0021, the Sexual Abuse Statute of Limitations Amendment Act of 2018. That bill provides, “for the recovery of damages arising out of sexual abuse that occurred while the victim was less than 35 years of age— the date the victim attains the age of 40, or 5 years from 40 when the victim knew, or reasonably should have known, of any act constituting sexual abuse, whichever is later;””

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division

**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** December 21, 2018

**SUBJECT:** First Draft of Report #28, Stalking

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #28 - Stalking.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT****RCC § 22A-1801, Stalking.**

RCC § 22A-1801(d)(4) contains the following definition, “The term “financial injury” means the reasonable monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, a member of the specific individual’s household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:” [emphasis added] As written, the term “specific individual” refers to the person who is doing the staking. However, the lead in language to the stalking offense contains the sentence “Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following...” [emphasis added] See RCC § 22A-1801(a)(1). Using the term “specific individual” to refer to both the perpetrator and victim would be confusing. However, given the context, OAG believes that what The Commission meant in RCC § 22A-1801(d)(4) is, “as a result of the stalking of the specific individual.”

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

RCC § 22A-1801(d)(8) states that the term “significant emotional distress” means “substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling.” On page 10 of the Commentary it clarifies the government’s obligation by stating, “The government is not required to prove that the victim sought or needed professional treatment or counseling.” OAG believes that that for the sake of clarity and to avoid needless litigation. The sentence in the Commentary should be in the text of the substantive provision in RCC § 22A-1801(d)(8).

RCC § 22A-1801(e) contains the exclusions from liability. Subparagraph (e)(3) states:

- (e) A person shall not be subject to prosecution under this section for conduct, if:
  - (A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, process server, pro se litigant, or compliance investigator; and
  - (B) Is acting within the reasonable scope of his or her official duties.

While it may be intuitive to understand what the official duties of a law enforcement officer, licensed private investigator, process server, and compliance investigator is within the context of this offense, it is unclear what the official duties of a pro se litigant is. Since a pro se litigant does not appear to have “official duties” (or “professional obligations,” to borrow the phrase used on page 12 of the report) in the ordinary meaning of that phrase, OAG believes that the subparagraph needs to be redrafted. In addition, there are questions as to whether an attorney or journalist necessarily has “official duties” as opposed to professional obligations. Therefore, OAG recommends that this provision be redrafted as follows:

- (A) The person is a law enforcement officer, licensed private investigator, or compliance investigator and is acting within the reasonable scope of his or her official duties; or
- (B) The person is a journalist, attorney, or pro se litigant and is acting within the reasonable scope of that role.

RCC § 22A-1801(f) provides for the parental discipline affirmative defense. This defense is available to “A parent, legal guardian, or other person who has assumed the obligations of a parent engaged in conduct constituting stalking of the person’s minor child...” However, there are situations when this defense should not be given to a parent or legal guardian. For example, a parent or legal guardian may abuse their child and lose visitation rights or be subject to court orders limiting the person’s contact with the child. The actions of these people in violating the provisions of RCC § 22A-1801 (a) may actually constitute stalking and, as such, these people should be subject to this offense.<sup>2</sup> RCC § 22A-1801(f) should be redrafted to ensure that

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<sup>2</sup> RCC § 22A-1801(a) provides that a person commits stalking when that person:

“(1) Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following:

- (A) Physically following or physically monitoring;
- (B) Communicating to the individual, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, after knowingly having

parents, legal guardians, or other people who have assumed the obligations of a parent can only avail themselves of this offense when they are exercising legitimate parental supervision and not when their rights are limited or nonexistent.

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received notice from the individual, directly or indirectly, to cease such communication; or

(C) In fact: committing a threat as defined in § 22A-1204, a predicate property offense, a comparable offense in another jurisdiction, or an attempt to commit any of these offenses...”

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Office of the Attorney General for the District of Columbia**

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** December 21, 2018

**SUBJECT:** First Draft of Report #30, Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #30 - Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 213, Withdrawal defense to legal accountability**

RCC § 213 states that it as affirmative defense to a prosecution when

a defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:

- (1) Wholly deprives his or her prior efforts of their effectiveness;
- (2) Gives timely warning to the appropriate law enforcement authorities; or
- (3) Otherwise makes proper efforts to prevent the commission of the offense.

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

The RCC does not define the phrase “proper efforts.” The Commentary does note, “This catchall “proper efforts” alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably calculated towards disrupting it. This standard should be evaluated in light of the totality of the circumstances.” [internal footnotes omitted] Neither the RCC nor the Commentary, however, explain the parameters of this defense. For example, it is unclear if the phrase “proper efforts” is meant to be broader, narrower, or the same as “reasonable efforts.” The RCC should give more guidance on the applicability of this defense.



# M E M O R A N D U M

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THE  
PUBLIC  
DEFENDER  
SERVICE  
*for the District of Columbia*



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Laura E. Hankins, General Counsel

Date: March 1, 2019

Re: Comments on First Draft of Report No. 31,  
Escape from Institution or Officer

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PDS has the following comments about the RCC offense of Escape from Institution or Officer.

