# First Draft of Report #12: Recommendations for Chapter 3 of the Revised Criminal Code— Definition of a Criminal Conspiracy

SUBMITTED FOR ADVISORY GROUP REVIEW
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

This Draft Report has two parts: (1) draft statutory text for a new Title 22A of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report No. 12, *Recommendations for Chapter 3 of the Revised Criminal Code—Definition of a Criminal Conspiracy*, is December 11, 2017 (five weeks from the date of issue). Oral comments and written comments received after December 11, 2017 will not be reflected in the Second Draft of Report No. 12. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

**§ 22A-303 CRIMINAL CONSPIRACY**

(a) 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.

(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, the defendant and at least one other person must intend to bring about any result or circumstance required by that 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 offense under the D.C. Code if 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 offense under the D.C. Code if 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.

(__) PENALTY. [Reserved].

## COMMENTARY

### 1. §§ 22A-303(a) & (b)—Definition of Conspiracy & Elevation of Culpable Mental States Applicable to Results and Circumstances of Target Offense

*Explanatory Note.* Subsections (a) and (b) establish the elements of the general inchoate offense of conspiracy under the Revised Criminal Code (RCC). These two provisions collectively specify the culpable mental state requirement, conduct requirement, and overt act requirement applicable to general conspiracy liability. Unless otherwise noted, this statement of the elements of a criminal conspiracy is intended to uniformly apply to all general conspiracy charges arising under the RCC.[1]

The prefatory clause of subsection (a) codifies two general principles governing general conspiracy liability. First, the culpability requirement applicable to a criminal conspiracy necessarily incorporates "the culpability required by [the target] offense."[2] Pursuant to this principle, a defendant may not be convicted of a conspiracy to commit a given offense absent proof that he or she acted with, at minimum, the culpable mental state(s)[3]—in addition to any other broader aspect of culpability[4]—required to establish that offense.[5] There is, however, one exception to this principle: although causation may be part of the culpability requirement for a target offense that requires proof of a result element, a conspiracy to commit that offense does not require proof that the requisite result occurred, and, therefore, does not require proof of causation.[6]

The second principle reflected in the prefatory clause of subsection (a) is a plurality requirement under which both the defendant "and at least one other person" must satisfy the elements of a conspiracy. This language effectively codifies a bilateral approach to conspiracy, which excludes unilateral agreements to engage in or aid crimes from the scope of general conspiracy liability under the RCC.[7] Absent proof that "two or more persons"[8] meet the elements set forth in subsections (a) and (b), the offense of conspiracy has not been committed.

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[1] Throughout subsections (a) and (b), the elements of a conspiracy are defined in relation to a target "offense." This clarifies that only *criminal* objectives fall within the scope of general conspiracy liability under the RCC.

[2] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 201(d) (culpability requirement defined). For additional principles governing the culpable mental state requirement of a criminal conspiracy, see RCC § 303(b) (discussed *infra* notes 16-18 and accompanying text).

[3] For example, if the target offense is comprised of a result or circumstance subject to a culpable mental state of purpose, the government is still required to prove purpose as to that result or conspiracy to secure a conspiracy conviction.

[4] For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government it still required to prove these broader aspects of culpability to secure a conspiracy conviction.

[5] A criminal conspiracy, just like any other crime in the RCC, is subject to the voluntariness requirement set forth in RCC § 203(a). *See* RCC § 201(d)(1) (noting that the voluntariness requirement is part of an offense's culpability requirement).

[6] *See* RCC § 204(a) ("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.")

[7] For example, where the only other party to an agreement to commit a crime is an undercover officer feigning agreement, a criminal conspiracy would not exist (though a criminal solicitation might).

[8] D.C. Code § 22-1805a.

Subsection (a)(1) establishes the agreement requirement at the heart of the law of conspiracy. Apart from generally clarifying that a conspiracy is comprised of a joint criminal agreement,[9] this provision addresses three fundamental issues regarding the scope of general conspiracy liability under the RCC. The first issue is identifying the forms of agreed-upon participation that will support a conspiracy conviction. The second issue is determining whether and to what extent the parties must possess a "purposive attitude"[10] towards that participation. And the third issue is clarifying the relevance of impossibility—i.e., the fact that the parties agreed to bring about conduct that, if carried out, could not have resulted in the target offense under the circumstances—to general conspiracy liability.

Subsection (a)(1) resolves the first issue by clarifying that general conspiracy liability is appropriate where two or more parties agree to "engage in or aid the planning or commission" of criminal conduct. This two-part formulation clarifies that agreements to assist with or otherwise facilitate the planning or commission of a crime, no less than agreements to directly engage in the requisite criminal conduct, can provide an adequate basis for a conspiracy conviction, provided that the parties form the agreement with the requisite culpable mental state.

Subsection (a)(1) resolves the second issue by clarifying that the requisite culpable mental state accompanying this agreement must be "purpose[ful]." There are two aspects of this purpose requirement that bear comment. First, the parties must act with a *conscious desire* to agree. Second, the parties must also act with a *conscious desire* to bring about the conduct that constitutes the object of the agreement.[11] Mere awareness that by joining an agreement one is likely to promote or facilitate the requisite conduct is, therefore, insufficient to establish conspiracy liability under subsection (a)(1).[12] Note, however, that this purpose requirement *does not* extend to whether the requisite conduct is, in fact, illegal or otherwise constitutes an offense.

Subsection (a)(1) resolves the third issue by clarifying that agreements to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" can also provide the basis for general conspiracy liability. The reference to attempts is intended to import the broad abolition of impossibility claims adopted by the RCC's general definition of attempt, § 301(a)(3)(B), into the conspiracy context.[13] Under this approach, it is generally immaterial that the parties agreed to engage in or provide accessorial support to a plan of

[9] That is, both the defendant "and at least one other person" must collectively "agree."

[10] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*).

[11] Where a party to an agreement individually plans to engage in the conduct that would constitute an offense, this purpose requirement will necessarily be established. Where, however, a party merely agrees to provide aid—such as, for example, by furnishing otherwise lawful goods or services—this requirement limits general conspiracy liability to those actors whose actual purpose is to promote or facilitate the requisite criminal conduct.

[12] For example, one who agrees to rent premises to another aware that the premises will be used for illegal activity (e.g., house of prostitution, narcotics den, or gambling casino) is not guilty of conspiring with another to commit a crime under the RCC unless he or she consciously desires to promote or facilitate the requisite criminal conduct. Mere knowledge of probable illegal use is not sufficient to satisfy RCC § 303(a)(1).

[13] Under RCC § 301(a)(3)(B), a person commits an attempt if, *inter alia*, he or she "[w]ould be dangerously close to committing that offense if the situation was as the person perceived it, provided that the person's conduct is reasonably adapted to commission of that offense."

action that could never have succeeded under the circumstances.[14] So long as the parties agreed to bring about conduct that would have culminated in an offense if "the situation was as [the parties] perceived it" then conspiracy liability may attach, provided that the agreed-upon plan of action was at least "reasonably adapted" to commission of the target offense.[15]

Subsection (a)(2) establishes that an overt act by the defendant or by a person with whom he or she has conspired in furtherance of a criminal agreement is a necessary element of conspiracy under the RCC. This overt act requirement is intended to be quite narrow. For example, it does not entail proof of progress sufficient to rise to the level of an attempt to commit the target offense under RCC § 301(a). While not particularly demanding, however, the requisite overt act must be proven beyond a reasonable doubt in order to support a conspiracy conviction.

Subsection (b) provides additional clarity concerning the relationship between the culpable mental state requirement applicable to a conspiracy and the culpable mental state requirement governing the target offense.[16] Whereas the prefatory clause of subsection (a) generally clarifies that a conspiracy conviction entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that "the defendant and at least one other person must intend to bring about any result or circumstance required by that offense." The latter requirement incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a conspiracy is comprised of a result or circumstance that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., the element is a matter of strict liability).[17]

Under the first principle, the parties must, by forming their agreement, intend to cause any result required by the requisite target offense. To satisfy this threshold culpable mental state requirement, the government must prove that the parties to the

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[14] The impossibility may be a product of circumstances beyond the parties' control. For example, if D1 and D2 agree to cause bodily injury to V at a particular place/time, but the police are aware of the plan, the fact that D1 and D2's plan is guaranteed to fail is irrelevant to a charge of conspiracy to assault. The impossibility may also, however, be a product of a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense. For example, if D1 and D2 agree to cause bodily injury to V, a person that they mistakenly believe to be an on-duty police officer, the fact that V is not, in fact, an on-duty police officer is irrelevant to a charge of conspiracy to commit APO.

[15] As explained in the commentary to RCC § 301(a)(3)(B), this language:

> [A]uthorizes an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation had been accurate. Where the defendant's perspective is relied upon, however, § 301(a)(3)(B) also requires the government to prove that the defendant's conduct was "reasonably adapted to commission of the [target] offense." By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.

RCC § 301(a): Explanatory Note.

[16] *See supra* notes 2-6 and accompanying text (discussing prefatory clause of RCC § 303(a)).

[17] For those target offenses that already require proof of intent, knowledge, or purpose as to any result or circumstance, subsection (b) does not elevate the applicable culpable mental state for a conspiracy charge.

agreement acted with either a belief that it was practically certain that the agreed-upon conduct would cause any results of the target offense, see RCC § 206(b)(3), or, alternatively, that they consciously desired for the agreed-upon conduct to cause any results of the target offense, see RCC § 206(e). This principle of culpable mental state elevation does not preclude the government from charging conspiracies to commit target offenses comprised of results subject to recklessness, negligence, or strict liability. However, to secure a conspiracy conviction for such offenses, proof that the parties to the agreement acted with the intent to cause those results is necessary.

Under the second principle, the parties must, by forming their agreement, have acted with intent as to the circumstances required by the requisite target offense. To satisfy this threshold culpable mental state requirement, the government must prove that the parties to the agreement acted with either a belief that it was practically certain that the circumstances of the target offense would be satisfied, see RCC § 206(b)(4), or, alternatively, that they consciously desired for these circumstances to be satisfied, see RCC § 206(e). This principle of culpable mental state elevation, just like the principle applicable to results, does not preclude the government from charging conspiracies to commit target offenses comprised of circumstances subject to recklessness, negligence, or strict liability. However, to secure a conspiracy conviction for such offenses, proof that the parties to the agreement acted with the intent that those circumstances be satisfied is necessary.[18]

Subsections (a) and (b) are intended to preserve existing District law relevant to the elements of a conspiracy to the extent it is consistent with the statutory text and accompanying commentary.[19] These provisions therefore incorporate existing legal authorities whenever appropriate.[20]

*Relation to Current District Law.* Subsections (a) and (b) codify, clarify, and fill in gaps reflected in District law on the culpable mental state requirement, conduct requirement, and overt act requirement of a criminal conspiracy.

The D.C. Code provides for conspiracy liability in a variety of ways. Most prominently, the D.C. Code contains a general conspiracy provision that applies to all criminal offenses.[21] In addition, the D.C. Code contains a variety of semi-general

[18] When formulating jury instructions for a conspiracy to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance), the term "intent," as defined in RCC § 206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* Commentary to RCC § 206(b): Explanatory Note.

[19] This includes both those topics explicitly addressed by subsections (a) and (b) as well as those that are not, such as, for example: (1) determining the scope, duration, and number of conspiracies, see *McCullough v. United States*, 827 A.2d 48, 60 (D.C. 2003); (2) Wharton's rule, see *Pearsall v. United States*, 812 A.2d 953, 961 (D.C. 2002); (3) unanimity, see D.C. Crim. Jur. Instr. § 7.102 (citing *U.S. v. Treadwell*, 760 F.2d 327, 336-37 (D.C. Cir. 1985)); and (4) charging, see *Tann v. United States*, 127 A.3d 400, 430 (D.C. 2015).

[20] For an example of an area of the District's law of conspiracy changed by the RCC, compare D.C. Code § 22-1805a(a)(1) ("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* . . . .") *with* RCC § 303(a) ("A person is guilty of a conspiracy to commit *an offense* . . . ."); *see supra* note 1.

[21] That provision, D.C. Code § 22-1805a, establishes in relevant part:

conspiracy penalty provisions, which alter the penalty structure for conspiracies to commit narrower groups of offenses.[22] Finally, some specific offenses in the D.C. Code individually accomplish the same on an offense-specific basis by incorporating the term "conspires" as an element of the offense.[23]

With only a few exceptions (discussed below), the D.C. Code does not provide details of what conduct is necessary to establish conspiracy liability. This statutory silence has effectively delegated to District courts the responsibility to establish the elements of a conspiracy. On some of the relevant issues, the case law is both clear and well-established, while on others it is both scant and ambiguous.

Consistent with the interests of clarity and consistency, subsections (a) and (b) translate existing principles governing the culpable mental state requirement, conduct requirement, and overt act requirement of a conspiracy into a detailed statutory framework. In so doing, subsections (a) and (b) also fill in various gaps in the District law of conspiracy.

A more detailed analysis of District law and its relationship with subsections (a) and (b) is provided below. It is organized according to six main topics: (1) the plurality requirement; (2) the agreement requirement; (3) the culpable mental state requirement; (4) impossibility; (5) the overt act requirement; and (6) the treatment of non-criminal objectives.

RCC § 303(a) (Prefatory Clause): Relation to Current District Law on Plurality Requirement. The prefatory clause of RCC § 303(a) both codifies and clarifies the bilateral approach to conspiracy currently applied in the District.

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> (a)(1) 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 not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.
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> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.

The first subparagraph was created by Congress in 1970. *See* 84 Stat. 599, Pub. L. 91-358, title II, § 202, at 599 (July 29, 1970). The latter subparagraph was added by the D.C. Council in 2009 as part of the Omnibus Public Safety and Justice Amendment Act of 2009. *See* D.C. Law 18-88, § 209, 56 DCR 7413, 2009 District of Columbia Laws 18-88 (Dec. 10, 2009). Both subparagraphs were subject to the Criminal Fine Proportionality Act of 2012, see D.C. Law 19-317, § 201(z), 60 DCR 2064 (June 11, 2013).

[22] *See* D.C. Code § 48-904.09 (setting forth penalties for conspiracy to commit various drug offenses); D.C. Code § 8-417 (setting forth penalties for conspiracy to commit various pesticide-related violations); D.C. Code § 50-1331.08 (setting forth penalties for conspiracy to commit various false title-related violations).

[23] *See* D.C. Code § 22-3153 (conspiracy to commit particular crimes of violence as acts of terrorism); D.C. Code § 22-3154 (conspiracy to manufacture or possess a weapon of mass destruction); D.C. Code § 22-3155 (conspiracy to use, disseminate, or detonate a weapon of mass destruction); D.C. Code § 22-2001 (conspiracy to kidnap); D.C. Code § 21-591 (conspiracy to violate various fiduciary obligations); D.C. Code § 1-1001.14 (conspiracy to engage in corrupt election practices).

One fundamental policy issue at the heart of conspiracy liability is whether the offense is bilateral or unilateral in nature. This distinction, which is further discussed below in the commentary on national legal trends, can be summarized as follows:

> The bilateral approach asks whether there is an agreement between two or more persons to commit a criminal act. Its focus is on the content of the agreement and whether there is a shared understanding between the conspirators. The unilateral approach is not concerned with the content of the agreement or whether there is a meeting of minds. Its sole concern is whether the agreement, shared or not, objectively manifests the criminal intent of at least one of the conspirators.[24]

Under current District law, it is well established that conspiracy is a bilateral, rather than unilateral, offense. The genesis of this approach is the District's general conspiracy statute, which explicitly states that "2 or more persons [must] conspire" to commit an offense.[25] The DCCA, in turn, has observed that this language means what it says, namely, that at least two of the relevant parties must actually agree.[26]

District practice, as captured by the Redbook jury instructions, also reflects a bilateral approach to conspiracy. More specifically, the Redbook states that the government must prove that "an agreement existed between two or more people to commit the crime" that constitutes the object of the conspiracy.[27] This aspect of the jury instructions does not entail proof of "a formal agreement or plan, in which everyone involved sat down together and worked out the details."[28] At the very least, however, the government must prove beyond a reasonable doubt that "there was a common

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[24] *State v. Pacheco*, 125 Wash. 2d 150, 160 (1994).

[25] D.C. Code §§ 22-1805a(1)-(2). Note that a person who merely *solicits* another to commit a crime of violence is subject to criminal liability under the District's general solicitation statute. *See* D.C. Code § 22-2107(b) ("Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.") Under District law, a "crime of violence" means:

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4).

[26] *E.g.*, *McCullough v. United States*, 827 A.2d 48, 58 (D.C. 2003); *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997); *see De Camp v. United States*, 10 F.2d 984, 985 (D.C. Cir. 1926) ("It is true that a conspiracy can only exist between two or more persons, and a single defendant could not be guilty of the crime.").

[27] D.C. Crim. Jur. Instr. § 7.102.

[28] *Id.*

understanding among those who were involved to commit the crime," which constitutes the object of the conspiracy.[29]

Under current District law, therefore, "[t]he existence of an agreement between [the defendant] and at least one other person, in the sense of a 'joint commitment' to a criminal endeavor, is not a mere technicality but 'the fundamental characteristic of a conspiracy.'"[30]

Consistent with the interests of clarity, as well as the preservation of current District law, the RCC codifies this bilateral approach to conspiracy. More specifically, the prefatory clause of RCC § 303(a) establishes that a person is guilty of a conspiracy to commit an offense when, *inter alia*, that "person *and at least one other person*" satisfy the elements of a conspiracy. This italicized language, drawn from DCCA case law, replaces the "2 or more persons" language employed in the District's current general conspiracy statute.[31] It more clearly communicates the required joint commitment at the heart of the bilateral approach to conspiracy under District law.

RCC § 303(a)(1): Relation to Current District Law on Agreement Requirement. RCC § 303(a)(1) codifies District law relevant to the agreement requirement of a criminal conspiracy.

The agreement constitutes both the "gist of"[32] and "[t]he essential element"[33] of a conspiracy under District law. Absent a statutory clarification of the agreement requirement in D.C. Code § 22-1805a, however, it has fallen to the DCCA to determine the contours of this essential element. The body of case law that has resulted can be subdivided into two different dimensions: (1) substantive (i.e., the principles of liability governing the agreement requirement); and (2) evidentiary (i.e., the kind of proof that will satisfy those principles). This section focuses on the substantive dimension.

The scope of the agreement requirement is quite broad under DCCA case law, encompassing a wide range of conduct. For example, it is well established that a defendant can be deemed to have agreed with others to pursue criminal objectives without "knowing the identity of all the other people . . . participating in the agreement."[34] Nor, for that matter, does the defendant need to have "agreed to all the details" of a scheme to be deemed to have agreed to pursue its objectives.[35]

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[29] *Id.*

[30] *In re T.M.*, 155 A.3d at 413 (Beckwith, J., *concurring in part and dissenting in part*) (quoting *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016)).

[31] D.C. Code § 22-1805a(a).

[32] *Wilson-Bey v. United States*, 903 A.2d 818, 841 (D.C. 2006) (*en banc*) (quotations and citations omitted).

[33] *Pearsall v. United States*, 812 A.2d 953, 961 (D.C. 2002) (citation omitted).

[34] *Thomas v. United States*, 748 A.2d 931, 939 (D.C. 2000); *Green v. United States*, 718 A.2d 1042, 1057 (D.C. 1998); *see Irving v. United States*, 673 A.2d 1284, 1288 (D.C. 1996) (rejecting appellant's argument that he did not knowingly participate in a conspiracy because he had never been sure with whom he conspired); *see also Rogers v. United States*, 340 U.S. 367, 375 (1951) ("[A]t least two persons are required to constitute a conspiracy but the identity of the other members of the conspiracy is not needed inasmuch as one person can be convicted of conspiracy with persons whose names are unknown.") (cited in D.C. Crim. Jur. Instr. § 7.102).

[35] *Thomas*, 748 A.2d at 939; *Green*, 718 A.2d at 1057. So, for example, as the DCCA observed in *Collins v. United States*:

Perhaps most importantly, a defendant can be convicted of a conspiracy under District law "even if that person agrees to play only a minor part as long as that person understands the unlawful nature of the plan."[36] This seems to mean that an agreement to aid another in the planning or commission of an offense, just like an agreement to directly commit that offense, can provide the basis for conspiracy liability "provided there is assent to contribute to a common enterprise."[37] Consistent with this principle, proof that a person agreed to participate in "every phase of the criminal venture" is neither a necessary nor essential component of conspiracy liability under District law.[38]

RCC § 303(a)(1) codifies the above District authorities applicable to understanding the scope of the agreement requirement. More specifically, RCC § 303(a)(1) establishes that an "[a]gree[ment] to engage in or aid the planning or commission" of criminal conduct is sufficient to establish general conspiracy liability under the RCC. This two-part formulation clarifies that agreements to aid (i.e., assist[39]), no less than agreements to directly commit, an offense constitute a sufficient basis for general conspiracy liability. This is consistent with current District law pertaining to the scope of the agreement requirement, and, as such, should preserve current District law pertaining to proof of the agreement requirement.[40]

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> The formation of a conspiracy to rob does not necessarily require agreement either as to the means of committing the robbery, or as to the particular person to be robbed . . . . Indeed, conspirators may leave room for improvisation or refinement of details so long as they have agreed upon their fundamental goal . . . .

73 A.3d 974, 983 (D.C. 2013) (citations and quotations omitted).

[36] *Thomas*, 748 A.2d at 939; *Green*, 718 A.2d at 1057.

[37] *Long v. United States*, No. 16-CF-730, 2017 WL 4248198, at *7 (D.C. Sept. 14, 2017) (quoting *United States v. Gardiner*, 463 F.3d 445, 457 (6th Cir. 2006)); *see, e.g., In re T.M.*, 155 A.3d at 404 (conspiracy conviction upheld where one party to agreement was "walking with and advising [the other party] on how to evade detection" after shooting); *McCoy v. United States*, 890 A.2d at 210 (conspiracy conviction upheld where one party to agreement shouted instructions at the other to drive the car in close range of the victim's car in furtherance of shooting); *Hairston v. United States*, 905 A.2d 765, 784 (D.C. 2006) (conspiracy conviction upheld where defendant "obtain[ed] guns and ammunition and join[ed] efforts to 'catch' members of [rival gang]"); *Green*, 718 A.2d at 1058 (upholding conspiracy conviction where defendant "joined the agreement with an understanding of its objective and with the intent to *assist* in its accomplishment").

[38] *Long*, 2017 WL 4248198, at *7 (quoting *Gardiner*, 463 F.3d at 457). The fact that agreements which envision accessorial support, no less than agreements to directly commit an offense, fall within the scope of conspiracy liability under District law seems to reflect the fact that concerted criminal activity is a social harm of the "gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime." *Wilson-Bey*, 903 A.2d at 841 (discussing when "two or more to confederate and combine together to commit or *cause to be committed* a breach of the criminal laws") (quoting *Pinkerton*, 328 U.S. at 644).

[39] *See generally Tann v. United States*, 127 A.3d 400 (D.C. 2015), *cert. denied sub nom. Arnette v. United States*, No. 16-8523, 2017 WL 1200942 (U.S. May 1, 2017); *Johnson v. United States*, 883 A.2d 135 (D.C. 2005); *Prophet v. United States*, 602 A.2d 1087 (D.C. 1992).

[40] As an evidentiary matter, DCCA case law clarifies that the agreement requirement need not be "proven by direct evidence." *Mitchell v. United States*, 985 A.2d 1125, 1135 (D.C. 2009) (quotations and citations omitted). Instead, they may be—and frequently must be—"inferred from a development and a collocation of circumstances." *Id.* (noting that evidentiary concerns are particularly significant in conspiracy cases given the difficulty of directly establishing the existence of an agreement.) The relevant circumstances considered by District courts as a matter of course "include the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties and the interests of

RCC §§ 303(a) & (b): Relation to Current District Law on Culpable Mental State Requirement. RCC §§ 303(a) and (b) codify and fills gaps in District law concerning the culpable mental state requirement governing a conspiracy.

The precise contours of the culpable mental state requirement applicable to conspiracy under District law are ambiguous. The DCCA has generally recognized that there exists "two separate intents" at issue in conspiracy, "the intent to agree and the intent to achieve the criminal objective."[41] And, consistent with this understanding, the court has repeatedly held that the government is required to prove that the defendant both: (1) "intentionally joined [an] agreement"; and (2) did so "with the intent to advance or further the unlawful object of the conspiracy."[42] Upon closer consideration, however, the actual import of this particular formulation is less than clear.[43]

Consider that the first requirement, an intent to join an agreement, is a relatively insignificant part of any conspiracy offense. It is well established, for example, that "[t]he term 'agree' is commonly understood to include an 'intent to agree,'"[44] and that such an intent is "without moral content."[45] As a result, the larger, and more significant, issue is "what objective the parties intended to achieve by their agreement."[46] This is the issue that the second requirement of the previously quoted District formulation purports to address; it requires the government to prove an "intent to advance or further the unlawful object of the conspiracy."[47] Yet this formulation begs at least two different questions, neither of which is clearly resolved by the case law. First, what does "intent" mean in the context of an "intent to advance or further the unlawful object of the conspiracy"? And second, how does this intent requirement interact with the elements of the target offense, which may, or may not, be considered part of the "unlawful object of the conspiracy"?

Confounding the first question is the fact that the term "intent" is defined in two different ways by common law authorities. Historically, intent has been "viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails

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the alleged conspirators." *Castillo–Campos v. United States*, 987 A.2d 476, 483 (D.C. 2010) (internal quotation marks and alterations omitted).

[41] *Green v. United States*, 718 A.2d 1042, 1057–58 (D.C. 1998).

[42] *Id.*; *see, e.g., Thomas v. United States*, 748 A.2d 931, 939 (D.C. 2000); D.C. Crim. Jur. Instr. § 7.102(2).

[43] Note that other DCCA cases use the phrase "knowing and voluntary participation in the agreement" instead of "intentionally joining an agreement." *E.g.*, *Campos-Alvarez v. United States*, 16 A.3d 954, 965 (D.C. 2011); *In re T.M.*, 155 A.3d 400, 404 (D.C. 2017); *McCullough v. United States*, 827 A.2d 48, 58 (D.C. 2003); *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997). These appear to be substantively identical formulations, though one *could* read the term "participation" in the latter formulation to impose an additional conduct requirement, above and beyond agreement. One problem with such a reading, however, is that it would seem to render the overt act requirement superfluous in the sense that the element of participation would by itself always satisfy the overt act requirement. *See generally* Commentary to RCC § 303(a)(2). In any event, as a matter of *mens rea*, this formulation does not alter the analysis of District law presented in this section. *See United States v. Childress*, 58 F.3d 693, 709 (D.C. Cir. 1995) (explaining why the "knowing and voluntary participation" language does not alter the fact that conspiracy is a "specific intent" crime).

[44] Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 752–53 (1983).

[45] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2 (Westlaw 2017).

[46] *Id.*

[47] *McCrae v. United States*, 980 A.2d 1082, 1089 (D.C. 2009).

proof of a conscious desire, "or the more general one of knowledge," which entails proof of a belief as to a practical certainty.[48] But there are exceptions to this bifurcated understanding. In specific contexts, for example, intent is employed as a synonym for purpose, thereby excluding knowledge as a viable basis for liability.[49] The law of conspiracy has typically been considered to be one such context by common law authorities.[50]

A careful reading of District authorities suggests that existing District law *likely* accords with the common law view. For example, as the DCCA—quoting from U.S. Supreme Court case law—observed in *Brawner v. United States*:

> In certain narrow classes of crimes . . . heightened culpability has been thought to merit special attention . . . . [One] such example is the law of inchoate offenses such as . . . conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.[51]

Consistent with this understanding of conspiracy as an offense that entails proof of a "heightened mental state," the DCCA has seemingly equated the "intent" at issue in conspiracy with an "unlawful purpose"[52] or "illegal purpose."[53] This kind of purpose-based interpretation also accords with persuasive precedent—cited by the Redbook—from the U.S. Court of Appeals for the D.C. Circuit, which explicitly clarifies that "a purposeful state of mind [is] required" for conspiracy.[54]

Also relevant to this issue is the DCCA's observation in *McCoy v. United States* that "[m]ere [] awareness" is "insufficient to make out a conviction for either aiding and abetting or conspiracy."[55] The requirement of a "purposive attitude" is, as recognized by the DCCA's *en banc* decision in *Wilson-Bey*, an essential component of complicity liability under District law.[56] It therefore stands to reason—and is likewise indicated by the *McCoy* decision—that the same kind of "purposive attitude" is a necessary component of conspiracy liability.[57]

Even assuming intent means purpose in the context of the phrase "intent to advance or further the unlawful object of the conspiracy," however, the culpable mental

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[48] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978); *see Tison v. Arizona*, 481 U.S. 137, 150 (1987).

[49] *See United States v. Bailey*, 444 U.S. 394, 405 (1980); Model Penal Code § 2.02, cmt. at 125; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.

[50] *See* sources cited *supra* note 49.

[51] 979 A.2d 1191, 1194 (D.C. 2009) (quoting *Bailey*, 444 U.S. at 405); *see Childress*, 58 F.3d at 707–08.

[52] *Green v. United States*, 718 A.2d 1042, 1058 (D.C. 1998).

[53] *Castillo-Campos*, 987 A.2d at 483; *see also Thomas*, 748 A.2d at 934 (for conspiracy requiring proof that the accused "*knowingly and intentionally* agrees.").

[54] *Childress*, 58 F.3d at 709; *see United States v. Clarke*, 24 F.3d 257, 264–65 (D.C. Cir. 1994) (to convict defendants of conspiracy to possess drugs with intent to distribute, "the government had to establish . . . that the defendants *purposefully* agreed to act in partnership"); *see also* Commentary to D.C. Crim. Jur. Instr. § 7.102 (citing *Childress* for the proposition that an erroneous instruction that conspiracy was a "general intent" crime was harmless since the instruction clearly informed the jury that a purposeful state of mind was required).

[55] *McCoy v. United States*, 890 A.2d 204, 211 (D.C. 2006), *as amended* (Feb. 23, 2006) (citing *Bolden v. United States*, 835 A.2d 532, 535 (D.C. 2003); *Speight v. United States*, 599 A.2d 794, 796-97 (D.C. 1991).

[56] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*).

[57] *See* sources cited *supra* notes 55-56.

state requirement applicable to conspiracy under District law still remains ambiguous. The reason? It fails to respect the admonition that, as the DCCA observed in *Ortberg v. United States*, "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."[58] To say, for example, that the parties to an agreement must desire to "advance or further the unlawful object of the conspiracy" does not specify whether the requisite purpose requirement applies to the (1) the *conduct* planned to culminate in that offense; (2) the *circumstances* surrounding that conduct; or (3) the *results*, if any, that conduct would cause if carried out.

It seems relatively clear that, at minimum, the parties to the agreement must desire to bring about the conduct planned to culminate in an offense.[59] Less clear, however, is whether and to what extent this purpose requirement—or any other principle of culpable mental state elevation—applies to the results and circumstances of the target offense.

For example, to secure a conviction for conspiracy to commit robbery *against a senior citizen*, must the government (merely) prove that the parties consciously desired to bring about conduct planned to culminate in the offense (e.g., knocking down and taking the wallet of victim X, who is over the age of 65)? Or, alternatively, must the government also prove that the parties consciously desired the relevant circumstance to exist (e.g., that victim X actually be over the age of 65)?

Likewise, where a target offense involving a result element is involved (e.g., homicide), must the government prove a conscious desire to bring about that result as well? Or, alternatively will a lesser mental state suffice (e.g., could two persons be convicted of conspiracy to commit second-degree murder where they agreed to blow up a housing project they were practically certain to be inhabited if their *purpose* was the destruction of building, and not to kill any of its inhabitants)?[60]

Existing DCCA case law on conspiracy sheds little light on these issues.[61] The best one can do, then, is look to other legal contexts, where awareness—but likely nothing less than awareness—seems to suffice for liability.

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[58] *Ortberg v. United States*, 81 A.3d 303, 307 (D.C. 2013) (citations, quotations, and alterations omitted).

[59] *See* sources cited *supra* notes 51-55; *see also Brown v. United States*, 89 A.3d 98, 103–04 (D.C. 2014) (noting that conspiracy is "a specific intent" crime); *In re T.M.*, 155 A.3d at 404 (upholding conspiracy conviction on the basis that one party "intended to help [the other party] carry out the overt act without detection").

[60] These culpable mental state issues are more fully discussed *infra* RCC §§ 303(a) & (b): Relation to National Legal Trends on Culpable Mental State Requirement.

[61] This is perhaps unsurprising given that, under the *Pinkerton* doctrine, the government can, in many cases, use proof of a conspiracy to commit *any* offense plus negligence as to the results or circumstances of a greater or distinct offense to secure full liability for the latter offense. *See Pinkerton v. United States*, 328 U.S. 640 (1946). Here's how the DCCA summarized the *Pinkerton* doctrine in *Wilson-Bey*:

> [T]he *Pinkerton* doctrine provides that "a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement." *Gordon v. United States*, 783 A.2d 575, 582 (D.C. 2001). Thus, in order to secure a conviction in conformity with *Pinkerton*, the prosecution must prove that an agreement existed, that a substantive crime was committed by a co-conspirator in furtherance of that agreement, and that the substantive crime was a reasonably foreseeable consequence of the agreement between

For example, DCCA case law on attempt—described in the commentary to § 301(a)—appears to indicate that a principle of intent elevation governs the results of the target offense.[62] If true, this would mean that, where an attempt to commit a result element crime is charged, the government must prove that the defendant acted with either a belief that it was practically certain that the person's conduct would cause that result, or, alternatively, that the person consciously desired to cause any results of the target offense—regardless of whether that result is subject to a less demanding culpable mental state.[63] (It would also mean, however, that purpose as to a result, while sufficient, is not necessary for an attempt conviction.[64])

Given that conspiracy, which merely requires proof of an agreement and a mere overt act in furtherance of it,[65] is even more inchoate than attempt, which requires proof of conduct dangerously close to completion,[66] it stands to reason that the culpable mental state requirement applicable to the results of a conspiracy would, at minimum, entail a principle of culpable mental state elevation at least as demanding as that applicable to attempt.[67]

For circumstances, on the other hand, DCCA case law on accomplice liability provides a relevant point of departure. In this context, the DCCA in *Robinson v. United States* recently observed that—quoting from U.S. Supreme Court case law—"[a]n aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime . . . . [T]he intent must go to the specific and entire crime charged."[68] It therefore follows, as the *Robinson* court concluded, that "[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved."[69]

The *Robinson* decision indicates that, whatever the culpable mental state governing the circumstances of the target offense, a person cannot be deemed an accomplice of that offense without knowledge (or perhaps a belief) that they existed—regardless of whether a less demanding culpable mental state, such as recklessness or negligence, will suffice to establish to target offense.[70] (It also indicates, however, that a

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> the conspirators. *Pinkerton*, 328 U.S. at 646-47, 66 S.Ct. 1180; *Gordon*, 783 A.2d at 582. The government is not, however, required to establish that the co-conspirator actually aided the perpetrator in the commission of the substantive crime, but only that the crime was committed in furtherance of the conspiracy.

903 A.2d at 840. Note that the *Pinkerton* doctrine, while requiring proof of the elements of a conspiracy, is actually a theory of complicity. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.08 (6th ed. 2012). Therefore, it is not addressed in this Report, but will instead be considered alongside accomplice liability in the CCRC's forthcoming work on complicity. The provisions that comprise RCC § 303 neither preclude nor necessitate continued recognition of the *Pinkerton* doctrine.

[62] *See* RCC § 301(a): Relation to Current District Law on Culpable Mental State Requirement.

[63] *See id.*

[64] *See id.*

[65] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 61, at § 27.07.

[66] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992) (citing *Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975).

[67] *See, e.g.*, Model Penal Code § 5.01 cmt. at 408-09.

[68] *Robinson*, 100 A.3d at 105–06 (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)).

[69] *Id.*

[70] *See id.*

purpose requirement does not govern the circumstances of the target offense when charged under a complicity theory.[71])

Given that accomplice liability requires proof that the target offense was completed—whereas conspiracy liability does not—it stands to reason that the culpable mental state requirement applicable to the circumstances of a conspiracy would, at minimum, entail principles of culpable mental state elevation that are at least as demanding as those applicable to those of accomplice liability.[72]

One question left open by this analysis is whether an even *more demanding* principle of purpose elevation might apply to the results and circumstances of the target offense when a conspiracy is charged.[73] While purpose elevation is possible,[74] for the reasons discussed below, it's hard to see why anything more demanding than intent as to the results and circumstances of the target offense should be necessary to ground a conspiracy conviction as a policy matter.[75]

In accordance with this section's analysis of District law, §§ 303(a) and (b) codify the culpable mental state requirement of conspiracy as follows. The prefatory clause of § 303(a) establishes that the culpability requirement applicable to a criminal conspiracy necessarily incorporates "the culpability required by [the target] offense." Subsection (a)(1) thereafter establishes a requirement of purpose applicable to both the agreement itself as well as to the conduct envisioned by the agreement, i.e., the parties must "[p]urposely agree to engage in or aid the planning or commission" of criminal conduct. These requirements are consistent with current District law on conspiracy.

Finally, § 303(b) establishes that, "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." This language incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a conspiracy is comprised of a result or circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). In this case, proof of intent on behalf of two or more parties is required. These two policies fill a gap in the District law of conspiracy in a manner that is broadly consistent with District law applicable in other relevant contexts.

RCC § 303(a)(1): Relation to Current District Law on Impossibility. RCC § 303(a)(1) fills gaps in District law pertaining to the relevance of impossibility to conspiracy prosecutions in a manner that is consistent with the District approach to impossibility in the context of attempt prosecutions.

The issue of impossibility arises in the conspiracy context wherein two or more parties agree to engage in or facilitate conduct that would culminate in a consummate criminal offense if—but only if—the conditions were as they perceived them. In this kind of situation, one or more parties charged with conspiracy might argue that liability should not attach due to the fact that, by virtue of a mistake concerning the surrounding

[71] *See Rosemond*, 134 S. Ct. at 1249.
[72] *See, e.g.,* Model Penal Code § 5.01 cmt. at 408-09.
[73] *But see Rosemond*, 134 S. Ct. at 1249.
[74] *But see Childress*, 58 F.3d at 707–08; *compare with Clarke*, 24 F.3d at 264–65 and *United States v. Haldeman*, 559 F.2d 31, 112 (D.C. Cir. 1976).
[75] *See* RCC §§ 303(a) & (b): Relation to National Legal Trends on Culpable Mental State Requirement.

conditions, completion of the target offense was impossible.[76] If presented with such a claim, the court would then have to determine whether and to what extent the particular kind of mistake rendering the criminal objective at the heart of a conspiracy prosecution impossible constitutes a defense.

There does not appear to be any District legal authority governing this particular kind of situation. No District statute speaks directly to the relationship between conspiracy and impossibility, and the DCCA does not appear to have published any opinions addressing it either.[77] The closest issue that District law addresses is the relationship between attempt and impossibility.

The commentary to RCC § 301(a) provides a detailed discussion of the relevant legal trends in the District concerning this issue.[78] Generally speaking, impossibility is not a defense to an attempt charge under District law. In practical effect, this means that the fact that a criminal undertaking fails because of a defendant's mistaken beliefs concerning the situation in which he or she acts is typically deemed to be irrelevant for purposes of assessing attempt liability.

This broad rejection of impossibility claims extends to two different situations: (1) those involving pure factual impossibility, i.e., where "the intended substantive crime is impossible of accomplishment [] because of some physical impossibility unknown to the defendant"[79]; and (2) those involving hybrid impossibility, i.e., where the object of an agreement is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense.[80] The reason for this broad rejection of impossibility is that in either of these situations, the defendant's "conduct, intent, culpability, and dangerousness are all exactly the same."[81]

At the same time, the District law of attempts also appears to recognize a narrow exception to this general rejection of impossibility. More specifically, it appears that impossibility may constitute a defense where the defendant's conduct is not "reasonably adapted" to completion of the target offense.[82] So, for example, if a person attempts to

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[76] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 61, at § 27.07.

[77] *See also* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4 (noting that "the issue of impossibility has been dealt with in the law of attempts . . . with much greater frequency").

[78] *See* RCC § 301(a): Relation to Current District Law on Impossibility.

[79] *In re Doe*, 855 A.2d 1100, 1106 (D.C. 2004) (citing *German v. United States*, 525 A.2d 596, 606 n.20 (D.C. 1987) and LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5). Impossibility of this nature may result from the defendant's mistake as to *the victim*: consider, for example, a pickpocket who is unable to consummate the intended theft because, unbeknownst to her, she picked the pocket of the wrong *victim* (namely, one whose wallet is missing). *See* DRESSLER, *supra* note 61, at § 27.07. Alternatively, impossibility of this nature may also result from the defendant's mistake as to *the means of commission*: consider, for example, the situation of a murderer-for-hire who is unable to complete the job because, unbeknownst to him, his murder weapon malfunctions. *See id*.