1. PDS recommends defining the term “custody” in subsection (c) of the statute. The commentary, citing *Davis v. United States*,<sup>1</sup> explains that “[c]ustody” requires a completed arrest; there must be actual physical restraint or submission of the person to arrest.”<sup>2</sup> Because of the range of interactions that law enforcement can have with persons on the street that fall short of custody, it is important for the statute to be as clear as possible about when leaving the presence of law enforcement crosses the line to becoming criminal “escape.” Specifically, PDS recommends the following definition:

Lawful custody exists where a law enforcement officer has completed an arrest, substantially physically restrained a person, or where the person has submitted to a lawful arrest.

This definition is supported by *Davis* and by *Mack v. United States*.<sup>3</sup> While completed arrest is not necessary for custody, fleeting or minor physical contact between an arresting officer and the individual does not qualify as custody for the purposes of escape. For example, in *Davis*, a law enforcement officer walked behind the defendant, grabbed the back of his pants and his belt and then unsnapped the handcuff case on his utility belt in order to handcuff the defendant. The defendant turned around, shoved the officer and took off running. On these facts, the Court of Appeals held that the officer did not have “sufficient physical control over appellant for him to be ‘in custody’ at the time of the purported escape.”<sup>4</sup> Rather, custody for the escape statute requires some manifestation of physical restraint. In *Mack v. United States*, grabbing the

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<sup>1</sup> 166 A.3d 944 (D.C. 2017).

<sup>2</sup> Report #31, page 4.

<sup>3</sup> 772 A.2d 813 (D.C. 2001).

<sup>4</sup> *Davis*, 166 A.3d at 949.

defendant, picking him up, and throwing him to the ground showed sufficient physical restraint. In *Mack*<sup>5</sup>, the Court of Appeals announced its intention to follow the “physical restraint legal principle” from a line of cases from other jurisdictions that stand for the proposition that custody exists where there a person’s liberty of movement is successfully restricted or restrained.”<sup>6</sup> That liberty has been substantially, albeit briefly, restrained should be reflected in the definition.

2. PDS recommends that the offense be rewritten to clarify that a person escapes the “custody” of a law enforcement officer and escapes the “confinement” of a correctional facility. Given the definition of “custody,” at least in the commentary and, if PDS’s first recommendation is accepted, in the RCC statutory definitions, it does not make sense for the second element to be framed in terms of “custody”, to wit “failing to return to custody,” or “failing to report to custody.” Even with respect to “leaving custody,” the term only makes sense in the context of leaving the custody of law enforcement, because correctional facilities do not “physically restrain” persons “pursuant to a [lawful] arrest.”
3. PDS recommends restructuring the penalties to better reflect the relative seriousness of the criminal conduct. RCC § 22E-3401(b) currently proposes to grade “leaving custody” as first-degree escape and “failing to return to custody” and “failing to report to custody” as second-degree escape. Leaving the custody of a law enforcement officer is not as serious as leaving the confinement of a correctional facility such as the DC Jail. Therefore, PDS recommends grading the latter as first-degree and grading the former, along with failing to return and failing to report, as second-degree.
4. PDS opposes mandating consecutive sentencing for this offense. PDS supports maximizing judicial discretion with respect to sentencing to allow the sentence (punishment) to fit the specific offense and specific offender. The conduct of a person who escapes from the DC Jail where he is confined to serve a sentence is more serious than the conduct of a person who is on probation and escapes from the lawful custody of a law enforcement officer on the street.<sup>7</sup> As drafted, RCC § 22E-3401 would mandate consecutive sentencing in both instances. Whether either or neither scenario would warrant consecutive sentencing should depend on a number of

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<sup>5</sup> *Mack*, 772 A.2d at 817.

<sup>6</sup> *Medford v. State*, 21 S.W.3d 668, 669 (Tex. App. 2000), cited by *Mack*, 772 A.2d at 817.

<sup>7</sup> Report #31 does not explain what it means to “serve a sentence” and therefore leaves open the possibility that a person who was “sentenced” to probation would be considered to be “serving a sentence” when he encounters a police officer on the street. *Veney v. United States*, 738 A.2d 1185 (D.C. 1999), cited in footnote 58 at page 9 of Report #31, does not answer the question. In that case, Mr. Veney “while being detained by police ... slipped out of the police station.” *Id.* at 1190. As the Court noted, “Even if the term ‘prisoner’ is read broadly to include all persons detained by the police [as the government argued], the statute still requires, as a second element, an original sentence.” *Id.* at 1199. Because at the time Mr. Veney was in police custody, he had not been “tried and convicted,” the Court concluded that he was not “under an original sentence, or any sentence as far as the record shows” and therefore the mandatory consecutive sentencing provision did not apply. *Id.*

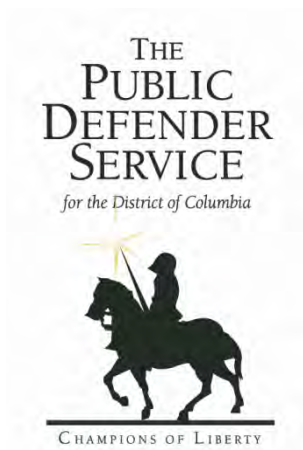
factors, but the unquestionable difference in severity of the two scenarios argues strongly in favor of judicial discretion at sentencing.