[80] DRESSLER, *supra* note 61, at § 27.07; *see In re Doe*, 855 A.2d at 1106. Illustrative scenarios of hybrid impossibility involve defendants caught in police sting operations. Consider, for example, the prosecution of a defendant who sends illicit photographs to a person he believes to be an underage female, but who is actually an undercover police officer, for attempted distribution of obscene material to a minor. *See People v. Thousand*, 631 N.W.2d 694 (Mich. 2001).

[81] *In re Doe*, 855 A.2d at 1106.

[82] *See, e.g., Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Thompson v. United States*, 678 A.2d 24, 27 (D.C. 1996); *Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *Doreus v. United States*, 964 A.2d 154, 158 (D.C. 2009); *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015).

kill another by "invok[ing] witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct could not "constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result."[83] By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement would seem to both preclude convictions for inherently impossible attempts[84] and limits the risk that innocent conduct will be misconstrued as criminal.[85]

These impossibility principles recognized by the DCCA in the attempt context are relevant to understanding contours of conspiracy liability under District law for two reasons. First, it's at least possible that these principles have actually been statutorily incorporated into the District's law of conspiracy. More specifically, the District's general conspiracy statute criminalizes conspiracies to commit any "crime of violence."[86] The latter category, in turn, is defined by D.C. Code § 23-1331 to include "attempt[s]" to commit a long list of designated offenses.[87] When viewed collectively, then, the

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[83] Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954). As explained in the commentary to § 301(a), there's no DCCA case law specifically addressing these kinds of issues. However, this is not surprising since attempt prosecutions premised upon "inherently impossible" attempts of this nature "seldom confront the courts." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5. Nevertheless, the DCCA has affirmatively upheld attempt convictions in impossibility cases based upon the premise that the defendant's conduct *was* reasonably adapted to commission of an offense. *See, e.g.*, *Seeney*, 563 A.2d at 1083; *Thompson*, 678 A.2d at 27. The implication, then, is that where a defendant's conduct is *not* reasonably adapted to commission of an offense—as would be the case with attempted murder by means of witchcraft—attempt liability could not attach.

[84] An inherently impossible attempt is one "where any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5. An illustrative example is an attempt to kill implemented by means of witchcraft, incantation, or any other superstitious practice.

[85] This conclusion is also consistent with the DCCA's policy rationale for generally rejecting impossibility defenses. For example, in *In re Doe*, the DCCA rejected an impossibility defense on the rationale that "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same." 855 A.2d at 1106. Where, however, a person attempts to commit a crime by means not otherwise reasonably adapted to commission of the target offense—for example, where the defendant's sole means of enticing a child is by performing a witchcraft ceremony in his own home—this rationale does not hold since the person's conduct and dangerousness seem qualitatively different.

[86] D.C. Code § 22-1805a(a) establishes in relevant part:

> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.

[87] More specifically, D.C. Code § 23-1331 "defines" a crime of violence by reference to a list of offenses so designated, which includes criminal attempts:

> (4) The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to

possibility of liability for a conspiracy to attempt a crime of violence could be understood to cover impossible conspiracies.[88]

Second, and perhaps more important, is that the policy considerations relevant to the resolution of impossibility claims are the same whether in the context of attempt liability or conspiracy liability.[89] Indeed, if anything, the policy considerations that weigh against recognizing impossibility claims in the attempt context weigh even more heavily in favor against recognizing impossibility claims in the conspiracy context.[90]

With these considerations in mind, and given the interests of clarity, consistency, and proportionality, the RCC applies the same approach to impossibility in the context of attempts—itself a codification of current District law—to impossibility in the context of conspiracy. This outcome is achieved by means of incorporation: RCC § 303(a)(1) makes "agreements" to engage in or aid in the planning or commission of conduct that, if carried out, would constitute "an attempt"[91] to commit that offense an adequate

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> children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an *attempt*, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4) (emphasis added).

[88] For a discussion of federal case law on conspiracy to attempt, see Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 60 (1989).

[89] *See infra* RCC § 303(a)(1): Relation to National Legal Trends on Impossibility.

[90] As one court has framed the point:

> The case has been argued as though, for purposes of the defense of impossibility, a conspiracy charge is the same as a charge of attempting to commit a crime. It seems that such an equation could not be sustained, however, because . . . a conspiracy charge focuses primarily on the intent of the defendants, while in an attempt case the primary inquiry centers on the defendants' conduct tending toward the commission of the substantive crime. The crime of conspiracy is complete once the conspirators, having formed the intent to commit a crime, take any step in preparation; mere preparation, however, is an inadequate basis for an attempt conviction regardless of the intent . . . Thus, the impossibility that the defendants' conduct will result in the consummation of the contemplated crime is not as pertinent in a conspiracy case as it might be in an attempt prosecution.

*State v. Moretti*, 52 N.J. 182, 187 (1968).

[91] The RCC's general definition of attempt, § 301(a)(3), provides an alternative formulation of the dangerous proximity standard, which authorizes the fact-finder to evaluate whether the dangerous proximity standard has been met in light of "the situation . . . as the person perceived it." RCC § 301(a): Explanatory Note. Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation had been accurate. *Id.* Where the defendant's perspective is relied upon, however, RCC § 301(a)(3)(B) also requires the government to prove that the defendant's conduct was "reasonably adapted to commission of the [target] offense." *Id.* By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts. *Id.*

alternative basis for conspiracy liability. When read in light of the definition of attempt under RCC § 301(a), this combination dictates the following approach to impossibility in the conspiracy context: so long as the parties agree to engage in or facilitate conduct that, if completed, "[w]ould be dangerously close to committing that offense if the situation was as [they] perceived it," a conspiracy charge may lie—provided that the agreed-upon conduct is "reasonably adapted" to commission of that offense.[92]

RCC § 303(a)(2): Relation to Current District Law on Overt Act Requirement. RCC § 301(a)(2) both codifies and clarifies current District law on the overt act requirement.

It is well established under District law that proof of a bilateral agreement to commit a crime and the requisite intent is not, by itself, sufficient to secure a conviction for conspiracy. Rather, "[u]nder D.C. law, a conspiracy requires proof of both agreement and action."[93] The latter component of action is reflected in the overt act requirement, which is expressly codified by the District's general conspiracy statute.

More specifically, D.C. Code § 22-1805a(b) states that: "No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose."[94] Construing this language, the DCCA has held that the overt act requirement entails proof that "during the life of the conspiracy, and in furtherance of its objective, the commission by at least one conspirator of at least one of the overt acts specified in the indictment."[95]

This overt act requirement often is not difficult to satisfy as a matter of practice.[96] In contrast to the conduct requirement of an attempt, for example, the DCCA has observed that conspiracy's overt act requirement "is far less exacting; a preparatory act, innocent in itself, may be sufficient."[97] All the same, it seems clear from both case law and statute that the overt act requirement is nevertheless an element of the offense of conspiracy.[98]

Consistent with these legal authorities, the RCC codifies the overt act requirement reflected in current District law. The relevant language employed in RCC § 303(a)(2)

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[92] For further discussion of this statutory incorporation approach, see *infra* RCC § 303(a)(1): Relation to National Legal Trends on Impossibility.

[93] *Gilliam v. United States*, 80 A.3d 192, 208 (D.C. 2013) (quoting *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997).

[94] D.C. Code § 22-1805a(b).

[95] *Hairston v. United States*, 905 A.2d 765, 784 (D.C. 2006); *see, e.g., Mitchell v. United States*, 985 A.2d 1125, 1135 (D.C. 2009). Likewise, the District's criminal jury instructions further clarify that this overt act must have been committed "for the purpose of carrying out the conspiracy." D.C. Crim. Jur. Instr. § 7.102.

[96] *See, e.g., Hairston*, 905 A.2d at 784; *Mitchell*, 985 A.2d at 1135.

[97] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992) (citing *Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975)).

[98] *See, e.g., Mitchell*, 985 A.2d at 1135. Note, however, that while D.C. Code § 1805a(b) requires for an overt act to be "alleged and proved," the DCCA has observed that "the overt act requirement is not a part of the 'corpus delicti' of conspiracy," which is to say the "body, substance or foundation of the crime." *Irving v. United States*, 673 A.2d 1284, 1288 (D.C. 1996). Rather, as the court in *Irving v. United States* phrased it: "The substance of the crime of conspiracy is knowing participation in an agreement to accomplish an unlawful act; the requirement of an overt act is merely an evidentiary prophylactic." *Id.* at 1288. This is relevant for evidentiary reasons. *See Bellanger v. United States*, 548 A.2d 501, 502–03 (D.C. 1988) (holding that proof of overt act is not required to support admission of evidence of statement of coconspirator during course of conspiracy).

requires proof that "[o]ne of the parties to the agreement engages in an overt act in furtherance of the agreement." This language is intended to be substantively identical to that employed in D.C. Code § 1805a(b); however, two clarifying revisions bear notice.

First, the phrase "alleged and proved," employed in D.C. Code § 1805a(b), is omitted as superfluous. This is a product of the fact that the RCC incorporates the overt act requirement into the definition of a conspiracy, rather than treating it through a separate subsection as is presently the case under D.C. Code § 1805a(b). Due to this reorganization, it is clear that the overt act requirement is an element of a conspiracy under the RCC. There is, then, no need to affirmatively state that the overt act requirement is entitled to the same procedural protections afforded to any other element of an offense.

Second, the phrase "pursuant to the conspiracy and to effect its purpose," employed in D.C. Code § 1805a(b), is replaced with the phrase "in furtherance of the conspiracy" under RCC § 303(a)(2). This substitution more accessibly communicates the contours of the overt act requirement reflected in District law.[99]

RCC §§ 303(a) and (b) (Generally): Relation to Current District Law on Agreements to Achieve Non-Criminal Objectives. RCC §§ 303(a) and (b) clarify, but may also change, District law by excluding non-criminal objectives from the scope of general conspiracy liability.

Under current District law, agreements to engage in non-criminal objectives also provide the basis for conspiracy liability under limited circumstances. This is a product of the fact that the District's general conspiracy statute criminalizes conspiring "*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*."[100] As the DCCA recently explained in *Long v. United States*: "The use of the word "either" in the conspiracy statute envisions two types of conspiracies: (1) a conspiracy to defraud the District of Columbia or any court or agency; and (2) a conspiracy to commit a specific offense."[101]

The contours of conspiracy to defraud liability under District law are ill defined. The relevant statutory language seems to expand criminal liability beyond that provided for by a charge of conspiracy to commit fraud (e.g., it seems to cover forms of fraud that would not be criminal if committed by a single individual).[102] Just how far this expansion is intended to go, however, is unclear: the relevant statutory language is quite vague,[103] while reported conspiracy cases premised on "defraud[ing] the District of Columbia or any court or agency" appear to be exceedingly rare. At minimum, though, relevant case law clarifies that such language is capacious enough to encompass at least some public corruption schemes.

For example, in *United States v. Lewis*, the U.S. Court of Appeals for the D.C. Circuit (CADC) upheld a conviction for conspiracy to defraud under the District's general conspiracy statute where the defendant, the owner of a restaurant-bar, agreed with

[99] *See, e.g., Hairston*, 905 A.2d at 784; *Mitchell*, 985 A.2d at 1135.
[100] D.C. Code § 22-1805a(1).
[101] *Long v. United States*, No. 16-CF-730, 2017 WL 4248198, at *5 (D.C. Sept. 14, 2017) (citing *Eaglin v. District of Columbia*, 123 A.3d 953, 956 (D.C. 2015)).
[102] For a historical overview consistent with this reading, see *infra* notes 309-24 and accompanying text.
[103] *See generally* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959) (noting that similar language in the federal conspiracy to defraud statute is extremely vague).

two government officials to a scheme in which the officials would pressure a shopping center to provide the defendant with a lease to a liquor store in exchange for a portion of that store's profits.[104] In so doing, the CADC held that the District's general conspiracy statute covers "conspiring to defraud the District of Columbia of its lawful governmental functions including its right to have the disinterested official services of [the defendants], and its right to have its business conducted honestly."[105]

The DCCA's recent decision in *Long v. United States* is similarly in accordance.[106] In that case, the Court of Appeals upheld a conviction for conspiracy to defraud based upon the defendant's participation in a public corruption scheme, wherein he agreed to: (1) serve as the driver for a mayoral candidate paid off the books in order to avoid campaign finances laws; and (2) arrange a meeting for one mayoral candidate to endorse another in exchange for some form of compensation.[107]

Aside from these two decisions, the contours of the conspiracy to defraud prong of D.C. Code § 22-1805a are undefined by existing case law. At the same time, there is general support in the case law for the proposition that the conspiracy to defraud prong of D.C. Code § 22-1805a should be construed in accordance with the comparable prong in the federal conspiracy statute, 18 U.S.C. § 371, which criminalizes conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." For example, the CADC in *Lewis* observed that:

> Though the legislative history does not expressly indicate Congress's desire to model the D.C. provision after the federal provision, the similarity of language and the routine construction of D.C.'s local statutes in accord with their federal counterparts lend strong support to the view that the D.C. provision should be interpreted along the lines of the federal provision.[108]

Likewise, the DCCA's *Long* decision seems to be consistent with this reading. In that case, the court observed that the federal conspiracy statute "contains essentially the same language as the District's statute," and, therefore, indicated that it should be construed in accordance with the federal statute.[109]

Assuming the breadth of these two provisions are identical, however, raises a host of problems. As further discussed below,[110] the federal conspiracy to defraud provision is oft-criticized for the use of language that is "shadowy" at best.[111] The relevant ambiguities, in turn, have produced criminal liability of "such broad and imprecise

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[104] *United States v. Lewis*, 716 F.2d 16, 22-23 (D.C. Cir. 1983). Having been convicted by the federal trial court of conspiracy to defraud under the District's general conspiracy statute, the defendant argued on appeal that his conviction ought to be overturned because the conspiracy to defraud prong of that statute "should be limited to fraud on the government involving money or property and not be read to reach fraud which impairs governmental functions." *Id.* at 23.
[105] *Id*.
[106] *Long*, 2017 WL 4248198, at *5.
[107] *See id.*
[108] *Lewis*, 716 F.2d at 23 (citing *Dennis v. United States*, 384 U.S. 855, 859-864 (1966); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).
[109] *Long*, 2017 WL 4248198, at *5.
[110] *See* RCC §§ 303(a) & (b) (Generally): Relation to National Legal Trends on Non-Criminal Objectives.
[111] Goldstein, *supra* note 103, at 408; *see In re McBride*, 602 A.2d 626, 633 (D.C. 1992) (citing *id.*).

proportions as to trench . . . the standards of fair trial and on constitutional prohibitions against vagueness and double jeopardy."[112] In light of these problems, today "most states provide that the object of a criminal conspiracy must be some crime, or some felony."[113]

Given these policy and practice considerations, and consistent with the interests of clarity and consistency, the RCC's general conspiracy provision excludes any reference to conspiracies "to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose." RCC §§ 303(a) and (b) are instead limited to agreements to commit criminal "offenses,"[114] including the revised and expanded fraud offense.[115] This exclusion will ensure that the RCC clearly communicates the elements of general conspiracy liability. This change may—but need not necessarily—circumscribe the limits of conspiracy liability under District law.[116]

*Relation to National Legal Trends.* RCC §§ 303(a) and (b) are in part consistent with, and in part depart from, national legal trends.

Most of the substantive policies incorporated into RCC §§ 303(a) and (b)—namely, the purpose requirement governing conduct, the principle of intent elevation governing results and circumstances, the agreement requirement, the overt act requirement, and the exclusion of non-criminal objectives—reflect majority or prevailing

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[112] Goldstein, *supra* note 103, at 408.

[113] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

[114] This prohibition is not intended to change current District law on Wharton's rule, which is an "'exception to the general principle that a conspiracy and the substantive offense that is its immediate end' are discrete crimes for which separate sanctions may be imposed." *Pearsall v. United States*, 812 A.2d 953, 961–62 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 781-82 (1975)). As the DCCA observed in *Pearsall*:

> Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to require necessarily the participation of two people for its commission . . . For example, Wharton's Rule applies to offenses such as adultery, incest, bigamy, and duelling that require concerted criminal activity, a plurality of criminal agents and is essentially an aid to the determination of legislative intent.

*Pearsall*, 812 A.2d at 961–62; *see United States v. Payan*, 992 F.2d 1387, 1390 (5th Cir.1993) ("Only where it is impossible under any circumstances to commit the substantive offense without cooperative action, does Wharton's Rule bar convictions for both the substantive offense and conspiracy to commit that same offense.") (citing *Gebardi v. United States*, 287 U.S. 112, 121-22 (1932)). Generally speaking, [t]he crimes that traditionally fall under Wharton's Rule share three characteristics": (1) "[t]he parties to the agreement are the only persons who participate in commission of the substantive offense"; (2) "the immediate consequences of the crime rest on the parties themselves rather than on society at large"; and (3) "the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert." *Pearsall*, 812 A.2d at 962 (quoting *Iannelli*, 420 U.S. at 783-84).

[115] By implication, conspiracy liability does not attach to agreements to engage in conduct that would not otherwise be criminal if committed by an individual.

[116] Whether this constitutes a change in law depends, first, upon whether there is a meaningful policy difference between conspiring to "defraud the District of Columbia or any court or agency thereof in any manner or for any purpose" under current law, and conspiring to commit the revised fraud statute, RCC § 22A-201. Assuming the answer to this question is yes, then the existence of a change in law depends upon, second, whether the RCC codifies a specific public corruption conspiracy offense, which might otherwise fill the foregoing gap in liability.

legal trends governing the law of conspiracy.[117] The most notable exception is the plurality requirement codified by RCC § 303(a), which reflects a minority trend.

Comprehensively codifying the culpable mental state requirement and conduct requirement applicable to criminal conspiracies is in accordance with widespread, modern legislative practice. However, the manner in which RCC §§ 303(a) and (b) codify these requirements departs from modern legislative practice in a few notable ways.

A more detailed analysis of national legal trends and their relationship to RCC §§ 303(a) and (b) is provided below. It is organized according to seven main topics: (1) the plurality requirement; (2) the agreement requirement; (3) the culpable mental state requirement; (4) impossibility; (5) the overt act requirement; (6) conspiracies to achieve non-criminal objectives; and (7) codification practices.

RCC § 303(a) (Prefatory Clause): Relation to National Legal Trends on Plurality Requirement. Within American criminal law, it is well established that the general inchoate offense of conspiracy is comprised of an intentional agreement to commit a criminal offense.[118] One fundamental issue at the heart of what this formulation actually means, however, is whether conspiracy is a *bilateral* or *unilateral* offense.

The bilateral approach to conspiracy incorporates a plurality principle under which proof of a subjective agreement between at least two parties who share a particular criminal objective is a necessary ingredient of conspiracy liability.[119] The unilateral

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[117] *But see infra* notes 207-14 and accompanying text (discussing the difference between purpose and intent elevation for results).

[118] *See, e.g.*, *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Braverman v. United States*, 317 U.S. 49, 53 (1942). By way of historical background:

> [T]he crime of conspiracy itself is of relatively modern origins. The notion that one may be punished merely for agreeing to engage in criminal conduct was unknown to the early common law . . . Until the late seventeenth century, the only recognized form of criminal conspiracy was an agreement to make false accusations or otherwise to misuse the judicial process . . . And it was not until the nineteenth century that courts in the United States began to view conspiracies as distinct evils . . . .

*State v. Pond*, 108 A.3d 1083, 1096-97 (Conn. 2015) (internal citations and quotations omitted). It is commonly recognized that "the crime of conspiracy serves two important but different functions: (1) as with solicitation and attempt, it is a means for preventive intervention against persons who manifest a disposition to criminality; and (2) it is also a means of striking against the special danger incident to group activity." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.

[119] *See, e.g.*, *People v. Justice*, 562 N.W.2d 652, 658 (Mich. 1997). This means that a conspiracy prosecution "must fail in the absence of proof that at least two persons possessed the requisite *mens rea* of a conspiracy, i.e., the intent to agree and the specific intent that the object of their agreement be achieved." DRESSLER, *supra* note 61, at § 29.06. It does not mean, however, that two persons must be prosecuted and convicted of conspiracy to support a conviction for any one person. *See id.* (citing *Commonwealth v. Byrd*, 417 A.2d 173, 176–77 (Pa. 1980); *State v. Colon*, 778 A.2d 875, 883 (Conn. 2001); *State v. Johnson*, 788 A.2d 628, 632–33 (Md. 2002)). Where, however, "all other alleged coconspirators are acquitted, the conviction of one person for conspiracy will not be upheld." *United States v. Bell*, 651 F.2d 1255, 1258 (8th Cir. 1981); *see* Michelle Migdal Gee, *Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators*, 19 A.L.R.4th 192 (Westlaw 2017). For a discussion of the extent to which this "traditional rule" appears to be "breaking down," see DRESSLER, *supra* note 61, at § 29.06 n.117. And for conflicting case law on the impact of a *nolle prosequi*, compare *United States v. Fox*, 130 F.2d 56 (3d Cir. 1942) with *Regle v. State*, 9 Md. App. 346 (1970).

approach to conspiracy, in contrast, rejects this kind of plurality principle, instead allowing for conspiracy liability to be applied to a person who him or herself agrees to commit a crime, provided that he or she believes another person has entered into that agreement.[120]

The difference between these two views of conspiracy liability is most significant in cases in which one person, committed to furthering a criminal enterprise, approaches another seeking to enlist his or her cooperation.[121] If the other party *seems* to agree, but secretly withholds agreement (perhaps even resolving to notify the authorities), the initiating person is guilty of conspiracy under a unilateral approach, but not under a bilateral approach.[122] The bilateral approach also rejects conspiracy liability where the only other party to an alleged conspiracy is mentally incapable of agreeing—whereas the unilateral approach would not.[123]

Historically speaking, conspiracy emerged as a bilateral offense.[124] In the eyes of the common law, the gist of a conspiracy is an agreement, and an agreement is generally understood to be a group act.[125] So unless two or more people are parties to an agreement, it does not make sense to speak of a conspiracy.[126] Typical older conspiracy statutes codified this bilateral approach by framing the offense in terms of an agreement between "two or more persons."[127]

In recent years, the trend among reform jurisdictions has been to replace the common law's bilateral approach with a unilateral approach. Rather than require that "two or more persons" agree, contemporary conspiracy provisions more frequently focus on whether one person "agrees with [another] person."[128] Which is to say: these provisions "focus inquiry on the culpability of the actor whose liability is in issue, rather than on that of the group of which [she] is alleged to be a part."[129] The basis for this shift is rooted in the Model Penal Code.

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[120] *See, e.g., State v. Rambousek*, 479 N.W.2d 832, 833–34 (N.D. 1992). In practical effect, this means that although the prosecution may not convict a person of conspiracy in the absence of proof of an agreement, it is no defense that the person with whom the actor agreed: (1) has not been or cannot be convicted; or (2) is acquitted in the same or subsequent trial on the ground that she did not have the intent to go forward with the criminal plan (e.g., she feigned agreement in an effort to frustrate the endeavor, or is insane). DRESSLER, *supra* note 61, at § 29.06; *see State v. Kihnel*, 488 So.2d 1238, 1240 (La. App. 4 Cir. 1986) (under the unilateral approach, "the trier-of-fact assesses the subjective individual behavior of a defendant, rendering irrelevant in determining criminal liability the conviction, acquittal, irresponsibility, or immunity of other co-conspirators.").

[121] *See* Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 220 (1981).

[122] *See e.g., State v. Pacheco*, 882 P.2d 183, 186 (Wash. 1994); *Palato v. State*, 988 P.2d 512, 515–16 (Wyo. 1999); *United States v. Escobar de Bright*, 742 F.2d 1196, 1199–200 (9th Cir. 1984); *Archbold v. State*, 397 N.E.2d 1071 (1979); *Moore v. State*, 290 So.2d 603 (Miss. 1974).

[123] *See Regle*, 264 A.2d at 119. More generally, under the bilateral approach, "any defense of a co-conspirator that undercuts his intention to agree or the validity of his agreement, would serve to prevent proof of the required element of 'agreement' in a prosecution of the defendant-co-conspirator." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 82 (Westlaw 2017).

[124] *See, e.g., Pettibone v. United States*, 148 U.S. 197 (1893); *Morrison v. California*, 291 U.S. 82, 92 (1934).

[125] DRESSLER, *supra* note 61, at § 29.06.

[126] *Id.*

[127] *See, e.g.*, D.C. Code § 22-1805a; Cal. Penal Code § 182.

[128] *See, e.g., Miller v. State*, 955 P.2d 892, 897 (Wyo. 1998).

[129] Model Penal Code § 5.03 cmt. at 393, 398–402.

More specifically, the Model Penal Code's general conspiracy provision, § 5.03(1)(a), establishes that "[a] person is guilty of conspiracy *with another person or persons* to commit a crime if . . . *he . . . agrees with such other person or persons* that they or one or more of them will engage in conduct that constitutes such crime . . . ."[130] Under this approach, "[g]uilt as a conspirator is measured by the situation as the actor views it."[131] Which is to say: so long as the defendant "believe[s] that he is agreeing with another that they will engage in the criminal offense," that person may be subjected to conspiracy liability under Model Penal Code § 5.03(1)(a).[132]

Since completion of the Model Penal Code, many jurisdictions have opted to abandon the common law's plurality principle. It now appears, for example, that a "majority of states [] apply[] the unilateral theory to the crime of conspiracy."[133] However, the general conspiracy statutes in some jurisdictions continue to retain the classic bilateral phraseology ("two or more persons").[134] Other jurisdictions appear to adopt the Model Penal Code's unilateral phrasing ("one person agrees with another person"), yet their state appellate courts have nevertheless construed them to yield a bilateral approach.[135]

Driving this disparity of treatment are the competing considerations respectively implicated by the bilateral and unilateral approaches. As a matter of plain English, for example, the plurality principle has strong intuitive appeal. As noted above, early

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[130] Model Penal Code § 5.03.

[131] Model Penal Code § 5.03 (explanatory note).

[132] *Id.* Under the foregoing approach, [a]n actor may be found guilty of conspiracy even if the person with whom he conspires objectively agrees but intends to and actually does inform the police of the agreement, or if the co-conspirator renounces his criminal intent." ROBINSON, *supra* note 123, at 1 CRIM. L. DEF. § 82. Indeed, "[t]his unilateral culpability standard is accepted even in instances where the co-conspirator is not apprehended, is not indicted, is acquitted, or is not prosecuted." *Id.*; *see* Model Penal Code § 5.04(1)(b) (Generally speaking, "it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that . . . the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.")

[133] *Miller*, 955 P.2d at 894. For criminal codes that incorporate a unilateral statutory formulation, *see* Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ariz. Rev. Stat. Ann. § 13-1003; Ark. Code Ann. § 5-3-401; Colo. Rev. Stat. Ann. § 18-2-201; Del. Code Ann. tit. 11, § 511; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-8; Haw. Rev. Stat. § 705-520; Ind. Code Ann. § 35-41-5-2; Kan. Stat. Ann. § 21-5302; Ky. Rev. Stat. Ann. § 506.040; Me. Rev. Stat. Ann. tit. 17-A, § 151; Minn. Stat. Ann. § 609.175; Mo. Ann. Stat. § 564.016; Mont. Code Ann. § 45-4-102; Neb. Rev. Stat. § 28-202; Nev. Rev. Stat. Ann. § 175.251; N.H. Rev. Stat. Ann. § 629:3; N.J. Stat. Ann. § 2C:5-2; N.M. Stat. Ann. § 30-28-2; N.Y. Penal Law § 105.00; N.D. Cent. Code § 12.1-06-04; Ohio Rev. Code Ann. § 2923.01; Or. Rev. Stat. § 161.450; Pa. Cons. Stat. Ann. tit. 18, § 903; Tex. Penal Code Ann. § 15.02; Utah Code Ann. § 76-4-201; Va. Code Ann. § 18.2-22; Wis. Stat. Ann. § 939.31; Wyo. Stat. § 6-1-303; Conn. Gen. Stat. Ann. § 53a-48; Ill. Comp. Stat. Ann. ch. 720, § 5/8-2; Wash. Rev. Code § 9A.28.040. Such language is typically interpreted to yield a unilateral approach. *See, e.g., Miller*, 955 P.2d at 894; *People v. Schwimmer*, 66 A.D.2d 91 (N.Y. App. Div. 1978), aff'd, 47 N.Y.2d 1004 (1979); *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *but see infra* note 135 and accompanying text.

[134] *See, e.g.*, 18 U.S.C.A. § 371; D.C. Code § 22-1805a; La. Stat. Ann. § 14:26; Cal. Penal Code § 182. It's worth noting that while the general conspiracy statute in a particular jurisdiction may be unilateral, that same jurisdiction may also have other special conspiracy statutes that are not. *See, e.g., Palato v. State*, 988 P.2d 512 (Wyo. 1999).

[135] *See, e.g., State v. Colon*, 778 A.2d 875 (Conn. 2001) (construing Conn. Gen. Stat. Ann. § 53a-48); *People v. Foster*, 457 N.E.2d 405 (Ill. 1983) (construing Ill. Comp. Stat. Ann. ch. 720, § 5/8-2); *State v. Pacheco*, 125 Wash.2d 150 (1994) (construing Wash. Rev. Code § 9A.28.040); ROBINSON, *supra* note 123, at 1 CRIM. L. DEF. § 82.

proponents of the bilateral approach to conspiracy emphasized the common sense notion of agreement, under which it is simply "impossible for a man to conspire with himself."[136] Even today, however, legal authorities point towards "dictionary definitions" of agreement as providing a relevant basis for preserving a bilateral approach.[137]

Those who support a unilateral approach to conspiracy, in contrast, argue that considerations of social policy ought to outweigh concerns of linguistic usage. For example, proponents of the unilateral approach argue that it is the policy that best serves the "subjectivist" goal of incapacitating dangerous offenders.[138] As one court phrases it: 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."[139]

Proponents of the unilateral approach additionally argue that recognition of a plurality principle undermines the law enforcement purpose of conspiracy laws.[140] Illustrative is the situation of an undercover police officer who feigns willingness to agree with an unsuspecting criminal.[141] Under a bilateral approach, that officer might have to wait until the criminal engages in sufficient conduct in furtherance of the agreed-upon criminal objective to meet the standard for attempt liability in order to ensure the existence of a prosecutable offense.[142]

Contemporary proponents of a bilateral approach tend to find the above lines of reasoning to be less than entirely persuasive, however.[143] For one thing, the extent to which the bilateral approach specifically undermines the law enforcement purpose of conspiracy laws may be overstated since a defendant who encourages, requests, or commands an undercover officer to commit a crime may—even absent true agreement on that officer's part—be found guilty of solicitation.[144]

More broadly, those who today support a plurality principle argue that it directly accords with the objectivist "special dangers in group criminality" rationale at the heart of conspiracy liability.[145] Here, for example, is how both state and federal courts have phrased it:

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[136] *Morrison v. California*, 291 U.S. 82, 92 (1934).

[137] *Pacheco*, 125 Wash. 2d at 154-55; *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965); *United States v. Derrick*, 778 F. Supp. 260, 265 (D.S.C. 1991).

[138] *See, e.g.*, Model Penal Code § 5.03 cmt. at 393.

[139] *Miller*, 955 P.2d at 897.

[140] *See* DRESSLER, *supra* note 61, at § 29.06.

[141] *See id.*

[142] *See id.*

[143] *See id.*

[144] *Id.* at n.122; *see, e.g., Pacheco*, 125 Wash. 2d at 156–58.

[145] DRESSLER, *supra* note 61, at § 29.06. On the flipside, proponents of a bilateral approach argue that absent real agreement, conspiracy liability merely punishes bad intentions. Here's how one court has phrased it:

> When one party merely pretends to agree, the other party, whatever he or she may believe about the pretender, is in fact not conspiring with anyone. Although the deluded party has the requisite criminal intent, there has been no criminal act.

*Pacheco*, 125 Wash. 2d at 157 (citing *United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984) and Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 926 (1959)); *see,*

> The primary reason for making conspiracy a separate offense from the substantive crime is the increased danger to society posed by group criminal activity . . . However, the increased danger is nonexistent when a person "conspires" with a government agent who pretends agreement. In the feigned conspiracy there is no increased chance the criminal enterprise will succeed, no continuing criminal enterprise, no educating in criminal practices, and no greater difficulty of detection.[146]

In sum, while the unilateral approach reflects the majority practice in American criminal law, there exists a significant minority of jurisdictions that appear to apply the bilateral approach currently recognized in District law. Because the plurality principle falls within the boundaries of longstanding American legal practice, is justifiable, and represents current District law, it is the approach incorporated into the RCC.

RCC § 303(a)(1): Relation to National Legal Trends on Agreement Requirement. The "essence"[147] of a conspiracy is the agreement.[148] It constitutes a necessary *actus reus* of the offense,[149] which is comprised of a "communion with a mind and will . . . on the part of each conspirator."[150] It also provides externalized evidence that the parties intended for a crime to be committed.[151]

In practice, the agreement requirement is viewed quite broadly by American legal authorities. For example, it is well established that the agreement at the heart of conspiracy liability need not be express.[152] Nor is "a physical act of communication of an agreement (e.g., a nod of the head or some verbal exchange) required."[153] Rather, proof

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*e.g.*, Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 929–30 (1977); Dierdre A. Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DEPAUL L. REV. 75, 93 (1979).

[146] *Pacheco*, 125 Wash. 2d at 157; *see, e.g., State v. Dent*, 123 Wash. 2d 467, 476 (1994); *Escobar de Bright*, 742 F.2d at 1199–1200; *United States v. Rabinowich*, 238 U.S. 78, 88, 35 S.Ct. 682, 684–85 (1915). One other concern highlighted by supporters of a bilateral approach is the "potential for abuse" in a unilateral regime. *Pacheco*, 125 Wash. 2d at 157. That is, "[i]n a unilateral conspiracy, the State not only plays an active role in creating the offense, but also becomes the chief witness in proving the crime at trial." *Id.* This state of affairs, in turn, "has the potential to put the State in the improper position of manufacturing crime." *Id.*

[147] *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

[148] *See, e.g., Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Braverman v. United States*, 317 U.S. 49, 53 (1942); *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999); *United States v. Roberts*, 14 F.3d 502, 511 (10th Cir. 1993); *Cuellar v. State*, 13 S.W.3d 449, 453 (Tex. App. 2000).

[149] *United States v. Shabani*, 513 U.S. 10, 16 (1994).

[150] DRESSLER, *supra* note 61, at § 29.04.

[151] Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 695 (2011) ("[T]he agreement takes the law beyond the individual mental states of the parties, in which each person separately intends to participate in the commission of an unlawful act, to a shared intent and mutual goal, to a spoken or unspoken understanding by the parties that they will proceed in unity toward their shared goal.").

[152] *See* DRESSLER, *supra* note 61, at § 29.04.

[153] *Id.*; *see United States v. James*, 528 F.2d 999, 1011 (5th Cir. 1976). Which is to say that "[t]here need not be an explicit offer and acceptance to engage in a criminal conspiracy; the agreement may be inferred from evidence of concert of action among people who work together to achieve a common end." Steven R. Morrison, *The System of Modern Criminal Conspiracy*, 63 CATH. U. L. REV. 371, 405 (2014); *see, e.g., Am.*

of a mere tacit understanding can be sufficient to establish conspiracy liability.[154] And the requisite "agreement can exist although not all of the parties to it have knowledge of every detail of the arrangement, as long as each party is aware of its essential nature."[155]

One particularly important aspect of the agreement requirement reflected in American criminal law on conspiracy is its relationship with accessory liability. It is well established, for example, that the parties to a conspiracy need not themselves agree "to undertake all of the acts necessary for the crime's completion," let alone directly participate in the commission of an offense.[156] Rather, "[o]ne can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense."[157]

The following examples, recently highlighted by the U.S. Supreme Court recently in *Ocasio v. United States*, illustrate the relevance of this principle:

> Entering a dwelling is historically an element of burglary . . . but a person may conspire to commit burglary without agreeing to set foot inside the targeted home. It is enough if the conspirator agrees to help the person who will actually enter the dwelling, perhaps by serving as a lookout or driving the getaway car. Likewise, a specific intent to distribute drugs oneself is not required to secure a conviction for participating in a drug-trafficking conspiracy. Agreeing to store drugs at one's house in support of the conspiracy may be sufficient.[158]

That planned participation as an accessory will provide the basis for conspiracy liability "if the requisite consensus is involved" is not only an established common law principle.[159] It also reflects the "contemporary understanding" of conspiracy liability.[160] The basis for the modern approach to the issue is rooted in the provisions of the Model Penal Code and the proposed Federal Criminal Code.[161]

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*Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *United States v. Lopez*, 979 F.2d 1024, 1029 (5th Cir. 1992); *United States v. Hegwood*, 977 F.2d 492, 497 (9th Cir. 1992); *United States v. Simon*, 839 F.2d 1461, 1469 (11th Cir. 1988)).

[154] *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *United States v. Rea*, 958 F.2d 1206, 1213-14 (2d Cir. 1992); *United States v. Concemi*, 957 F.2d 942, 950 (1st Cir. 1991).

[155] *Blumenthal v. United States*, 332 U.S. 539, 557–58 (1947); *see People v. Mass*, 628 N.W.2d 540, 549 n.19 (Mich. 2001).

[156] *Salinas v. United States*, 522 U.S. 52, 65 (1997).

[157] *Id.* at 64-65 ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.").

[158] 136 S. Ct. 1423, 1430 (2016). Likewise, where "D1 agrees to provide D2 with a gun to be used to kill V, D1 is guilty of conspiracy to commit murder, although she did not agree to commit the offense herself." DRESSLER, *supra* note 61, at § 29.04 n.77

[159] *United States v. Barnes*, 158 F.3d 662, 671 (2d Cir. 1998) (quoting Model Penal Code § 5.03 cmt. at 421). *See, e.g., United States v. Holte*, 236 U.S. 140, 144 (1915); *see United States v. Rabinowich*, 238 U.S. 78, 86 (1915); *Direct Sales Co. v. United States*, 319 U.S. 703, 712 (1943).

[160] *Salinas*, 522 U.S. at 64–65; *see, e.g., United States v. Barnes*, 158 F.3d 662, 671 (2d Cir. 1998); *United States v. Perry*, 643 F.2d 38, 46-47 (2d Cir. 1981); *United States v. Middlebrooks*, 618 F.2d 273, 278-79 (5th Cir.), *modified in part*, 624 F.2d 36 (5th Cir. 1980).

[161] Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1134 (1975).

The relevant Model Penal Code provision, § 5.03(1)(b), permits a person to be convicted of conspiracy if he or she "agrees to aid such other person or persons in the planning or commission of such crime . . ."[162] The commentary to this provision emphasizes that, pursuant to such language, the "actor need not agree 'to commit' the crime."[163] Rather, "so long as the purpose of the agreement is to facilitate commission of a crime," conspiracy liability is appropriate under circumstances where the planned participation is of an accessorial nature.[164]

The proposed Federal Criminal Code employs a similar approach, albeit articulated through different language. Under the relevant provision, § 1004(1), "[a] person is guilty of conspiracy if he agrees with one or more persons *to engage in or cause the performance of conduct* which, in fact, constitutes a crime or crimes . . . ."[165] By enabling conspiracy liability to rest upon causing another person to engage in conduct that constitutes a crime, this proposed Federal Criminal Code provision would explicitly enable planned accessorial participation to provide the basis for conspiracy liability.[166]

Numerous modern criminal codes explicitly codify one of these two formulations.[167] However, "[e]ven under statutes defining conspiracy simply as an agreement *to commit* a crime," courts routinely conclude that planned participation as an accessory provides an appropriate basis for conspiracy liability—notwithstanding the absence of an explicit legislative hook.[168]

Consistent with national legal trends outlined above, agreements to aid in the planning or commission of criminal conduct, no less than agreements to directly perpetrate criminal conduct, fall within the boundaries of conspiracy liability under § 303(a)(1) of the RCC.

RCC §§ 303(a) & (b): Relation to National Legal Trends on Culpable Mental State Requirement. Understanding conspiracy's culpable mental state requirement is particularly crucial to denoting the contours of criminal liability given that this frequently charged offense is "predominantly mental in composition."[169] Complicating this understanding, however, is the fact that there has "always existed considerable confusion

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[162] Model Penal Code § 5.03(1)(b).
[163] Model Penal Code § 5.03(1)(b) cmt. at 409.
[164] *Id.*
[165] Proposed Federal Criminal Code § 1004(1).
[166] *Id.*; *see* Buscemi, *supra* note 161, at 1134. Here's an example:

> [S]uppose A and B agree to solicit C to murder X. If C consents and successfully implements the plan, A and B would surely be liable not only for solicitation, but also, under a complicity theory, for murder. Completely apart from C's reaction, though, A and B would probably be liable for conspiracy to commit murder under a statute which defined that inchoate offense as an agreement to engage in or *cause the performance of conduct constituting the substantive crime*.