Accordingly, PDS recommends rewriting subsections (a) and (b) of RCC § 22E-3401 as follows:

- (a) *Escape from Institution or Officer.* A person commits escape from institution or officer when that person:
- (1) In fact:
    - (A) Is subject to a court order that authorizes the person's confinement in a correctional facility; or
    - (B) Is in the lawful custody of a law enforcement officer of the District of Columbia or of the United States; and
  - (2) Knowingly, without the effective consent of the correctional facility or law enforcement officer:
    - (A) Leaves confinement eustody;
    - (B) Fails to return to confinement eustody; ~~or~~
    - (C) Fails to report to confinement eustody; or
    - (D) Leaves custody.
- (b) *Gradations and Penalties.*
- (1) *First Degree.* A person commits first degree escape from institution or officer when that person violates subsection (a)(2)(A). First degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) *Second Degree.* A person commits second degree escape from institution or officer when that person violates subsection (a)(2)(B), ~~or~~ (C) or (D). Second degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - ~~(3) *Consecutive Sentencing.* If the person is serving a sentence at the time escape from institution or officer is committed, the sentence for escape from institution or officer shall run consecutive to the sentence that is being served at the time of the escape from institution or officer.~~

## M E M O R A N D U M

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Public Defender Service for the District of  
Columbia

Date: March 1, 2019

Re: Comments on First Draft of Report 32,  
Tampering with a Detection Device

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The Public Defender Service makes the following comments on Report #32, Tampering with a Detection Device.

1. Pursuant to RCC § 22E-3402(a)(2)(B) a person commits tampering with a detection device when she or he “alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so.” The terms alter and mask appear to be redundant of “interfere with the operation of the detection device.” The commentary provides that “alter” means to change the device’s functionality, not its appearance, and that “mask” means changing the device’s detectability, not its appearance.<sup>1</sup> Under those definitions, masking and altering are means of interfering with the operation of the device. The operation of the device, since its purpose is to monitor the individual wearing it, necessarily includes detection and function. However, by including mask and alter in the statute, but placing the definitions for those terms only in the commentary, the terms appear to criminalize something other than interference with the operation of the device. An individual looking at the statute could come to the conclusion that altering includes decorating or vandalizing the device and that masking means covering from view. For simplicity and clarity, PDS recommends that the RCC remove mask and alter from the statutory language. Clarity in the statutory language itself rather than the commentary would be particularly helpful in this instance as it is easy to imagine that this statute would be read by the court or supervision officers to individuals who are required to wear detection devices.

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<sup>1</sup> Report #32, page 4.

2. The commentary for RCC § 22E-3402 states that “‘interfere’ includes failing to charge the power for the device or allowing the device to lose the power required to operate.”<sup>2</sup> For clarity and to assist any reader, PDS recommends that the commentary specifically mention the applicable *mens rea* in the failure to charge language. Failure to charge is a common infraction for individuals wearing detection devices in part because the charging requirements are onerous for individuals without secure housing. Under current practice, the failure to charge often results in an admonishment from the court rather than a new criminal charge. PDS does not believe the Commission intends to change that practice and does not expect that RCC § 22E-3402 as written necessarily would. However, the RCC should recognize that practitioners may sometimes only quickly read the commentary before advising individuals about pleas or the strength of the government’s case. Therefore, for the sake of clarity and out of an abundance of caution, PDS recommends that the commentary state that failing to charge a detection device falls within the scope of interference only when it is done with the conscious desire to cause the device to fail.<sup>3</sup>

PDS recommends adding the following language to the commentary:

“Interfere” includes failing to charge the power for the device or allowing the device to lose the power required to operate when done purposely, meaning with the conscious desire to interfere with the operation of the device.

3. RCC § 22E-3402(a)(1) should specify that the defendant is required to wear a detection device as a result of an order issued in relation to a D.C. Code offense or by a judge in D.C. Superior Court. The offense should not reach violation of court orders imposed by other jurisdictions, where the District has no role in ensuring the fulfillment of due process protections for defendants or control over the underlying statutes that allowed for the placement of a detection device.
4. PDS suggests the modifications below.

**RCC § 22E-3402. Tampering with a Detection Device.**

(a) *Tampering with a Detection Device.* A person commits tampering with a detection device when that person:

(1) Knows he or she is required to wear a detection device pursuant to a D.C. Code offense or order issued by a judge of the Superior Court of the District of Columbia while:

- (A) Subject to a protection order;
- (B) On pretrial release;
- (C) On presentence or predisposition release;

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<sup>2</sup> Report #31, page 4.

<sup>3</sup> See RCC § 22A-206(a).

- (D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or
  - (E) On supervised release, probation, or parole; and
- (2) Purposely:
- (A) Removes the detection device or allows an unauthorized person to do so;
  - (B) ~~Alters, masks, or~~ Interferes with the operation of the detection device or allows an unauthorized person to do so.
- (b) *Penalties.* Tampering with a detection device is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *Definitions.* In this section:
- (1) The terms “knows” and “purposely” have the meaning specified in § 22E-206; and
  - (2) The term “detection device” means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology; and
  - (3) The term “protection order” means an order issued pursuant to D.C. Code § 16-1005(c).