*Id.* (emphasis added).
[167] *Compare, e.g.*, N.J. Stat. Ann. § 2C:5-2; 18 Pa. Stat. and Cons. Stat. Ann. § 903 *with* N.D. Cent. Code Ann. § 12.1-06-04; Wash. Rev. Code Ann. § 9A.28.040; N.Y. Penal Law § 105.17; Ala. Code § 13A-4-3 Or. Rev. Stat. Ann. § 161.450 ; Me. Rev. Stat. tit. 17-A, § 151.
[168] Buscemi, *supra* note 161, at 1134; *see supra* notes 155-60.
[169] Albert Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 632 (1941).

and uncertainty about precisely what mental state is required for this crime."[170] That American legal authorities have long struggled to address the culpable mental state requirement governing conspiracy is not surprising, however: it is a "particularly challenging" topic by any standard.[171]

Historically speaking, the treatment of the culpable mental state requirement of conspiracy in American criminal law has evolved in a manner similar to that of the culpable mental state requirement governing complicity. At common law, for example, both conspiracy and complicity were viewed through the lens of offense analysis, under which each was understood to entail proof of a "specific intent." That is, whereas conspiracy liability entailed proof of a "specific intent" to commit an agreed-upon offense,[172] complicity required proof of a "specific intent" to aid another in the commission of an offense.[173] More recently, however, American legal authorities have come to realize that both of these *mens rea* formulations are fundamentally ambiguous. The reason? They fail to take "account of both the policy of the inchoate crime and the policies, varying elements, and culpability requirements of all substantive crimes."[174]

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.[175] The same is also true of complicity and conspiracy, which respectively criminalize steps towards completion of a particular crime (respectively, aiding or agreeing to commit/aid an offense). At the same time, the inchoate and multi-participant nature of both complicity and conspiracy raises its own set of culpable mental state considerations, namely, the relationship between the actor's mental state and future conduct (often committed by someone else) that, if carried out, would consummate the target offense.[176]

For this reason, it is frequently said that both complicity and conspiracy incorporate "dual intent[]" requirements.[177] In the context of conspiracy, for example, the first intent requirement relates to the parties' culpable mental state with respect to future conduct: generally speaking, the parties must "intend," by their agreement, to promote or facilitate conduct planned to culminate in an offense.[178] The second intent requirement, in contrast, relates to the parties' culpable mental state with respect to the

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[170] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.
[171] 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).
[172] *See, e.g.*, LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2; *People v. Swain*, 12 Cal. 4th 593, 600 (1996).
[173] *Swain*, 12 Cal.4th at 602; *People v. Cortez*, 18 Cal. 4th 1223, 1232 (1998).
[174] Wechsler et al., *supra* note 171, at 967.
[175] *Id.*
[176] *See, e.g.*, Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).
[177] For discussion of the dual intent requirement in the context of complicity, see *State v. Foster*, 202 Conn. 520, 526 (1987). 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; *see also* Harno, *supra* note 169, at 631; *United States v. Alvarez*, 610 F.2d 1250, 1255 (5th Cir. 1980); *United States v. Piper*, 35 F.3d 611, 614-15 (1st Cir. 1994).
[178] Robinson, *supra* note 176, at 864.

results and/or circumstance elements of the target offense: generally speaking, the parties must "intend," by their agreement, to bring them about.[179]

Upon closer consideration, each component of this double-barreled recitation of conspiracy's culpable mental state requirement encompasses key policy issues. With respect to the first intent requirement, for example, the central policy question is this: may a party to an agreement be convicted of conspiracy if he or she is *merely aware* (i.e., knows) that, by such agreement, he or she is promoting or facilitating conduct planned to culminate in an offense? Or, alternatively, must it proven that the accused *desires* (i.e., has the purpose) to promote or facilitate such conduct?

Resolution of this question is "crucial to the resolution of the difficult problems presented when a charge of conspiracy is leveled against a person whose relationship to a criminal plan is essentially peripheral."[180] Illustrative situations include: (1) whether the operator of a telephone answering service may be convicted of conspiracy for agreeing to provide telephone messages to known prostitutes;[181] or (2) whether a drug wholesaler may be convicted of conspiracy for agreeing to sell large quantities of legal drugs to a buyer who the wholesaler knows will use them for unlawful purposes.[182]

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."[183] What remains to be determined is whether this culpable mental state provides a sufficient basis for a conspiracy conviction. Conflicting policy considerations are implicated in the resolution of this question, 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."[184]

A "true purpose" view holds that the culpable mental state requirement governing conspiracy can only be satisfied by proof of a *conscious desire* to promote or facilitate criminal conduct by such agreement. As a matter of policy, it reflects the position that:

> [C]onspiracy laws should be reserved for those with criminal motivations, rather than seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders . . . [T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner. Indeed, in 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'

[179] *Id.*
[180] Model Penal Code § 5.03 cmt. at 403.
[181] *See People v. Lauria*, 251 Cal. App. 2d 471 (Ct. App. 1967).
[182] *See Direct Sales Co. v. United States*, 319 U.S. 703 (1943).
[183] DRESSLER, *supra* note 61, at § 27.07. Typical also "is the case of the person who sells sugar to the producers of illicit whiskey," since he or she "may have little interest in the success of the distilling operation and be motivated mainly by the desire to make the normal profit from an otherwise lawful sale." Wechsler et al., *supra* note 171, at 1030. "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." *Id.*
[184] Model Penal Code § 5.03 cmt. at 403.

> plans) will also be prosecuted, thereby seriously undermining lawful commerce.[185]

The knowledge view, in contrast, holds that *mere awareness* that one is promoting or facilitating the commission of a crime is considered to be sufficient, even absent a true purpose to advance the criminal end. As a matter of policy, it 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.[186]

Although case law from the mid-twentieth century appears to reflect both some disagreement[187] and ambiguity[188] on the choice between these two positions, it appears that contemporary American criminal law has embraced the true purpose view.[189] The basis for this resolution of the issue is the work of the Model Penal Code.

Having considered the consequences of holding criminally liable those who knowingly provide goods or services to criminal schemes—whether under a conspiracy theory (based on agreement) or a complicity theory (based on assistance)—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."[190] The Model Penal Code drafters thereafter deemed "the case" for this resolution to be an "even stronger one" in the context of conspiracy, thereby making "the same purpose requirement that governs complicity essential for conspiracy."[191]

More specifically, the Model Penal Code's general definition of conspiracy, § 5.03(1), like its general definition of complicity, § 2.06(3), requires proof that the requisite agreement was accompanied by "the purpose of promoting or facilitating the

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[185] *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940) (Hand, J.).

[186] DRESSLER, *supra* note 61, at § 27.07.

[187] *Compare Falcone*, 109 F.2d at 581; *Jacobs v. Danciger*, 328 Mo. 458, 41 S.W.2d 389 (1931) *with Quirk v. United States*, 250 F.2d 909, 911 (1st Cir. 1957); *United States v. Tramaglino*, 197 F.2d 928, 932 (2d Cir. 1952).

[188] This ambiguity is primarily a product of two U.S. Supreme Court decisions from the 1940s. The first decision, *United States v. Falcone*, held that proof of knowledge of a purchaser's illegal use of a product is insufficient to establish an inference of intent to facilitate a conspiracy. 311 U.S. 205, 208-10 (1940). Thereafter, in *Direct Sales Co. v. United States*, the U.S. Supreme Court held that proof of the sale of large quantities of controlled substances for profit with knowledge of the illicit distribution of those substances was sufficient to establish the intent required for conspiracy. 319 U.S. 703, 711-13 (1943). There is disagreement over whether and to what extent *Direct Sales* contradicts *Falcone*. *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2; *Maldonado*, 137 N.M. at 699. However, given that *Direct Sales* reaffirms that the "inten[t] to further, promote and cooperate in" criminal activity "is the gist of conspiracy," which "is not identical with mere knowledge that another purposes unlawful action," 319 U.S. at 711-13, it seems that *Direct Sales* is not inconsistent with a true purpose view, see Model Penal Code § 5.03 cmt. at 404.

[189] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.

[190] Model Penal Code § 5.03 cmt. at 406.

[191] *Id.*

commission of the crime."[192] The relevant explanatory note to this provision states that "[t]he purpose requirement is meant to extend to [the] conduct elements of the offense that is the object of the conspiracy."[193] And the accompanying commentary explicitly states that this general requirement of purpose is intended to clarify that, among other issues, "[a] conspiracy does not exist if a provider of goods or services is aware of, but fails to share, another person's criminal purpose."[194]

Since publication of the Model Penal Code in 1962, the drafters' recommended embrace of the true purpose view appears to have been widely accepted. For example, "most of the modern codes specifically state that [a conscious desire] to commit a crime is required" by their general conspiracy offense.[195] Even outside of reform jurisdictions, however, "all the states which have demonstrated their intention to enact a relatively thorough codification of the conspiracy offense" seem to endorse the true purpose view.[196] The true purpose view also finds support in contemporary case law, which establishes that "knowing aid is not [a] sufficient" basis for liability.[197] Likewise, legal commentary similarly appears to support the true purpose view in the context of conspiracy liability.[198]

Whereas conspiracy's first intent requirement implicates a relatively narrow and bifurcated policy choice between purpose and knowledge as to conduct, conspiracy's second intent requirement implicates broader and more wide-ranging policy issues. At the heart of these issues are the various possibilities presented by an element analysis of the results and/or circumstances of a conspiracy.

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[192] Model Penal Code § 5.03(1).

[193] Model Penal Code § 5.03(1) (explanatory note)

[194] Model Penal Code § 5.03(1) cmt. at 404. *See also id.* (noting that this formulation "should also dispel the ambiguity inherent in many judicial formulations that predicate conspiracy on merely 'joining' or 'adhering' to a criminal organization or speak of an 'implied agreement' with the conspirators by aiding them 'knowing in a general way their purpose to break the law'").

[195] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 n.111. *See, e.g.*, Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ariz. Rev. Stat. Ann. § 13-1003; Ark. Code Ann. § 5-3-401; Colo. Rev. Stat. Ann. § 18-2-201; Conn. Gen. Stat. Ann. § 53a-48; Del. Code Ann. tit. 11, § 511; Fla. Stat. Ann. § 777.04; Haw. Rev. Stat. § 705-520; Ill. Comp. Stat. Ann. ch. 720, § 5/8-2; Ind. Code Ann. § 35-41-5-2; Ky. Rev. Stat. Ann. § 506.040; Me. Rev. Stat. Ann. tit. 17-A, § 151; Mo. Ann. Stat. § 564.016; Mont. Code Ann. § 45-4-102; Neb. Rev. Stat. § 28-202; N.H Rev. Stat. Ann. § 629:3; N.J. Stat. Ann. § 2C:5-2; N.M. Stat. Ann. § 30-28-2; N.Y. Penal Law § 105.00; Ohio Rev. Code Ann. § 2923.01; Or. Rev. Stat. § 161.450; Pa. Cons. Stat. Ann. tit. 18, § 903; Tenn. Code Ann. § 39-12-103; Tex. Penal Code Ann. § 15.02; Utah Code Ann. § 76-4-201; Wash. Rev. Code § 9A.28.040; W. Va. Code § 61-10-31; Wis. Stat. Ann. § 939.31. Note, however, that "at least two states have adopted criminal facilitation statutes that clearly and unequivocally eliminate the requirement that the defendant share the co-conspirator's [purpose] to commit a crime." *State v. Maldonado*, 137 N.M. 699, 703 n.2 (citing Ky. Rev. Stat. Ann. § 506.080; N.Y. Penal Law, §§ 115.00 to 115.08).

[196] Buscemi, *supra* note 161, at 1145–48; *see, e.g.*, W. Va. Code § 61-10-31; La. Rev. Stat. Ann. § 14:26

[197] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 n. 144. *See, e.g., United States v. Alvarez*, 610 F.2d 1250 (5th Cir. 1980), *on rehearing* 625 F.2d 1196 (5th Cir. 1980) (unloading illegal cargo of plane does not make one a member of the known conspiracy); *Maldonado*, 137 N.M. at 703 (selling pseudoephedrine to another, knowing it to be used to manufacture methamphetamine, no conspiracy); *Com. v. Nee*, 458 Mass. 174, 181, 935 N.E.2d 1276, 1282 (2010) ("[M]ere knowledge of an unlawful conspiracy is not sufficient to make one a member of it.") (quoting *Commonwealth v. Beal*, 314 Mass. 210, 222 (1943)).

[198] Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 53 COLUM. L. REV. 228, 239 (1953); DRESSLER, *supra* note 61, at § 29.05.

Consider first the relationship between a would-be conspirator's state of mind and the result elements of the target offense. The parties to an agreement may purposely agree to cause a result, as would be the case where two gang members explicitly agree to assassinate a rival gang member. At the same time, the parties to an agreement may also agree to cause a result, acting knowingly, recklessly, or even negligently as to the particulars of that result. Illustrative is the situation of two gang members who agree to commit the daytime arson of a rival gang member's home, during which time the gang member's newborn daughter is normally sleeping. If the parties to the agreement are practically certain that the child will be home and trapped inside at the time of the arson, then they've knowingly agreed to kill the child. If, in contrast, the parties to the agreement are merely aware of a substantial risk that the child will be home and trapped inside at the time of the arson, then they've recklessly agreed to kill. And if the parties are not aware of a substantial risk that the child will be home and trapped inside during the time of the arson, but nevertheless should have been aware of this possibility, then they've negligently agreed to kill.

This analysis of results is similarly applicable to circumstances. Imagine, for example, that two friends agree to set up a sexual encounter between one of the friends and an underage female. If the friends desire to facilitate sex with the victim *because of her young age*, then they've purposely agreed to facilitate sex with a minor. If, in contrast, the friends are practically certain that the victim is underage, then they've knowingly agreed to facilitate sex with a minor. And if the friends are aware of a substantial risk that the victim is underage, then they've recklessly agreed to facilitate sex with a minor. But if the friends are not aware, yet should have been aware, of a substantial risk that the victim is underage then they've negligently agreed to facilitate sex with a minor.

Insofar as the above issues are concerned, American legal authorities uniformly support two general principles. First, a "conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent" applicable to the objective elements of "the substantive offense itself."[199] And second, "the culpability required for conviction of conspiracy at times must be greater than is required for conviction of the object of the agreement."[200] What remains to be determined, however, is the scope of the latter principle. For example, *when* must the culpable mental state requirement governing conspiracy be greater than that of the target offense, and, to the extent that this kind of elevation is appropriate, *which* culpable mental states will satisfy it? On these questions, American criminal law has generally not been a model of clarity.

The most well-established rule in this area of law is as follows: "[T]here is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or

[199] *Ingram v. United States*, 360 U.S. 672, 678 (1959); G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under Rico*, 33 AM. CRIM. L. REV. 1345, 1535 (1996). Note also that other culpability requirements governing the target offense are imported into a conspiracy charge. *See, e.g.*, *United States v. Chagra*, 807 F.2d 398 (5th Cir. 1986) (conspiracy to commit second degree murder legally possible, as where prosecution proves that at the moment of conspiratorial agreement, the intent "was impulsive and with malice aforethought"); *United States v. Croft*, 124 F.3d 1109 (9th Cir. 1997) (discussing *id.*).

[200] DRESSLER, *supra* note 61, at § 29.05.

negligently causing a result."[201] In practice, this rule does not preclude the government from charging conspiracies to commit target offenses comprised of results subject to a non-intentional culpable mental state. However, where "recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime, as, for example, when homicide through negligence is made criminal," proof of a higher culpable mental state is necessary to secure a conspiracy conviction.[202]

This rejection of reckless or negligent conspiracies (insofar as results are concerned) is deeply rooted, finding support in a broad range of common law and modern legal authorities. It seems implicit, for example, in the general statutory requirement of purpose—discussed *supra*—applicable to conspiracy liability originally proposed by the Model Penal Code and thereafter adopted by "most of the modern codes."[203] And indeed, state courts in reform jurisdictions routinely (but not always[204]) hold that a defendant cannot be charged with "conspir[ing] to commit a crime where the culpability is based upon the result of reckless [or negligent] conduct."[205] Outside reform jurisdictions the situation is much the same: "[n]umerous state courts" have exercised their common law authority to hold "that one cannot conspire to accomplish an unintended result."[206]

As for whether only a true purpose to cause a result—or, alternatively, a conscious desire *or* awareness/belief—will suffice, American legal authorities are less clear. Writing at the turn of the twentieth century, for example, one frequently cited law review article observes that "a person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees, when that action is unreasonable in view of that consequence; and thus his agreement to perform the unreasonable action is equivalent to an agreement to help accomplish its consequence."[207] This seems to indicate that either purpose or knowledge/intent as to a result is an appropriate basis to ground a conspiracy conviction.

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[201] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.

[202] *State v. Donohue*, 150 N.H. 180, 183 (2003) (quoting Model Penal Code § 5.03 cmt. at 408); *see* DRESSLER, *supra* note 61, at § 29.05.

[203] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 n.111; *see* sources cited *supra* note 195.

[204] For example, Pennsylvania appellate courts appear to recognize reckless and negligent conspiracies. *See Commonwealth v. Johnson*, 719 A.2d 778, 785-86 (Pa. Super. 1998) (*en banc*) (defendant can be charged with conspiracy to commit third degree murder, which requires malice, not purpose); *see also Com. v. Weimer*, 602 Pa. 33, 38 (2009) ("If appellant conspired to intentionally, knowingly, recklessly, or negligently cause the death of [the victim], she may be found guilty regardless of which of those adverbs are found or not found by the jury.").

[205] *Donohue*, 150 N.H. at 185-86; *see, e.g., Palmer v. People*, 964 P.2d 524, 528-30 (Colo. 1998) (conspiracy to commit reckless manslaughter not a crime); *State v. Beccia*, 199 Conn. 1, 505 A.2d 683, 684-85 (1986) (conspiracy to commit reckless arson not a crime).

[206] *Donohue*, 150 N.H. at 184. *See People v. Swain*, 12 Cal.4th 593 997-1001 (1996) (conspiracy to commit reckless murder not a crime); *People v. Hammond*, 466 N.W.2d 335, 336-37 (Mich. 1991) (conspiracy to commit second-degree murder not a crime); *Evanchyk v. Stewart*, 340 F.3d 933, 939–40 (9th Cir. 2003) (holding conspiracy to commit murder requires an intent to kill and, therefore, felony murder may not be the predicate offense for a conspiracy conviction); *State v. Wilson*, 43 P.3d 851, 853–54 (Kan. 2002) (same); *United States v. Croft*, 124 F.3d 1109, 1121–22 (9th Cir. 1997) (noting an "intent to kill" is an essential element of conspiracy to commit second-degree murder); *United States v. Chagra*, 807 F.2d 398, 401 (5th Cir. 1986) (noting an "intent to kill" is an essential element of conspiracy to commit second-degree murder).

[207] *See* Note, *supra* note 145, at 923.

More contemporary legal authorities seem to indicate, in contrast, that only a true purpose to cause a result will suffice. For example, the Model Penal Code drafters understood their general purpose requirement—"the purpose of promoting or facilitating" the commission of the crime—to entail a principle of culpable mental state elevation applicable to results under which "it would not be sufficient, as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it."[208]

The commentary to one modern criminal code, Hawaii, appears to endorse this principle of purpose elevation.[209] And it is also occasionally referenced by the courts in reform jurisdictions, though it should be noted that these references all seem to occur in the context of cases involving prosecutions involving recklessness or negligence, not knowledge.[210] Indeed, there appears to be a dearth of case law directly addressing the purpose vs. knowledge issue head-on in the context of results, i.e., decisions overturning a conspiracy conviction where the parties formed an agreement with the *conscious desire* of facilitating planned conduct, *believing* it would result it some prohibited harm, on the rationale that the parties *did not consciously desire* that harm to occur.

Were such a case to arise, moreover, it's unclear why a principle of purpose elevation would be appropriate under the circumstances. Application of such a principle would mean, for example, that:

> [I]f two persons plan to destroy a building by detonating a bomb, though they know and believe that there are inhabitants in the building who will be killed by the explosion, they are nevertheless guilty only of a conspiracy to destroy the building and not of a conspiracy to kill the inhabitants.[211]

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[208] Model Penal Code § 5.03 cmt. at 408-09; *see id.* ("[I]n relation to those elements of substantive crimes that consist of . . . undesirable results of conduct, the Code requires purposeful behavior for guilt of conspiracy, regardless of the state of mind required by the definition of the substantive crime."). So, for example:

> [S]uppose that D1 and D2 agree to set fire to an occupied structure in order to claim the insurance proceeds. If the resulting fire kills occupants, they may be convicted of murder on the ground that the deaths, although unintentional, were recklessly caused. They are not guilty of conspiracy to commit murder, however, because their objective was to destroy the building, rather than to kill someone.