## M E M O R A N D U M

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THE  
PUBLIC  
DEFENDER  
SERVICE  
*for the District of Columbia*



To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: Public Defender Service for the District of  
Columbia

Date: March 1, 2019

Re: Comments on First Draft of Report 33,  
Correctional Facility Contraband

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The Public Defender Service makes the following comments on Report #33, Correctional Facility Contraband.

1. RCC § 22E-3403(c)(5) includes halfway houses within the definition of “correctional facility.” PDS objects to this expansion of the definition of correctional facility and requests that halfway houses be removed from the definition. Many of the concerns about possession of contraband inside of a jail or secure juvenile facility are not applicable to halfway houses. For instance, the possession of handcuff keys, hacksaws, and tools for picking locks and bypassing doors are not a realistic concern in halfway houses where individuals already have a degree of freedom and access to the outside. RCC § 22E-3403(c)(6)(K) prohibits the possession of a correctional officer’s uniform, law enforcement uniform, medical staff clothing and any other uniform. It is certainly common for individuals in halfway houses to work at jobs that require uniforms. Those individuals should be able to keep their uniforms at the location where they may be housed for months. RCC § 22E-3403(c)(6)(C) prohibits the possession of flammable liquid – meaning a lighter. A person who lawfully smokes cigarettes while outside of the halfway house should not be subject to a separate criminal offense for returning to the halfway house at the end of a day of work with a lighter.

Further, the possession of controlled substances inside a halfway house is not dissimilar from possession of controlled substances in the community. There is little difference between a halfway house resident who possesses a controlled substance across the street from the halfway house and a halfway house resident who possesses a controlled substance inside the halfway house for personal use. Since individuals at halfway houses typically have regular and unsupervised access to the community, there are not the same concerns about a coercive or violent drug trade taking root inside a halfway house as in the setting of complete confinement. Rather than expanding the criminal offense of correctional facility contraband to include halfway houses, under the RCC, possession or distribution of

unlawful items in a halfway house should be prosecuted under the general statutes applicable to all individuals. Possession of items listed in RCC § 22E-3403 and other rule-violating behaviors while in a halfway house will still be punished, either as a criminal offense that applies equally in the community or by remand to the D.C. Jail for failure to comply with halfway house rules.

2. PDS recommends the following changes to RCC § 22E-3403 (d), exclusions from liability, to ensure that the medical exclusion covers each instance that lawyers, investigators, social workers, experts and other professionals carry otherwise prohibited items to secure facilities for their health and safety.

(d) Exclusions from Liability.

(1) Nothing in this section shall be construed to prohibit conduct permitted by the U.S. Constitution.

(2) A person does not commit correctional facility contraband when the item:

(A) Is a portable electronic communication device used by an attorney during the course of a legal visit; or

(B) Is a controlled substance, syringe, needle, or other medical device that is prescribed to the person and for which there is a medical necessity to access immediately or constantly.

PDS recommends adding explanatory language to the commentary that section (d)(2)(B) applies to medicines and medical devices necessary to treat chronic, persistent, or acute medical conditions that would require constant or immediate medical response such as diabetes, severe allergies, or seizures.



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Office of the Attorney General for the District of Columbia**

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 1, 2019

**SUBJECT:** First Draft of Report #31, Escape from Institution or Officer

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #31 - Escape from Institution or Officer.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22E-3401. Escape from Institution or Officer.**

OAG suggests that the RCC § 22E-3401 be amended to specifically state that a person commits the offense of Escape from Institution or Officer when that person, in fact, leaves, a correctional facility without effective consent when that person “Is committed to the Department of Youth Rehabilitation Services and is placed in a correctional facility.”

RCC § 22E-3401 (a) provides that:

- (a) *Escape from Institution or Officer.* A person commits escape from institution or officer when that person:
  - (1) In fact:
    - (A) Is subject to a court order that authorizes the person’s confinement in a correctional facility; or

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

- (B) Is in the lawful custody of a law enforcement officer of the District of Columbia or of the United States; and
- (2) Knowingly, without the effective consent of the correctional facility or law enforcement officer:
  - (A) Leaves custody;
  - (B) Fails to return to custody; or
  - (C) Fails to report to custody.