DRESSLER, *supra* note 61, at § 29.06. However, D1 and D2 may be convicted of conspiracy to recklessly endanger the occupants of the building. *See* Model Penal Code § 211.2. This result is possible because their purpose, in the language of § 5.03(1)(a), was to "engage in conduct [setting fire to the building] that constitutes such crime [placing another person in danger of death or serious bodily injury, the actus reus of reckless endangerment]." DRESSLER, *supra* note 61, at § 29.06; *see also United States v. Mitlof*, 165 F. Supp. 2d 558, 565–66 (S.D.N.Y. 2001) ("[O]ne can be guilty of conspiring to violate a federal substantive statute that criminalizes negligent conduct.")

[209] Commentary to Haw. Rev. Stat. Ann. § 705-520.

[210] *See State v. Mariano R.*, 123 N.M. 121 (1997); *State v. Borner*, 836 N.W.2d 383 (N.D. 2013).

[211] Model Penal Code § 5.03 cmt. at 408.

This "restrictive" outcome, some have argued, "is necessitated by the extremely preparatory behavior that may be involved in conspiracy."[212] Where, however, the actors' culpable knowledge or belief can be proven beyond a reasonable doubt, these mental states would seem to provide a legitimate basis for imposing liability for conspiracy to kill—just as they provide a legitimate basis for imposing liability for an attempt to kill.[213] Consistent with this perspective, others have argued in favor of allowing non-purposeful mental states (as to results) to ground both attempt and conspiracy convictions.[214]

It is therefore unclear, in the final analysis, whether a principle of purpose elevation or a principle of intent elevation best reflects national legal trends governing the results of the offense that is the target of a conspiracy.

With respect to the culpable mental state requirement governing the circumstances of the target of a conspiracy, in contrast, national legal trends seem to more clearly support a principle of intent elevation, though, again, the picture is relatively complex.

Part of this complexity is a product of the fact that the relevant legal authorities are nearly all contained in case law. For example, whereas the commentary to Model Penal Code § 5.03(1) clarifies that the drafters intended for the relevant purpose requirement to apply to conduct and results, the commentary explicitly deems the relationship between a would-be conspirator's state of mind and the circumstances of the target offense to be an issue "best left to judicial resolution."[215] And since publication of the Model Penal Code, only one reform jurisdiction, Hawaii, appears to have legislatively addressed the issue, and even then the relevant principle—one of intent elevation—is communicated through commentary.[216] (English statutory law more explicitly codifies a principle of intent elevation for circumstances.[217])

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[212] Commentary to Haw. Rev. Stat. Ann. § 705-520.

[213] *But see id.* ("While this result may seem unduly restrictive from the viewpoint of the completed crime, it is necessitated by the extremely preparatory behavior that may be involved in conspiracy.").

[214] *See* Robinson & Grall, *supra* note 44, at 755–57 (intent elevation for both); Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1174–75 (1997) (reckless elevation for both).

[215] Model Penal Code § 5.01 cmt. at 414.

[216] The relevant commentary entry to Haw. Rev. Stat. § 705-520 reads:

> The Model Penal Code commentary leaves open the question of whether a defendant can be guilty of criminal conspiracy if the defendant is not aware of the existence of attendant circumstances specified by the definition of the substantive offense which is the object of the conspiracy. This is of obvious importance in those crimes, which do not require that the defendant act intentionally or knowingly with respect to attendant circumstances. It does not seem wise to leave this question to resolution by future interpretation . . . . *It seems clear, and it is the position of the [Hawaii Criminal] Code, that, because of the preparatory nature of conspiracy, intention to promote or facilitate the commission of the offense requires an awareness on the part of the conspirator that the circumstances exist.*

(emphasis added).

[217] More specifically, Section 1(2) of chapter 45 of the Criminal Law Act, 1977, provides:

> Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission

Another part of this complexity, however, is distinguishing between and understanding relevant state and federal case law, the latter of which tends to revolve around a distinctive kind of circumstance element, namely, those that are jurisdictional.[218] More specifically, under federal law, culpable mental state issues concerning the circumstances of conspiracy most often present themselves in cases "in which some circumstance that affords a basis for federal jurisdiction, such as use of the mails or crossing state lines, is made an element of the crime."[219] Accordingly, the issue presented in these cases is whether a principle of culpable mental state elevation applies to a strict liability jurisdictional circumstance element of the target of a conspiracy.

The federal judicial response to this issue has been mixed. During the mid-twentieth century most of the relevant decisions "h[e]ld that, although knowledge of such circumstances is unnecessary for guilt of the substantive crime, it is necessary for guilt of conspiracy to commit that crime."[220] Since then, however, some (though not all) subsequent federal cases appear to hold that when "knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense."[221]

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> of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence . . . unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

*See State v. Pond*, 315 Conn. 451, 484 (2015) (noting that the foregoing "statutory language has since been amended in ways not relevant to the [*mens rea* of conspiracy]") (discussing Armed Forces Act, 2006, c. 52, § 45 (U.K.)); *see also* LAW COMM'N, WORKING PAPER NO. 50, *Inchoate Offenses: Conspiracy, Attempt and Incitement*, at 33 (1970).

[218] *See, e.g.*, *Pond*, 315 Conn. at 485.

[219] Wechsler et al., *supra* note 171, at 972.

[220] *Id.*; *see, e.g.*, *United States v. Tannuzzo*, 174 F.2d 177 (2d Cir. 1949) (causing stolen goods to be transported in interstate commerce); *United States v. Sherman*, 171 F.2d 619, 623 (2d Cir. 1948) (receiving goods stolen from interstate commerce); *Mansfield v. United States*, 155 F.2d 952 (5th Cir. 1946) (mail fraud); *Blue v. United States*, 138 F.2d 351, 360 (6th Cir. 1943) (same); *Guardalibini v. United States*, 128 F.2d 984 (5th Cir. 1942) (same).

Most significant is the U.S. Court of Appeals for the Second Circuit's decision in *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941). At issue in *Crimmins* was the defendant's conviction for conspiracy to transport stolen securities in interstate commerce where he did not know the relevant securities were, in fact, connected to interstate commerce—the touchstone of federal jurisdiction. *Id.* at 273. Although such absence of knowledge would have been immaterial had the offense been completed, the Second Circuit regarded it as quite material to the conspiracy charge. To understand why, Judge Learned Hand, writing for the court, gave his famous traffic light analogy: "While one may . . . be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." *Id.* From this, the *Crimmins* court ultimately concluded "that there can be no conspiracy to transport stolen securities in interstate commerce "unless it is understood to be a part of the project that they shall cross state lines." *Id.* at 273-74.

[221] *United States v. Feola*, 420 U.S. 671, 696 (1975); *see, e.g.*, *United States v. Eisenberg*, 596 F.2d 522, 525 (2d Cir. 1979); *United States v. Rosa*, 17 F.3d 1531, 1544–45 (2d Cir. 1994); *United States v. Gurary*, 860 F.2d 521, 524 (2d Cir.1988); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976), *United States v. Green*, 523 F.2d 229, 233–34 (2d Cir. 1975). Most significant is the U.S. Supreme Court's decision in *United States v. Feola*, 420 U.S. 671 (1975). At issue in *Feola* was whether, under federal conspiracy law, proof of knowledge as to the strict liability circumstance element of the offense of assault of a federal

The precise contours of federal case law on the culpable mental state requirement governing the circumstance element(s) of a conspiracy is much discussed; however, two basic points are relevant here. First, to the extent such case law supports a principle of culpable mental state equivocation, that principle only applies to "the attendant circumstance element of a crime" whose "primary purpose" is to "confer federal jurisdiction."[222] Second, none of the relevant federal cases are constitutionally based.[223] As a result, states remain free to determine the relationship between the culpable mental state requirement governing a conspiracy and that applicable to the circumstance(s) of the target offense themselves.[224]

There is not a lot of state case law on this issue; however, to the extent it exists, it supports a principle of intent elevation. Historically speaking, for example, a principle of intent elevation of this nature appears to have been implicit in the early state case law on the corrupt motive doctrine.[225] More recently, however, this principle appears to have been explicitly endorsed by a handful of state appellate decisions.[226]

The most illustrative, and comprehensively reasoned, of these decisions is the Connecticut Supreme Court's recent opinion in *State v. Pond*.[227] The specific issue presented in *Pond* was whether an individual who plans and agrees to participate in "a simple, unarmed robbery," may thereafter be held criminally liable for "planning or agreeing to an armed robbery, or one in which a purported weapon is displayed or its use threatened, when he had no such intention and agreed to no such plan."[228] The Connecticut Supreme Court ultimately answered this question in the negative, holding that "to be convicted of conspiracy, a defendant must specifically intend that every element of the planned offense be accomplished, even an element that itself carries no specific intent requirement."[229]

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officer—namely, whether the victim was a federal officer—is necessary. *See id.* The U.S. Supreme Court concluded that it was not, deeming conspiracy to commit assault against a federal officer to incorporate a principle of culpable mental state equivocation, under which the government need not prove that the parties to a conspiracy *understand* or are in any way *aware* that the victim of the intended assault is a federal officer. *Id.* Rather, the same strict liability rule applicable to the circumstance of assaulting a federal officer applies to a conspiracy to commit the same. *Id.*

[222] *Pond*, 315 Conn. at 486–87 (discussing *Feola*, 420 U.S. at 685, 687, 692–94). Indeed, even this may be an overstatement given subsequent federal conspiracy cases applying a principle of intent elevation to strict liability circumstantial elements of other federal offenses *that are primarily jurisdictional*. *See United States v. Salgado*, 519 F.3d 411, 415 (7th Cir.), *on reh'g in part sub nom. United States v. Pacheco-Gonzales*, 273 F. App'x 556 (7th Cir. 2008) (applying a principle of intent elevation to a charge of conspiracy to steal money from the United States, 18 U.S.C. § 371, on the basis that, notwithstanding the *Feola* decision, "the elements of a conspiracy offense *do* include knowing what makes the planned activity criminal" under federal criminal law).

[223] DRESSLER, *supra* note 61, at § 29.05.

[224] *Id.*

[225] *See* Alexander & Kessler, *supra* note 214, at 1160 (1997) (discussing *People v. Powell*, 63 N.Y. 88, 88 (1875); *Commonwealth v. Benesch*, 194 N.E. 905 (Mass. 1905); *Commonwealth v. Gormley*, 77 Pa. Super. 298 (1921)).

[226] *See infra* notes 232-35 and accompanying text.

[227] 315 Conn. at 468–89.

[228] *Id.* at 477.

[229] *Id.* at 453.

In support of employing this "higher *mens rea* requirement for conspiracies than for the underlying substantive offense," [230] the *Pond* court provides three different policy rationales:

> First, it stands to reason that the legislature would have imposed a higher intent requirement for conspiracy than for some substantive crimes because conspiracy, by its very nature, is predominantly mental in composition . . . . [J]ust as the legislature has imposed more stringent *actus reus* requirements for substantive offenses that are defined principally with respect to their conduct elements, so may it reasonably demand a greater showing of wrongful intent for an anticipatory, inchoate crime such as conspiracy, which predominantly criminalizes the wrongful scheme.
>
> Second, on the most basic level, it makes sense to impose a specific intent requirement for conspiracy to commit robbery in the second degree, but not for robbery in the second degree, because one crime actually involves the display or threatened use of a purported weapon and the other does not . . . .
>
> It makes little sense . . . to say that, if an individual plans and agrees to participate in a simple, unarmed robbery, he then may be held criminally liable for planning or agreeing to an armed robbery, or one in which a purported weapon is displayed or its use threatened, when he had no such intention and agreed to no such plan . . . .
>
> [To hold otherwise] could lead to unintended and undesirable consequences . . . . The reason the law punishes conspiracies to commit armed robberies more severely is to discourage would-be felons from planning this more dangerous class of crime. [However, applying a principle of culpable mental state equivocation] would eliminate any such disincentive.
>
> Third, [failure to endorse a principle of intent elevation] would create the potential for abuse . . . . To require less would permit the state to prosecute a person who conspires with a would-be pickpocket, shoplifter or library book bandit for conspiracy to commit an armed felony without proving that that person either intended to or did in fact engage in such a crime.[231]

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[230] *Id.* at 475.

[231] *Id.* at 476-79. In supporting adoption of a principle of intent elevation, the *Pond* court also addressed "the state's argument that it would have been irrational for the legislature to adopt a legislative scheme in which offenders face broad vicarious liability for their roles in first and second degree robberies—whether as participants, accessories or, under a Pinkerton theory, coconspirators—and yet to stop short of extending that same vicarious liability to the crime of conspiracy itself." *Id.* at 487. In response, the *Pond* court highlighted that, "[f]irst, there is a fundamental difference between holding a person liable for his role in an actual crime, whatever that role might be, as opposed to punishing him solely for agreeing to commit a

Policy considerations aside, the *Pond* court likewise observes that a principle of intent elevation finds support in the case law of all other state courts to explicitly address it, namely, decisions from New York,[232] New Hampshire,[233] Michigan,[234] and North Carolina.[235]

The principle of intent elevation reflected in state case law also appears to accord with legal commentary: the scholarly literature on this issue, to the extent it exists, generally weighs against applying a principle of culpable mental state equivocation to the circumstances of a conspiracy.[236]

Consistent with the above analysis of national legal trends relevant to the culpable mental state requirement governing a criminal conspiracy, the RCC incorporates four substantive policies, each of which is broadly consistent with current District law.

First, the prefatory clause of RCC § 303(a) establishes that the culpability required for the general inchoate offense of criminal conspiracy is, at minimum, that required by the target offense. Thereafter, and second, RCC § 303(a)(1) endorses the purpose approach to conspiracy, under which proof that the parties to an agreement consciously desired to bring about conduct planned to culminate in the target offense is a necessary component of conspiracy liability. Both of these positions are supported by both majority legal practice and compelling policy considerations.

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crime," such that there are "sound historical, practical and theoretical reasons for imposing stricter liability in the latter case than in the former." *Id.* (citing *Krulewitch v. United States*, 336 U.S. 440, 450 (1949) ("[T]he conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory, for those charges . . . . lie [only] when an act which is a crime has actually been committed.") (Jackson, J., concurring)). "Second, under *Pinkerton*, coconspirators are already held vicariously liable for crimes in which their coconspirators' use of weapons or purported weapons is reasonably foreseeable." *Id.* at 488. In this sense, "*Pinkerton* liability is forward looking, holding conspirators liable as principals for crimes that predictably result from an already formed and clearly defined conspiracy." *Id.* Applying a principle of culpable mental state equivocation to conspiracies, in contrast, "would create a legal anachronism: it turns back the clock and rewrites the terms of the conspirators' original criminal agreement to reflect conduct that coconspirators are alleged to have subsequently performed." *Id.*

[232] *People v. Joyce*, 474 N.Y.S.2d 337, 347 (1984) ("Not only was there no proof that the defendant agreed to the display, but there was no proof that he was even aware that his coconspirators planned to possess what would appear to be firearms in the course of the burglary.")

[233] *State v. Rodriguez*, 164 N.H. 800, 812 (2013) ("[T]o affirm the defendant's convictions for conspiracy to commit first degree assault and 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.")

[234] *People v. Mass*, 464 Mich. 615, 629-30 (2001) ("[T]o be convicted of conspiracy to possess with intent to deliver a controlled substance, the prosecution had to prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person.")

[235] *State v. Suggs*, 117 N.C.App. 654, 661–62 (1995) ("To hold a defendant liable for the substantive crime of conspiracy, the State must prove an agreement to perform every element of the crime . . . . [Therefore, the conspiracy to assault with a dangerous weapon charge] required that the State produce substantial evidence, which considered in the light most favorable to the State, would allow a jury to find beyond a reasonable doubt that the defendant and [the co-conspirator] contemplated the use of a deadly weapon in carrying out the assault . . . .")

[236] For a discussion and collection of the relevant authorities, see Alexander & Kessler, *supra* note 214, at 1162. For an opposing view, see Robinson & Grall, *supra* note 44, at 740-43.

Third, RCC § 303(b) applies a principle of intent elevation to the results of a conspiracy. Under this principle, the parties must, by forming their agreement, intend to cause any result required by the target offense. The exclusion of conspiracy liability for reckless and negligence as to results is deeply rooted in American criminal law. The acceptance of knowledge/belief as to results, in contrast, may depart from some national legal trends. To the extent it does, however, it is justified by the same policy considerations that support applying a principle of intent elevation (and not purpose elevation) to the results of an attempt.

Fourth, RCC § 303(b) also applies a principle of intent elevation to the circumstances of a conspiracy. Under this principle, the parties must, by forming their agreement, have acted with intent as to the circumstances required by the target offense. This principle is supported by state practice (to the extent it exists) as well as compelling policy considerations.

RCC § 303(a)(1): Relation National Legal Trends on Impossibility. The topic of impossibility revolves around the following question: what is the relevance of the fact that, by virtue of some mistake concerning the conditions the actor believed to exist, the target offense for which the defendant is being prosecuted could not have been completed?[237] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense, but nevertheless argue that impossibility of completion should by itself preclude the imposition of criminal liability.[238]

The problem of impossibility is most commonly discussed in the context of attempt prosecutions. Illustrative issues include whether the following actors have committed a criminal attempt: (1) a pickpocket who puts her hand in the victim's pocket, believing it to contain valuable items, only to discover that it is empty;[239] (2) an assailant shooting into the bed where the intended victim customarily sleeps, believing the victim to be there, only to discover that he isn't;[240] (3) a participant in a sting operation who receives property believing it to be stolen, only to discover that it isn't;[241] and (4) an actor who believes that he or she is selling a controlled substance, only to discover that the substance is innocent.[242]

In principle, the precise same issues of impossibility can also arise in the context of prosecutions for any other general inchoate crime, including conspiracy.[243] Consider, for example, how slight tweaks to the above fact patterns present the same questions of impossibility for conspiracy prosecutions: (1) two thieves agree to jointly work towards the pickpocketing of a victim's jacket, believing it to contain valuable items, only to discover that it is empty; (2) two assailants plan to shoot into a bed where the intended victim customarily sleeps, believing the victim to be there, only to discover that he isn't; (3) two participants in a sting operation agree to traffic in stolen property with an undercover agent, believing it to be stolen, only to discover that it isn't; and (4) two

[237] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 61, at § 27.07.
[238] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 61, at § 27.07.
[239] *See People v. Twiggs*, 223 Cal. App. 2d 455 (Ct. App. 1963).
[240] *See State v. Mitchell*, 71 S.W. 175 (Mo. 1902).
[241] *See People v. Rojas*, 358 P.2d 921 (Cal. 1961).
[242] *See United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978).
[243] DRESSLER, *supra* note 61, at § 27.07.

actors agree to jointly sell a controlled substance, only to discover that the substance is innocent.

Notwithstanding these factual symmetries, in practice, impossibility issues arise less frequently in the context of conspiracy prosecutions.[244] Furthermore, when they do arise, courts tend to shy away from the "lengthy explorations of the distinction between [different kinds of] impossibility" that characterizes attempt jurisprudence.[245] Instead, "the conspiracy cases have usually gone the simple route of holding that impossibility is not a defense."[246] That being said, the same distinctions exist in this area of law, and it's important to recognize them in order to appreciate the boundaries of conspiracy liability.

There are four different categories of impossibility that might be recognized in the context of conspiracy.[247] The first is *pure factual impossibility*, which arises when the object of an agreement cannot be consummated because of circumstances beyond the parties' control.[248] The second category of impossibility is *pure legal impossibility*, which arises where the parties to an agreement act under a mistaken belief that the law criminalizes their intended objective.[249] The third category is *hybrid impossibility*, which arises where the object of an agreement is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense.[250] And the fourth category of impossibility is *inherent impossibility*, which arises when "any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought" to be achieved by a criminal agreement.[251]

Illustrative of these distinctions are the following variations on a hypothetical involving an agreement to engage in sexual activity with a minor.

*Pure Factual Impossibility*: X and Y, adult males, agree to arrange a sexual encounter with Z, a young child, at a specified time/location. Unbeknownst to X and Y, the police have been alerted to the arrangement and are awaiting the arrival of X and Y. If charged with conspiracy to commit statutory rape, this situation presents an issue of pure factual impossibility because the object of the conspiracy, sexual activity with a minor, cannot be consummated because of circumstances beyond the parties' control, namely, police intervention.