According to the Commentary, this offense replaces D.C. Code § 22-2601, Escape from institution or officer, and D.C. Code § 10-509.01a. Unlike D.C. Code § 22-2601,<sup>2</sup> RCC § 22E-3401 does not specifically state that it is an offense to escape from, “An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed.”<sup>3</sup> Unlike in when a person is detained in adult cases or in pre-adjudicated juvenile cases, a juvenile who is committed to the Department of Youth Rehabilitation Services (DYRS) is not detained, “subject to a court order” nor is a DYRS staffer or contractor necessarily a “law enforcement officer of the District of Columbia.” While in a disposition hearing, a judge may commit a juvenile to DYRS, the judge does not have the authority to order that the respondent be confined. The confinement decision for juveniles is vested solely in DYRS.<sup>4</sup>

The Criminal Code Amendment Act of 2010 amended D.C. Code § 22-2601 to add to that offense the situation where a youth escaped from, “An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed.” On page 14 of the Committee Report, the Council explained, in relevant part, that this language:

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<sup>2</sup> D.C. Code § 22-2601, Escape from institution or officer, states:

(a) No person shall escape or attempt to escape from:

(1) Any penal or correctional institution or facility in which that person is confined pursuant to an order issued by a court of the District of Columbia;

(2) The lawful custody of an officer or employee of the District of Columbia or of the United States; or

(3) An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed.

(b) Any person who violates subsection (a) of this section shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, said sentence to begin, if the person is an escaped prisoner, upon the expiration of the original sentence or disposition for the offense for which he or she was confined, committed, or in custody at the time of his or her escape.

<sup>3</sup> OAG understands that the Commission meant for this offense to cover escapes from DYRS placements and it acknowledges that the Commentary states that the “word ‘authorizing’ makes clear that an order permitting a custodial agency to choose a secured or unsecured residential placement is sufficient.”

<sup>4</sup> See generally, D.C. Code § 16-2320 (c)(2), *In Re P.S.*, 821 A.2d 905 (D.C. 2003), and *In re J.M.W.*, 411 A.2d 345, 348 (D.C. 1980).

Amends D.C. Code § 22-2601 (escape) to include persons committed to the Department of Youth Rehabilitation Services (DYRS). This amendment will close a loophole. Under current law, it is illegal for a youth to escape or attempt to escape from a DYRS facility pre-disposition because he or she is confined pursuant to a court order. It is also illegal for a youth to escape while in transit because he or she will be in the lawful custody of an officer of the District of Columbia or the United States. It is not illegal, however, for the same youth to escape or attempt escape from a DYRS facility after he or she has been adjudicated delinquent because, first, a court order committing a youth to DYRS is not a court order to confine that person in an institution or facility. DYRS makes the decision whether to place the youth in an institution or facility. Second, a youth committed to DYRS who is placed in a contract facility is not necessarily "in the lawful custody of an officer or employee of the District of Columbia or the United States."

Given the history of the amendments to this offense and the Council's rationale for them, the Commission's mandate to use language in the recommendations that are clear and plain<sup>5</sup>, and to avoid needless litigation, OAG suggests that RCC § 22E-3401 (a) (1) be amended to add a paragraph (C) which states, "Is committed to the Department of Youth Rehabilitation Services and is placed in a correctional facility."

OAG recommends that the definition of "correction facility" be amended to clarify that it includes DYRS congregate care facilities for purposes of the proposed escape statute. RCC § 22E-3401 (c) defines the term "correction facility." It states that the term means:

- (A) Any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense;
- (B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
- (C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

Subparagraphs (A) and (C) use the term "secure confinement." Subparagraph (B) does not. The Commentary states that subparagraph (B) is meant to apply only to adult facilities, such as halfway houses.<sup>6</sup> The juvenile version of a halfway house is called a shelter house, when a delinquent youth is placed there pre-adjudication, and a group home, when a youth is placed there post-adjudication. Youth are also placed in congregate care, halfway house like settings, in some residential placements. All of these congregate care facilities are staff

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<sup>5</sup> See D.C. Code § 3-152 (a)(1) which states that the comprehensive criminal code reform recommendations "use clear and plain language."

<sup>6</sup> See page 6 of the commentary.

secure. Under current law, youth who leave a shelter house or group home placements without consent have committed an escape.<sup>7</sup>

OAG recommends that RCC § 22E-3401 (c)(4)(C) be amended so that the definition of “correctional facility” explicitly includes DYRS congregate care facilities.<sup>8</sup> One way that the Commission could do this is to amend this definition to read as follows, “(C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the hardware secure or staff secure confinement of persons committed to the Department of Youth Rehabilitation Services.”

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<sup>7</sup> Youth who leave shelter houses, or a shelter care placement, without consent violate court orders. Therefore, they are guilty of escaping from a “penal or correctional institution or facility in which that person is confined pursuant to an order issued by a court of the District of Columbia.” See D.C. Code § 22-2601(a)(1). Committed youth who leave group homes, or other congregate care facilities, without consent are also guilty of escape because they left “An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed.” See D.C. Code § 22-2601(a)(3).

<sup>8</sup> OAG is not suggesting that a youth who leaves any DYRS placement be guilty of escape. Just as the Commentary notes that for adults “the definition [of a correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs...”, for youth, the definition should exclude family placements, foster care placements, and independent living programs.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Office of the Attorney General for the District of Columbia**

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 1, 2019

**SUBJECT:** First Draft of Report #32 - Tampering with a Detection Device

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #32 - Tampering with a Detection Device.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22E-3402. Tampering with a Detection Device.**

RCC § 22E-3402 (a)(1) specifies that for criminal liability to attach the person must know that he or she is required to wear a detection device while:

- (A) Subject to a protection order;
- (B) On pretrial release;
- (C) On presentence or predisposition release;
- (D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or
- (E) On supervised release, probation, or parole

Persons who are in the juvenile justice system may be required to wear a detection device while awaiting trial and placed in a shelter house or shelter care facility. These people are not on

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

pretrial or predisposition release, nor are they incarcerated or committed to the Department of Youth Rehabilitation. RCC § 22E-3402 (a)(1) should be amended to make it clear that it applies to people who are required to wear detention devices while placed in a shelter house or in shelter care facility.