*Pure Legal Impossibility.* X and Y, adult males, agree to arrange a sexual encounter with Z, a 20 year-old woman. X and Y know Z is 20; however, they believe that the age of consent is 21 (when, in fact, it is 18). Therefore, X and Y believe themselves to be conspiring to commit statutory rape. If charged with conspiracy to

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[244] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4.
[245] *Id.*
[246] *Id.*
[247] This general framework and breakdown is drawn from DRESSLER, *supra* note 61, at § 27.07.
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1099 (1992); Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995).

commit statutory rape, this situation presents an issue of pure legal impossibility because X and Y have acted under a mistaken belief that the law criminalizes their intended objective, sexual activity with a 20 year-old woman.

*Hybrid Impossibility.* X and Y, adult males, agree to arrange a sexual encounter with Z, an undercover police officer posing as a young child. X and Y believe that Z is a young child. If charged with conspiracy to commit statutory rape, this situation presents an issue of hybrid impossibility because the object of X and Y's agreement, sexual activity with a minor, is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense, namely, whether Z is, in fact, a minor.

*Inherent Impossibility*. X and Y, adult males, agree to arrange a sexual encounter with Z, a child-like manikin sitting in a shop window. X and Y believe that Z is an actual child, a mistake that is patently unreasonable under the circumstances. If charged with conspiracy to commit statutory rape, this situation presents an issue of inherent impossibility because any reasonable person would have known that the manikin was not a child.

Viewed through the lens of this framework, national legal trends can be summarized as follows. First, pure factual impossibility is not a defense to a conspiracy charge.[252] Illustrative decisions rejecting factual impossibility claims in the context of conspiracy prosecutions include the following holdings: (1) there may be a conspiracy to defraud the United States although the government was aware of the scheme (and thus would have stopped it);[253] (2) there may be a conspiracy to murder although the person whom the other co-conspirators believe will carry out the deed is actually a government agent;[254] (3) there may be a conspiracy to obstruct justice even if the scheme of having certain individuals called as jurors could not have been accomplished by the conspirators;[255] and (4) there may be a conspiracy to import controlled substances although a boat needed for the importation had already been seized by government agents.[256]

Second, hybrid impossibility is not a defense to a conspiracy charge.[257] Illustrative decisions rejecting hybrid impossibility claims in the context of conspiracy prosecutions include the following holdings: (1) there may be a conspiracy to commit rape on a woman believed to be unconscious although she was in fact dead;[258] (2) there may be a conspiracy to perform an abortion on a woman (during a historical era when abortion was criminal) although the woman is not pregnant;[259] (2) there may be a

[252] DRESSLER, *supra* note 61, at § 29.09.
[253] *United States v. Everett*, 692 F.2d 596 (9th Cir. 1982).
[254] *People v. Liu*, 46 Cal.App.4th 1119, 54 Cal.Rptr.2d 578 (1996).
[255] *Gallagher v. People*, 211 Ill. 158, 71 N.E. 842 (1904).
[256] *United States v. Belardo-Quinones*, 71 F.3d 941 (1st Cir.1995),
[257] DRESSLER, *supra* note 61, at § 29.09.
[258] *United States v. Thomas*, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962).
[259] *See People v. Tinskey*, 228 N.W.2d 782 (Mich. 1975).

conspiracy to murder or rape a person who doesn't actually exist;[260] (3) there may be a conspiracy to receive stolen property although the property is not stolen;[261] and (4) there may be a conspiracy to steal trade secrets although the object of the conspiracy is not a trade secret.[262]

Factual and hybrid impossibility are by far the most common species of impossibility. The "stated majority rule" governing both of them is clear: "neither . . . is a defense to a criminal conspiracy."[263] Less clear are the legal trends governing pure legal impossibility and inherent impossibility in the conspiracy context since prosecutions implicating them rarely (if ever) arise. Nevertheless, to the extent they do, it appears that both forms of impossibility may provide a viable defense to a conspiracy charge.

That pure legal impossibility constitutes a viable defense to a conspiracy charge is not particularly surprising since, in such situations, "the requisite conspiratorial objective is lacking."[264] For example, just as "[a] hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place," so too "a charge of conspiracy to shoot a deer would be equally untenable" although the parties themselves believed deer hunting to be criminally prohibited.[265]

Inherent impossibility may also constitute a viable defense to a conspiracy charge. In the attempt context, courts generally seem reluctant to impose liability "where the means chosen are totally ineffective to bring about the desired result."[266] This also appears to be the case in the conspiracy context, where the "inherently impossible" nature of an agreed-upon plan can preclude liability.[267] "For instance, an attack on a wooden Indian cannot be an assault and battery (though it might constitute malicious destruction of property), and hence a combination and agreement to do so cannot be a conspiracy to commit assault and battery, although the defendants, before acting, thought the 'victim' a

[260] *See State v. Houchin*, 765 P.2d 178 (Mont. 1988); *United States v. Roeseler*, 55 M.J. 286, 291 (C.A.A.F. 2001); *State v. Heitman*, 629 N.W.2d 542 (Neb. 2001).

[261] *See United States v. Petit*, 841 F.2d 1546 (11th Cir. 1988).

[262] *See United States v. Yang*, 281 F.3d 534 (6th Cir. 2002); *United States v. Hsu*, 155 F.3d 189 (3d Cir. 1998).

[263] DRESSLER, *supra* note 61, at § 29.09. That "[i]mpossibility of success is not a defense" to conspiracy generally reflects the common law view that "criminal combinations are dangerous apart from the danger of attaining the particular objective." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4. To the extent that there are special dangers inherent in group criminality, the factual or legal impossibility of committing a particular offense arguably does not negate the dangerousness of the conspiratorial agreement. *See* DRESSLER, *supra* note 61, at § 29.09. The foregoing perspectives on impossibility are endorsed by the U.S. Supreme Court in *United States v. Jimenez Recio*, 537 U.S. 270, 274–76 (2003).

[264] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4; *see United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013).

[265] *In re Sealed Cases*, 223 F.3d 775 (D.C. Cir. 2000).

[266] *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973); *see, e.g.*, *Dahlberg v. People*, 225 Ill. 485, 490 (1907); *Attorney General v. Sillen*, 159 Eng. Rep. 178, 221 (1863); *United States v. Lincoln*, 589 F.2d 379, 381 (8th Cir. 1979); *United States v. Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973); *Parham v. Commonwealth*, 347 S.E.2d 172, 174-75 (Va. Ct. App. 1986); *State v. Logan*, 656 P.2d 777, 779-80 (Kan. 1983); *People v. Elmore*, 261 N.E.2d 736, 737 (Ill. App. Ct. 1970); *People v. Richardson*, 207 N.E.2d 453, 456 (Ill. 1965).

[267] *State v. Moretti*, 97 N.J. Super. 418, 420–21 (App. Div. 1967), aff'd, 52 N.J. 182, 244 A.2d 499 (1968).

living person."[268] So too with "an attempt or conspiracy to pick the pocket of what is merely a wooden dummy."[269]

These principles of conspiracy liability are mostly rooted in case law. However, some criminal codes address the relationship between impossibility and conspiracy. The basis for this modern legislative approach is the Model Penal Code's general definition of conspiracy, which effectively carries over Code's general abolition of impossibility claims in the attempt context to the conspiracy context.[270] Here's how this incorporation-based approach operates.

The Model Penal Code's formulation of a criminal attempt, § 5.01(1)(c), establishes that: "[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person "purposely does or omits to do anything that, *under the circumstances as he believes them to be*, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[271] By broadly recognizing that an "actor can be held liable for an attempt to commit the offense he *believed* he was committing, without regard to whether or why the commission of the offense is impossible," the Model Penal Code approach renders most impossibility claims immaterial in the attempt context.[272]

The Model Penal Code drafters intended to apply the same approach to dealing with impossibility in the conspiracy context. "It would be awkward, however, to incorporate the impossibility language of attempt into other inchoate offenses."[273] With that in mind, the Model Penal Code instead "treats conspiracy to attempt the commission of a crime as a conspiracy to commit that crime."[274]

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[268] *Ventimiglia v. United States*, 242 F.2d 620, 622 (4th Cir. 1957); Note, *supra* note 145, at 944-45.

[269] *Ventimiglia*, 242 F.2d at 622.

[270] Model Penal Code § 5.03 cmt. at 421. Note that the Model Penal Code similarly extends the same treatment of inherent impossibility afforded in attempt prosecutions to conspiracy prosecutions by authorizing the court to account for the relevant issues at sentencing. Model Penal Code § 5.01 cmt. at 318. The relevant provision, Model Penal Code § 5.05(2), establishes that "[i]f the particular conduct charged to constitute a criminal attempt, solicitation, or conspiracy, is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense," then the court has two alternatives at its disposal. Model Penal Code § 5.05(2). First, the court may "impose sentence for a crime of lower grade or degree." *Id.* Second, and alternatively, the court may, "in extreme cases, [simply] dismiss the prosecution." *Id.* Generally speaking, this kind of "safety valve is extremely desirable in the inchoate crime area, which, by definition, involves threats of infinitely varying intensity." Buscemi, *supra* note 161, at 1187. In the conspiracy context, however, such a provision will specifically "help avoid the injustice which might be created by the MPC's non-recognition of impossibility as a defense to a conspiracy indictment." *Id.* at 1187.

[271] Model Penal Code § 5.01(1)(c).

[272] PAUL H. ROBINSON & MICHAEL CAHILL, CRIMINAL LAW 514 (2d. 2012). Model Penal Code § 5.01(c) could also be read to abolish the defense of pure legal impossibility. *See id.* However, the Model Penal Code commentary indicates that the drafters intended that pure legal impossibility remain a defense:

> It is of course necessary that the result desired or intended by the actor constitute a crime. If . . . the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.

Model Penal Code § 5.01 cmt. at 318; *see* Wechsler et al., *supra* note 171, at 579.

[273] ROBINSON, *supra* note 123, at 1 CRIM. L. DEF. § 85.

[274] Model Penal Code § 5.03 cmt. at 421.

More specifically, Model Penal Code § 5.03(1) states that a person is guilty of an offense if she agrees with another person that "they or one of them will engage in conduct that constitutes . . . an *attempt* … to commit such crime," or if he or she "agrees to aid such other person or persons . . . in *an attempt* . . . to commit such crime." Inclusion of the term "attempt" in this formulation dictates that:

> [if an] actor agrees that he or another will engage in conduct that he believes to constitute the elements of the offense, but that fortuitously does not in fact involve those elements, he would under this section be guilty of an agreement to attempt the offense, since attempt liability could be made out under Section 5.01 if the contemplated conduct had occurred.[275]

In practical effect, this statutory approach ensures that the Model Penal Code's general conspiracy provision, like its general attempt provision, broadly prohibits impossibility claims by "focus[ing] upon the circumstances as the actor believes them to be rather than as they actually exist."[276] So, for example, as the Model Penal Code commentary illustrates: if D1 and D2 agree to rob a bank believing, incorrectly, that it is federally insured, they may be convicted of conspiracy to rob *a federally insured bank*, based upon their view of the situation.[277]

Since completion of the Model Penal Code, a relatively small number of modern criminal codes have imported this legislative solution to impossibility.[278] However, "the fact a code is silent on this issue, while expressly declaring impossibility is no defense to an attempt charge, is not to be taken to mean that impossibility is a defense to conspiracy."[279] Instead, and as illustrated by the case law referenced above, just the opposite is true: in nearly all instances (i.e., factual and hybrid) impossibility is not a defense to conspiracy. [280]

Consistent with the above analysis of national legal trends, the RCC broadly renders impossibility claims irrelevant in the context of conspiracy prosecutions. RCC § 303(a) accomplishes this by establishing that an agreement to engage in or bring about conduct that, if carried out, would constitute an "attempt" will also suffice for conspiracy liability. The reference to an attempt is intended to incorporate the same approach applicable to impossibility in the latter context, which, pursuant to RCC § 301(a)(1),

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[275] Model Penal Code § 5.03 cmt. at 421

[276] Model Penal Code § 5.01 cmt. at 297.

[277] *See* DRESSLER, *supra* note 61, at § 29.09.

[278] *See* Colo. Rev. Stat. Ann. § 18-2-201; Ky. Rev. Stat. Ann. § 506.040; Del. Code Ann. tit. 11, § 511; N.J. Stat. Ann. § 2C:5-2; Pa. Cons. Stat. Ann. tit. 18, § 903. Other jurisdictions simply state by statute that impossibility is not a defense to a conspiracy charge. *See* Ohio Rev. Code Ann. § 2923.01(D) ("It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the conspiracy was impossible under the circumstances.") For reform jurisdictions that have adopted the Model Penal Code approach to inherent impossibility, see Ark. Code Ann. § 5-3-101; Colo. Rev. Stat. Ann. § 18-2-206; N.J. Stat. Ann. § 2C:5-4;18 Pa. Stat. and Cons. Stat. Ann. § 905.

[279] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4 (citing *State v. Bird*, 285 N.W.2d 481 (Minn. 1979)).

[280] For other cases, see *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984); *United States v. Giordano*, 693 F.2d 245 (2d Cir. 1982); *United States v. Thomas*, 13 C.M.A. 278 (1962); *Thompson v. State*, 106 Ala. 67 (1895); *People v. Tinskey*, 212 N.W.2d 263 (Mich. Ct. App. 1973).

necessarily abolishes factual impossibility and hybrid impossibility defenses by focusing on the situation as the defendant viewed it.[281]

RCC § 303(a)(2): Relation to National Legal Trends on Overt Act Requirement. American criminal law generally recognizes that the general inchoate offense of conspiracy is "predominantly ideational [in] nature."[282] One relevant policy question this raises, however, is whether and to what extent *any conduct at all*, above and beyond the agreement at heart of conspiracy liability, is a necessary component of the offense.

Historically, conduct in furtherance of a criminal agreement was not understood to be required for a conspiracy conviction. At early common law, for example, a conspiracy was deemed complete upon formation of the unlawful agreement, such that no additional conduct needed to be proved.[283] More recently, however, American legal authorities have diverged from this early common law approach.[284] Rather than allowing proof of an agreement to constitute the sole *actus reus* of a conspiracy, modern conspiracy statutes frequently require proof of an overt act in furtherance of the conspiracy.[285] The basis for this shift is rooted in the Model Penal Code.

The Model Penal Code's general conspiracy provision, § 5.03(5), establishes that a person may not be convicted of conspiracy to commit a misdemeanor or a felony of the third degree[286] unless she or a fellow conspirator performs an overt act in furtherance of the conspiracy.[287] The relevant language reads: "[n]o person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired."[288]

The Model Penal Code's embrace of the overt act requirement is premised on the drafters view "that it affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists."[289] At the same time, however, it should be noted that the drafters did not wholly embrace this rationale—after all, Model Penal Code § 5.03(5) also exempts conspiracies to commit felonies of the first or second degree from the overt act requirement. For these offenses, the drafters believed

[281] RCC § 303(a) likewise imports the same approach to recognizing inherent impossibility employed in RCC § 301(a). More specifically, where the parties' perspective of the situation is relied upon, the government must prove that their agreed-upon plan was "reasonably adapted to commission of the [target] offense." By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement precludes convictions for inherently impossible conspiracies.

[282] *State v. Pond*, 315 Conn. 451, 475 (2015); *see, e.g.*, DRESSLER, *supra* note 61, at § 29.04; *see* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

[283] DRESSLER, *supra* note 61, at § 29.04; *see, e.g., State v. Merrill*, 530 S.E.2d 608, 611 (N.C. Ct. App. 2000); *Commonwealth v. Nee*, 935 N.E.2d 1276, 1282 (Mass. 2010).

[284] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

[285] *See* DRESSLER, *supra* note 61, at § 29.04.

[286] Note that all felonies under the Model Penal Code are of the third degree unless another degree is specified. *See* Model Penal Code § 6.01(1).

[287] Model Penal Code § 5.03(5).

[288] *Id.*

[289] Model Penal Code § 5.03(5) cmt. at 453.

that "the importance of preventive intervention is *pro tanto* greater than in dealing with less serious offenses," such that the requirement of an overt act should not be applied.[290]

Since publication of the Model Penal Code, the overt act requirement has gained "wide acceptance" among the states.[291] In fact, "[m]ost penal code revisions" actually *exceed* the recommendation of the Model Penal Code.[292] For example, whereas Model Penal Code § 5.03(5) would exclude first and second-degree felonies from the overt act requirement, modern criminal codes typically apply the overt-act rule to all crimes.[293] Even outside reform jurisdictions, moreover, application of a broad overt act requirement is a common feature of conspiracy legislation.[294]

Common law authorities have also frequently endorsed the overt act requirement, highlighting a range of virtues associated with it. For example, courts have observed that the overt act requirement, by requiring "that a conspiracy has moved beyond the talk stage and is being carried out,"[295] appropriately ensures "that society does not intervene prematurely"[296] while, at the same time, helping "to separate truly dangerous agreements from banter and other exchanges that pose less risk."[297] And on an even more basic level, courts have championed the fact that the overt act requirement, by prohibiting liability for

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[290] *Id.*

[291] DRESSLER, *supra* note 61, at § 29.04; *see* Model Penal Code § 5.03 cmt. at 455–56.

[292] DRESSLER, *supra* note 61, at § 29.04. Like the Model Code, most modern conspiracy "statutes [also] uniformly require an overt act by only one of the conspirators." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 (collecting citations). This means that proof of a single overt act by any party to a conspiracy is a sufficient basis to prosecute every member of the conspiracy, including those who may have joined in the agreement after the act was committed. *See, e.g.*, *Bannon v. United States*, 156 U.S. 464 (1895); *People v. Adams*, 766 N.Y.S.2d 765 (County Ct. 2003); *Blumenthal v. United States*, 332 U.S. 539 (1947); *United States v. Rabinowich*, 238 U.S. 78 (1915); *United States v. Reyes*, 302 F.3d 48 (2d Cir. 2002); *State v. Gonzalez*, 69 Conn.App. 649 (2002); *People v. McGee*, 49 N.Y.2d 48 (1979); *United States v. Isaacson*, 752 F.3d 1291 (11th Cir. 2014); *State v. Millan*, 290 Conn. 816 (2009); *Broomer v. State*, 126 A.3d 1110 (Del. 2015); *State v. Keller*, 2005 ND 86 (2005). Note that Model Penal Code § 5.03(5) requires both *allegation* and *proof* of an overt act. To that end, "[f]ifteen states have incorporated similar language into their conspiracy provisions, but most jurisdictions have not confronted, in their substantive law, the issue of what must be alleged in a conspiracy indictment." Buscemi, *supra* note 161, at 1157–58.

[293] DRESSLER, *supra* note 61, at § 29.04. *See* Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ark. Code Ann. § 5-3-401; Colo. Rev. Stat. Ann. § 18-2-201; Conn. Gen. Stat. Ann. § 53a-48; Ga. Code Ann. § 16-4-8; Haw. Rev Stat. § 705-520;; Ill. Comp. Stat. Ann. ch. 720, § 5/8-2; Ind. Code Ann. § 35-41-5-2; Kan. Stat. Ann. § 21-5302; Ky. Rev. Stat. Ann. § 506.050;; Me. Rev. Stat. Ann. tit. 17-A, § 151; Minn. Stat. Ann. § 609.175; Mo. Ann. Stat. § 564.016; Mont. Code Ann. § 45-4-102; N.H. Rev. Stat. Ann. § 629:3; N.Y. Penal Law § 105.20; Ohio Rev. Code Ann. § 2923.01; Okla. Stat. Ann. tit. 21, § 423; Pa. Cons. Stat. Ann. tit. 18, § 903; S.D. Cod. Laws § 22-3-8; Tenn. Code Ann. § 39-12-103; Tex. Penal Code Ann. § 15.02; Vt. Stat. Ann. tit. 13, § 1404; Wash. Rev. Code § 9A.28.040; Wis. Stat. Ann. § 939.31; Wyo. Stat. § 6-1-303.

[294] *See* Cal. Penal Code § 184; Idaho Code § 18-1701; Iowa Code Ann. § 706.1; La. Rev. Stat. Ann. § 14:26; Neb. Rev. Stat. § 28-202; W. Va. Code § 61-10-31. Likewise, "Congress has included an express overt-act requirement in at least [23] current conspiracy statutes." *Whitfield v. United States*, 543 U.S. 209, 216 (2005).

[295] *People v. Abedi*, 595 N.Y.S.2d. 1011, 1020 (Sup. Ct. 1993).