There is a separate issue with the phrasing RCC § 22E-3402 (a)(1)(D). It states, “Incarcerated or committed to the Department of Youth Rehabilitation Services.” While OAG believes that the Commission meant that the word “incarcerated” pertain to adults in the criminal justice system and “committed” pertain to persons in the juvenile justice system, the phrasing is ambiguous. As drafted, it is not clear whether the phrase “to the Department of Youth Rehabilitation Services” modifies just the word “committed” or whether it modifies the word “incarcerated” also. To ensure that this phrase is correctly interpreted, OAG suggests that this subparagraph be changed to read, “committed to the Department of Youth Rehabilitation Services or incarcerated.”

RCC § 22E-3402 (a) states that a person commits tampering with a detection device when that person is required to wear a detection device, in specified circumstances, and the person, “(2) Purposely... (B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so.”

Although the Commentary suggests what the terms “alter,” “mask,” and “unauthorized person” are intended to mean, those definitions need to be included in the statute because they are not apparent from the current language nor from the words’ dictionary definitions. On page 4 of the Report, in the Commentary, it states:

Subsection (a)(2)(B) prohibits altering the operation of the device, masking the operation of the device, interfering with the operation of the device, and allowing an unauthorized person to do so. “Alter” means changing the device’s functionality, not its appearance. “Mask” means changing the device’s detectability, not its appearance. “Interfere” includes failing to charge the power for the device or allowing the device to lose the power required to operate. An unauthorized person is a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device.

Just as RCC § 22E-3402 (c) states the definitions for the terms “knows”, “purposely”, “detection device”, and “protection order”, all terms used in this offense, so that the reader can easily understand the scope of the provision, subparagraph (c) should also list the definitions for “mask”, “interfere”, and “unauthorized person.” These are terms that go to the heart of the offense.

There is a separate issue as to the definition of an “unauthorized person.” As noted above the Commentary limits this phrase to “a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device.” [emphasis added] However, RCC § 22E-3402 (a)(1)(D) also brings under the scope of this offense the unauthorized

tampering of a detection device that a person is required to wear by the Department of Youth Rehabilitation Services. The definition of an unauthorized person should be amended to include that agency.

As noted above, RCC § 22E-3402 (a) states that a person commits tampering with a detection device when that person is required to wear a detection device, in specified circumstances, and the person, “(2) Purposely... (B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so.” It is unclear from the text of the offense whether the phrase “with the operation of” only modifies the word “interferes” or whether it modifies the words “alters” and “mask” as well. In other words, subparagraph (B) can either be read to mean, “Interferes with the operation, alters, or masks the detection device” or “alters the operation of the detention device, masks the operation of the detention device, or interferes with the operation of the detention device.”<sup>2</sup> The provision should be redrafted to make clear which interpretation is correct.<sup>3</sup>

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<sup>2</sup> In pointing out the ambiguity in the way the offense language is written, OAG acknowledges that in the Commentary, as noted on the previous page of this memo, it states “Subsection (a)(2)(B) prohibits altering the operation of the device, masking the operation of the device, interfering with the operation of the device, and allowing an unauthorized person to do so.” That language should appear in the text of the offense.

<sup>3</sup> D.C. Code § 22-1211, the current tampering with a detection device provision, does not explicitly tether “masking” or “interfering” to the operation of the device. Section 22-1211(a) states:

(A) Intentionally remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device;

(B) Intentionally allow any unauthorized person to remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device; or

(C) Intentionally fail to charge the power for the device or otherwise maintain the device’s battery charge or power.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 1, 2019

**SUBJECT:** First Draft of Report #33, Correctional Facility Contraband

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #33 - Correctional Facility Contraband.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22E-3403. Correctional Facility Contraband**

RCC § 22E-3403 provides that a person commits correctional facility contraband when they knowingly bring a prohibited item into a correctional facility without the effective consent of a specified individual. Subparagraph (c) (6) RCC § 22E-3403 (6) defines “Class A contraband” and RCC § 22E-3403 (c) (7) defines Class B contraband. The term “correctional facility” is defined in RCC § 22E-3403 (c)(5).

“Class A Contraband” means:

- (A) A dangerous weapon or imitation dangerous weapon;
- (B) Ammunition or an ammunition clip;
- (C) Flammable liquid or explosive powder;

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.



- (D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;
- (E) A shank or homemade knife;
- (F) Tear gas, pepper spray, or other substance capable of causing temporary blindness or incapacitation;
- (G) A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;
- (H) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;
- (I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool capable of cutting through metal, concrete, or plastic;
- (J) Rope; or
- (K) A correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, or any other uniform.

“Class B contraband” means:

- (A) Any controlled substance listed or described in [Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01];
- (B) Any alcoholic liquor or beverage;
- (C) A hypodermic needle or syringe or other item that can be used for the administration of a controlled substance; or
- (D) A portable electronic communication device or accessories thereto.

The term “correctional facility” is defined in RCC § 22E-3403 (c) (5). It states that “correctional facility” means:

- (A) Any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense;
- (B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
- (C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

Subparagraphs (A) and (C) use the term “secure confinement.” Subparagraph (B) does not. The Commentary states “With the exception of halfway houses, the definition [of correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs.”<sup>2</sup> The juvenile version of a halfway house is called a shelter house, when a delinquent youth is placed there pre-adjudication, and a group home, when a youth is placed there post-adjudication. Youth are also placed in congregate care, halfway house like settings, in some residential placements. All of these congregate care facilities are staff secure. Just as it

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<sup>2</sup> See page 7 of the Commentary.

dangerous for adults to bring Class A contraband (e.g. dangerous weapons, explosive powder, and shanks) and Class B contraband (controlled substances and hypodermic needles) into halfway houses, it is dangerous for persons charged as juveniles to bring those items into DYRS congregate care facilities.<sup>3</sup>

One way that the Commission could amend the Correctional Facility Contraband offense, to include DYRS congregate care facilities, is to amend RCC § 22E-3403 (c) (5) (C) to read, “Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the hardware secure or staff secure confinement of persons placed by the Department of Youth Rehabilitation Services.”<sup>4</sup>

As mentioned above, the definition of Class B contraband includes “(D) A portable electronic communication device or accessories thereto.”<sup>5</sup> The definition of “accessories” mentioned in the Commentary, drawn from an earlier Council committee report, should be incorporated into the definitions section of the proposed statutory language if it’s intended to be controlling. OAG suggests that subparagraph (D) be redrafted to say, “A portable electronic communication device, chargers, batteries, or other accessories thereto.”

RCC § 22E-3403 (e) establishes the facility’s authority to detain a person. OAG has two suggestions on how to amend this provision. RCC § 22E-3403 (e) states:

*Detainment Authority.* If there is probable cause to suspect a person of possession of contraband, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a police officer with the Metropolitan Police Department.

Page 6 of the report says subsection (e) of the proposed statute “limits the correctional facility’s authority to detain a person on suspicion of bringing contraband to a period of two hours.” [emphasis added] However, subsection (e) does not refer to suspicion of bringing contraband into a facility, the offense described in subsection (a)(1). It refers to suspicion of possessing contraband by someone confined to a correctional facility, something prohibited only in (a)(2). There is no reason, however, to limit the amount of time someone can be detained, for possessing contraband in violation of (a)(2) because that person is already “someone confined to a correctional facility.” OAG suggests that the text of RCC § 22E-3403 (e) be amended so that it covers persons who bring

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<sup>3</sup>OAG is not suggesting that youth who bring contraband into all Department of Youth Rehabilitation Services (DYRS) be guilty of this offense. Just as the Commentary notes that for adults “[the definition of a correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs...”, for youth, the definition should exclude family placements, foster care placements, and independent living programs.

<sup>4</sup> The Commentary should then make it clear that the phrase “placed by the Department of Youth Rehabilitation Services” includes situations where DYRS places the person in a facility pre-adjudication, pursuant to a court order, as well as after commitment to that agency.

<sup>5</sup> See RCC § 22E-3403 (c)(7)(D).

contraband into the facility (and, therefore, is consistent with the explanation in the Commentary).

The detainment authority in RCC § 22E-3403 (e) specifically states that the head of the facility “may detain the person... pending surrender to a police officer with the Metropolitan Police Department” (MPD). For the following reasons, OAG suggests that this provision be amended to say “law enforcement” rather than MPD.

D.C. Code § 10-509.01 authorizes the Mayor to designate any employee of the District of Columbia to act in a law enforcement capacity at the property which includes the current site of New Beginnings, in Laurel, Maryland.<sup>6</sup> In addition, for a period of time ending in 2002, the Department of Human Services, Youth Services Administration (the predecessor to the District’s Department of Youth Rehabilitation Services) had an MOU with U.S. Park Police (USPP), pursuant to authority granted to it by the Mayor, obligating USPP to enforce the laws and regulations at the Oak Hill Youth Facility (now the site of New Beginnings). There is no reason why RCC § 22E-3403 (e) should limit the Mayor’s authority to designate which law enforcement agency has responsibility for investigating and arresting people at this location.

OAG recommends that, pursuant to the two suggestions noted above, the Commission redraft this provision to state

Detainment Authority. If there is probable cause to suspect a person who is not confined to the facility of possessing or bringing contraband into the facility, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a law enforcement officer.

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<sup>6</sup> This authority was granted to the Mayor by Congress in 1956. See 70 Stat. 488, ch. 508, § 1.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Office of the Attorney General for the District of Columbia**

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 1, 2019

**SUBJECT:** First Draft of Report #34, De Minimis Defense

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #34 - De Minimis Defense.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 215. DE MINIMIS DEFENSE.**

RCC § 215 provides for an affirmative defense to all misdemeanor and certain felony offenses. Currently, District law does not provide for a “defense for those actors whose conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction.” See the Commentary on page 8. This provision states:

(a) De Minimis Defense Defined. It is an affirmative defense to any misdemeanor or a Class 6, 7 or 8 felony that the person’s conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances.

(b) Relevant Factors. In determining whether subsection (a) is satisfied, the factfinder shall consider, among other appropriate factors:

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

- (1) The triviality of the harm caused or threatened by the person’s conduct;
- (2) The extent to which the person was unaware that his or her conduct would cause or threaten that harm;
- (3) The extent to which the person’s conduct furthered or was intended to further legitimate societal objectives; and
- (4) The extent to which any individual or situational factors for which the person is not responsible hindered the person’s ability to conform his or her conduct to the requirements of law.

(c) Burden of Proof. The defendant has the burden of proof and must prove all requirements of this affirmative defense by a preponderance of the evidence.

While OAG appreciates the value of some protection from convictions based upon de minimis behavior, we are not entirely clear how this defense is supposed to work and want to make sure that it is not used improperly as a way to argue for and obtain jury nullification. In particular, at least three aspects of this defense seem unclear:

- (1) Are the expressly identified factors the factfinder must consider to be treated as pure questions of fact, or are any of them partially questions of law (e.g., whether a particular societal objective is “legitimate”)?
- (2) When a de minimis defense is raised, how does a judge decide what evidence can be excluded, given that the factfinder can consider seemingly anything that the factfinder thinks goes to blameworthiness? Can the judge make some decision on what constitutes relevant evidence of blameworthiness notwithstanding this expansive factfinder discretion – and if so, based on what?
- (3) Suppose a de minimis defense is raised and then rejected by the jury. Assuming the jury instructions were proper, could the jury’s rejection of that defense be challenged – and if so, what criteria would a reviewing court deploy?

These questions are especially significant because the proposal here – notably broader than many of the laws the Report cites from other jurisdictions – is very different from the court’s power to govern its proceedings in the interest of judicial economy, a comparison the report repeatedly seeks to make. The proposal goes to the fundamental question of whether someone really deserves to be convicted of a crime.

OAG is particularly concerned about how this affirmative defense will operate as it only prosecutes adult misdemeanor offenses and some of these offenses are fine only or carry the penalty of fine or jail time. We are concerned that this provision will encourage jury

nullification of appropriate prosecutions, which is not encouraged in the District.<sup>2</sup> To put this another way, any de minimis defense provision has to be crafted in such a way that it is clear to the trier of fact that there must be something special concerning the individual circumstances of a defendant's actions when he or she commits an offense and not that the offense itself only criminalizes behavior that the trier of fact may believe is in and of itself, de minimis. It is up to the legislature to determine what behavior is criminal; the trier of fact should not be able to second guess that determination. OAG will continue to work with the Commission to try and craft an appropriate provision.

OAG does have one suggestion, however, at this point. To ensure that this defense is appropriately applied, RCC § 215 should include a requirement that in bench trials the judge must issue a written opinion stating his or her reasoning in determining that the requirements of this defense is met.

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<sup>2</sup> As the Court stated in *Reale v. United States*, 573 A.2d 13 (D.C. 1990), at 15, “The common-law doctrine of jury nullification permits jurors to acquit a defendant on the basis of their own notion of justice, even if they believe he or she is guilty as a matter of law. *Watts v. United States*, 362 A.2d 706, 710 (D.C. 1976). While we cannot reverse such an acquittal, see *Fong Foo v. United States*, 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962), we do not encourage jurors to engage in such practice. Thus, we have upheld convictions in cases where, as here, the trial court instructs the jury that it is obligated to find the defendant guilty if the government meets all the elements of the charged offense. *Watts*, supra, 362 A.2d at 710-11.”

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** March 1, 2019

**SUBJECT:** Second Draft of Report #9, Recommendations for Theft and Damage to Property Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission’s Second Draft of Report #9, Recommendations for Theft and Damage to Property Offenses. OAG reviewed this document and makes the recommendations noted below.<sup>1</sup>

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22E-2101, Theft**

In the Commentary, on page 6, it says, “...non-violent pickpocketing or taking property from the immediate actual possession of another person is no longer subject to a penalty enhancement for the presence or use of a dangerous weapon or for the status of the complainant.” [emphasis added] The Commentary does not explain how the “use of a dangerous weapon” can be classified as non-violent. On page 7 of the Commentary, however, it states, “In addition, any actual use or display of a dangerous weapon during the taking would constitute robbery under the RCC.” OAG suggests that for the sake of clarity, these two comments be joined as follows, “...non-violent pickpocketing or taking property from the immediate actual possession of

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<sup>1</sup> This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

another person is no longer subject to a penalty enhancement for the presence or use of a dangerous weapon, as the use or display of the weapon during the taking would constitute robbery under the RCC.” The Commentary would then have a separate sentence explaining how the provision deals with the status of the complainant.