[296] *People v. Mass*, 628 N.W.2d 540, 559 (Mich. 2001) (Markman, J., concurring).

[297] *United States v. Sassi*, 966 F.2d 283, 284 (7th Cir. 1992).

"a project still resting solely in the minds of the conspirators,"[298] appropriately respects the admonition that "evil thoughts alone cannot constitute a criminal offense."[299]

As a matter of practice, the overt act requirement is, in those jurisdictions that recognize it, not particularly demanding.[300] Generally speaking, any act, no matter how trivial, is sufficient to satisfy the overt act requirement if performed in furtherance of the conspiracy.[301] In practical effect, this means that the act need not even constitute a "substantial step" towards completion of the criminal objective.[302] Nor, for that matter, must the act be illegal.[303] Indeed, otherwise innocent conduct such as writing a letter, making a telephone call, lawfully purchasing of an instrument to commit the offense, or attending a lawful meeting can, when made pursuant to an unlawful agreement, satisfy the overt act requirement.[304]

In accordance with both the above national legal trends and well-established District law, RCC § 303(b) incorporates a broadly applicable overt act requirement into the general conspiracy statute.

RCC §§ 303(a) & (b) (Generally): Relation to National Legal Trends on Agreements to Achieve Non-Criminal Objectives. The recognition of conspiracy liability "reflects the fact that joint criminal plots pose risks to society that, if not unique, are undoubtedly greater than those posed by lone-wolf, would-be felons."[305] The members of a joint criminal plot "may benefit from the division of labor in the execution of criminal schemes," which in turn "may lead to the commission of additional crimes beyond those initially envisioned."[306]

Consistent with this criminogenic rationale, there is, and has historically been, a broad consensus that the general inchoate offense of conspiracy ought to be broadly construed, applying to all (or most) crimes in the special part of a criminal code.[307] But what about where two or more parties agree to engage in or bring about conduct that is

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[298] *Yates v. United States*, 354 U.S. 298 (1957); *see, e.g.*, *People v. Arroyo*, 93 N.Y.2d 990 (1999); *State v. Miller*, 677 P.2d 1129 (Utah 1984); *Burk v. State*, 848 P.2d 225 (Wyo. 1993); *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820 (2001).

[299] *People v. Russo*, 25 P.3d 641, 645 (Cal. 2001) (collecting cases).

[300] *Heitman*, 629 N.W.2d at 553. In some jurisdictions, an overt act, although required to convict, is not a formal element of the offense." DRESSLER, *supra* note 61, at § 29.04. Instead, the act "merely affords a *locus penitentia*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." *United States v. Britton*, 108 U.S. 199, 205 (1883). In other words, the overt-act requirement in such jurisdictions gives a conspirator, before that act occurs, "an opportunity to repent." *Russo*, 25 P.3d at 645.

[301] *Commonwealth v. Weimer*, 977 A.2d 1103, 1106 (Pa. 2009).

[302] *But see* LaFave, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 ("In a few states, this overt act must be a 'substantial step' toward commission of the crime.")

[303] *Heitman*, 629 N.W.2d at 553.

[304] DRESSLER, *supra* note 61, at § 29.04 (citing *Yates v. United States*, 354 U.S. 298, 333–34 (1957), overruled on other grounds in *Burks v. United States*, 437 U.S. 1 (1978))).

[305] *Pond*, 315 Conn. at 474.

[306] *Id.* (citations omitted); *see, e.g.*, *Payan*, 992 F.2d at 1390 (collective criminal activity "increases the chances that the criminal objective will be attained, decreases the chances that the involved individuals will abandon the criminal path, makes larger criminal objective attainable, and increases the probability that crimes unrelated to the original purpose for which the group was formed will be committed") (citing *Iannelli*, 420 U.S. at 778).

[307] *See, e.g.*, DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

generally immoral, but not itself criminal? Treatment of this issue—namely, of whether and to what extent the general inchoate crime of conspiracy ought to encompass non-criminal objectives—by American legal authorities has undergone a robust transformation over the course of the last century.[308]

Historically speaking, the law of conspiracy frequently encompassed non-criminal objectives. For example, the early common law definition of this general inchoate offense "views conspiracy as a combination formed to do either an unlawful act or a lawful act by unlawful means."[309] Under this formulation, it "is not essential . . . to criminal liability that the acts contemplated should constitute a criminal offense for which, without the elements of conspiracy, one alone could be indicted."[310] Rather, "it will be enough if the acts contemplated are corrupt, dishonest, fraudulent, or immoral, and in that sense illegal."[311]

Illustrative of this early common law trend are mid-twentieth century American conspiracy statutes, which extend to "any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the laws."[312] Other illustrative statutory provisions include those criminalizing "conspiracies to cheat and defraud, and to oppress individuals or prevent them from exercising a lawful trade or from doing any other lawful act."[313] Viewed collectively,

> [t]hese broad formulations may be considered as being of two types, though they are not mutually exclusive: (1) those reaching behavior that the law does not regard as sufficiently undesirable to punish criminally when pursued by an individual, but which is considered immoral, oppressive to individual rights, or prejudicial to the public; and (2) those dealing with categories of behavior that the criminal law traditionally reaches, such as fraud and obstruction of justice, but which define such behavior far more broadly than does the law governing the related substantive crimes.[314]

More recently, however, American legal authorities have diverged from the common law approach.[315] Rather than allowing for conspiracy liability to extend to non-criminal objectives, most modern criminal codes limit the reach of the general inchoate crime of conspiracy to specific offenses.[316] And rather than address particular kinds of criminal objectives through vague conspiracy formulations, modern criminal codes typically rely upon the application of general conspiracy provisions to more comprehensively defined specific offenses.[317] The impetus for these changes is the Model Penal Code.

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[308] *See, e.g.*, DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[309] Wechsler et al., *supra* note 171, at 963.
[310] *E.g.*, *State v. Kemp*, 126 Conn. 60, 78 (1939) (quoting *State v. Parker*, 114 Conn. 354, 158 (1932)).
[311] *See id.*
[312] Model Penal Code § 5.03 cmt. at 395 (collecting statutes).
[313] *Id.* (collecting statutes).
[314] *Id.* at 395-96.
[315] *See* DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[316] *See* DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[317] *See* DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

In what the drafters recognized to be a "significant departure[]" from the common law, the Model Penal Code's general definition of conspiracy, § 5.03(1), is framed in terms of conspiring to commit "a crime."[318] In practical effect, this excludes non-criminal objectives from scope of general conspiracy liability. The rationale provided for this change is rooted in the need for clarity and consistency, namely, the Model Penal Code drafters believed that the "over-broad conspiracy provisions" employed in common law statutes "fail to provide a sufficiently definite standard of conduct to have any place in a penal code."[319]

An illustrative example of these problems, highlighted by the drafters of the Model Penal Code, is the federal conspiracy to defraud provision, 18 U.S.C. § 371.[320] That provision renders any conspiracy to "defraud the United States in any manner or for any purpose" a felony.[321] Over the years, this statute "has grown through judicial interpretation to cover 'virtually any impairment of the Government's operating efficiency,'"[322] including much conduct that would not otherwise be an offense at all.[323] The breadth of the federal conspiracy statute is a function of the vagueness of the language it employs; as is often observed, the phrase "defraud the United States" lacks any fixed meaning.[324]

Notwithstanding their critique of common law conspiracy statutes, the Model Penal Code drafters were not wholly against extending conspiracy liability beyond criminal objectives.[325] Indeed, the Model Penal Code commentary explicitly acknowledges "that there are some activities that should be criminal only if engaged in by a group."[326] Where this expansion of liability is appropriate, however, the drafters "believe[d] [it] should be dealt with by special conspiracy provisions in the legislation governing the general class of conduct in question, and they should be no less precise than penal provisions generally in defining the conduct they proscribe."[327]

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[318] Model Penal Code § 5.03 cmt. at 394.
[319] *Id.* at 396.
[320] *See id.* at 395.
[321] 18 U.S.C. § 371.
[322] Model Penal Code § 5.03 cmt. at 396 (quoting Goldstein, *supra* note 103, at, 461). This includes, for example, fraud in defense contracts, medicare fraud, or virtually any fraudulent taking or misappropriation involving a federally-funded institution or program. *See e.g., Glasser v. U.S.*, 315 U.S. 60, 80, (1942); *U.S. v. Bordelon*, 871 F.2d 491 (5th Cir. 1989) (HUD official involved in private commercial venture); *U.S. v. Abushi*, 682 F.2d 1289, 1293 (9th Cir. 1982) (food stamp fraud); *U.S. v. Hodges*, 770 F.2d 1475, 1478 (9th Cir. 1985) (fraud on federally insured savings and loan associations).
[323] Model Penal Code § 5.03 cmt. at 394; *see, e.g., United States v. Johnson*, 383 U.S. 169, 172 (1966). As a historical matter, "[s]chemes to defraud individuals or corporations at common law generally [were] held to be criminal conspiracies, and were punishable as conspiracies before the fraud became a substantive crime." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[324] Model Penal Code § 5.03 cmt. at 394; *see* Goldstein, *supra* note 103, at 408; John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?*: *Reflections on the Disappearing Tort/crime Distinction in American Law*, 71 B.U. L. REV. 193, 246 (1991); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 750 (1999).
[325] Model Penal Code § 5.03 cmt. at 396.
[326] *Id.*
[327] *Id.* For illustrative examples of specific offenses that explicitly cover prohibited agreements, see Model Penal Code §§ 240.1 (bribery in official and political matters), 240.7(1)(selling political endorsement), and 240.7(2) (special influence). Likewise, to the extent that common law "provisions aimed at corruption of morals, obstruction of justice, cheating and defrauding" were simply an inartful way of encompassing criminal objectives, the "approach of the Model Penal Code . . . is to define the substantive crimes in these areas more specifically and comprehensively than do many present systems, with the result that there is no

Modern American criminal law has since followed suit, embracing both the prescriptions and accompanying rationale of the Model Penal Code.[328] On the legislative level, for example, the current legal trend is to limit general conspiracy liability to the achievement of criminal objectives, such that "[a]ll but three state penal code revisions since the adoption of the final draft of the Code in 1962 have agreed with the American Law Institute."[329] Among these jurisdictions, a "majority" apply general conspiracy liability to *all* criminal objectives.[330] However, a strong plurality go a step further and only apply conspiracy liability to *some* criminal objectives. For example, "a few of the modern recodifications" limit conspiracy liability to agreements to commit *a felony*.[331] Other conspiracy statutes are limited in other ways, "such as by specifying the crimes which will suffice as objectives,"[332] or "by including [only] felonies and higher misdemeanors."[333]

Contemporary American legal commentators are also strongly supportive of the Model Penal Code approach, highlighting, among other considerations,[334] the importance of fair notice[335] and the concomitant risk of "prosecutorial and judicial abuse" created by conspiracy statutes of uncertain scope.[336] As one commentator phrases it:

> People are entitled to fair notice that their planned conduct is subject to criminal sanction. In an age in which legislatures rather than courts define criminal conduct, people should be able to turn to a written code for reasonable guidance in the conduct of their lives. If the legislature has not

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need to strike at the problems through over-broad conspiracy provisions." Model Penal Code § 5.03 cmt. at 396.

[328] DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

[329] Model Penal Code § 5.03, cmt. at 397; *but see* Mich. Comp. Laws Ann. § 750.157a; Miss. Code Ann. § 97-1-1; S.C. Code § 16-17-410.

[330] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3; *see* Ala. Code § 13A-4-3; Ariz. Rev. Stat. Ann. § 13-1003; Ark. Code Ann. § 5-3-401; Colo. Rev. Stat. Ann. § 18-2-201; Conn. Gen. Stat. Ann. § 53a-48; Del. Code Ann. tit. 11, § 511; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-8; Haw. Rev. Stat. § 705-520; Idaho Code § 18-1701; Ill. Comp. Stat. Ann. ch. 720, § 5/8-2; Iowa Code Ann. § 706.1; Kan. Stat. Ann. § 21-5302; Ky. Rev. Stat. Ann. § 506.040; La. Rev. Stat. Ann. § 14:26; Me. Rev. Stat. Ann. tit. 17-A, § 151 Minn. Stat. Ann. § 609.175; Mo. Ann. Stat. § 564.016; Mont. Code Ann. § 45-4-102; N.H. Rev. Stat. Ann. § 629:3; N.J. Stat. Ann. § 2C:5-2; N.Y. Penal Law § 105.00; N.D. Cent. Code § 12.1-06-04; Pa. Cons. Stat. Ann. tit. 18, § 903; Utah Code Ann. § 76-4-201; Wash. Rev. Code § 9A.28.040; Wis. Stat. Ann. § 939.31; Wyo. Stat. § 6-1-303. A few states, however, do retain conspiracy to defraud general provisions, though nearly all are more limited than the federal statute. *See* Ga. Code Ann. § 16-10-21 (but limited to property fraud); Iowa Code Ann. § 425.13 (limited to fraud in obtaining homestead tax credits); Mich. Comp. Laws. Ann. § 752.1005 (limited to health care benefit fraud); Miss. Code Ann. §§ 43-13-211 (same); Utah Code Ann. § 26-20-6 (same).

[331] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3; *see* Ind. Code Ann. § 35-41-5-2; Neb. Rev. Stat. § 28-202; Nev. Rev. Stat. Ann. § 175.251; N.M. Stat. Ann. § 30-28-2; Tex. Penal Code Ann. § 15.02; Va. Code Ann. § 18.2-22.

[332] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3; *see* Alaska Stat. § 11.31.120; Ohio Rev. Code Ann. § 29.23.01; Vt. Stat. Ann. tit 13, § 1404

[333] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3; *see* Or. Rev. Stat. § 161.450; Tenn. Code Ann. § 39-12-107.

[334] *See* Francis Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 397 (1922) (noting that the common law rule was likely "based on what is probably an incorrect reading of the early cases").

[335] *See, e.g, Commonwealth v. Bessette*, 217 N.E.2d 893, 896 n.5 (Mass. 1966).

[336] *E.g.*, LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.

> made a specified act criminal it is unfair to surprise people by punishing the agreement to commit the noncriminal act.[337]

Relevant scholarly literature similarly highlights the fact that "[f]air notice is [] a constitutional requirement."[338] For example, "[a]lthough the Supreme Court has never ruled on the validity of this feature of conspiracy law, it once hinted that the breadth of the 'unlawfulness' element violates due process."[339] And on the state level, broad conspiracy statutes from the early common law era have been the subject of much constitutional litigation, though only rarely have they been struck down as unconstitutional.[340]

Whatever their constitutional status, however, the general consensus among contemporary common law authorities is that "[i]t is far better," as a policy matter, "to limit the general conspiracy statute to objectives which are themselves criminal, as has been done in the most recent recodifications."[341]

In accordance with the national legal trends described above, RCC § 303(a) limits general conspiracy liability to agreements to commit specific offenses. To the extent that conspiracy liability ought to extend to agreements to engage in conduct that would not otherwise be criminal if engaged in by an individual, the RCC will codify special conspiracy provisions that specifically clarify the elements of the requisite offenses.

RCC §§ 303(a) and (b): Relation to National Trends on Codification. There is wide variance between jurisdictions insofar as the codification of a general definition of conspiracy is concerned.[342] Generally speaking, though, the Model Penal Code's general definition of conspiracy, § 5.03(1),[343] provides the basis for most contemporary reform

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[337] DRESSLER, *supra* note 61, at § 29.04.
[338] *Id.*
[339] *Id.* (discussing *Musser v. Utah*, 333 U.S. 95, 96–97 (1948)).
[340] *See* DRESSLER, *supra* note 61, at § 29.04; *compare, e.g.*, *State v. Bowling*, 427 P.2d 928, 932 (Ariz. Ct. App. 1967) *with People v. Sullivan*, 248 P.2d 520, 526 (Cal. Ct. App. 1952).
[341] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3. Which is not to say that conspiracy liability always needs to track the offenses in the Special Part. However, to the extent that "there are some activities which should be criminal only if engaged in by groups," commentators seem to agree with the Model Penal Code's prescription that they be "specifically identified in special conspiracy provisions no less precise than penal provisions generally." *Id.*
[342] This variance relates to both the "detail and nuance" of general conspiracy provision. Buscemi, *supra* note 161, at 1126 (providing a detailed overview of codification trends).
[343] The entirety of this provision reads as follows:

> (1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Model Penal Code § 5.03(1).

efforts.[344] The general definition of conspiracy incorporated into RCC §§ 303(a) and (b) incorporates drafting techniques from the MPC, 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, and frequently criticized, drafting decision reflected in the Model Penal Code's general definition of conspiracy is the manner in which the culpable mental state requirement of conspiracy is codified. Notwithstanding the Model Penal Code drafters' general commitment to element analysis, the culpability language utilized in § 5.03(1) reflects offense analysis, and, therefore, leaves the culpable mental state requirements applicable to conspiracy ambiguous.[345]

Illustrative is the prefatory clause of Model Penal Code § 5.03(1), which entails proof that the defendant enter the requisite agreement "with the purpose of promoting or facilitating" the commission of the offense that is the object of the conspiracy. 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). It is, therefore, unclear to which of the elements of the target offense this purpose requirement should be understood to apply.[346]

That the Model Penal Code's offense-level framing of the culpable mental state requirement of conspiracy fails to clarify the culpable mental state requirement (if any) applicable to each element of a conspiracy appears, at least in part, to have been intentional. For example, the commentary to the Model Penal Code's general conspiracy provision explicitly states that § 5.03(1) "does not attempt to [address the culpable mental state requirement of conspiracy] by explicit formulation . . . but affords sufficient flexibility for satisfactory decision as such cases may arise."[347]

This grant of policy discretion to the courts is problematic. The codification virtues of clarity, consistency, and fair notice all point towards providing comprehensive legislative guidance concerning the culpable mental state requirement of conspiracy.[348] So too do 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."[349] As a result, "[t]he ambiguous language of the conspiracy provision coupled with the ambivalent language of the commentary indicates a need for clarification."[350]

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[344] *See* Buscemi, *supra* note 161, at 1126 (distinguishing between "laws clearly derived from the MPC," those that "borrow[] at least some of the [MPC] recommendations," and those that "precisely follow[] the MPC language"). As noted *supra* notes 161-68 and accompanying text, the general definition of conspiracy incorporated into the proposed Federal Criminal Code has also been influential. *See* FCC § 1004(1) ("A person is guilty of conspiracy if he agrees with one or more persons to engage in or cause the performance of conduct which, in fact, constitutes a crime or crimes, and any one or more of such persons does an act to effect an objective of the conspiracy.") For a more comprehensive discussion of the latter approach to codification, as well as its adoption on the state level, see Buscemi, *supra* note 161, at 1127.

[345] *See, e.g.*, Robinson & Grall, *supra* note 44, at 756.

[346] *See id.*

[347] Model Penal Code § 5.03(1) cmt. at 113.

[348] *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 332-366 (2005)

[349] Wesson, *supra* note 121, at 209.

[350] Robinson & Grall, *supra* note 44, at 754. As one commentator frames the issue:

Since publication of the Model Penal Code, a few state legislatures have modestly improved upon the Code's treatment of conspiracy's culpable mental state requirement. For example, a handful of jurisdictions helpfully clarify by statute that conspiracy's purpose requirement (or its substantive equivalent) specifically applies to "conduct constituting an offense."[351] While helpful, however, no "state statute has attempted to deal comprehensively with the state of mind required for circumstance elements of the conspiracy offense."[352] (Note, though, that English statutory law explicitly codifies the culpable mental state requirement governing the circumstances of a conspiracy.[353]) And the same also appears to be true with respect to the culpable mental state requirement applicable to the results of a conspiracy, at least insofar as explicit statutory formulations are concerned.[354]

There is, then, no American criminal code that fully implements a statutory element analysis of conspiracy's culpable mental state requirement.

The RCC approach to codifying the culpable mental state of conspiracy, in contrast, strives to provide that clarification, 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 § 303(a) establishes that the culpability requirement applicable to a criminal conspiracy necessarily incorporates "the culpability required by [the target] offense." This language is modeled on the prefatory clauses employed in various modern attempt statutes.[355] It effectively communicates that conspiracy liability requires, at minimum, proof of the culpable mental states (if any) governing the results and circumstances of the target offense.[356]

Next, RCC § 303(a)(1) clearly and directly articulates that conspiracy's distinctive purpose requirement governs the conduct which constitutes the object of the agreement. This is achieved by expressly applying a culpable mental state of purpose to the agreement clause. More specifically, RCC § 301(a)(1) states that the parties must, *inter alia*, "[p]urposely agree to engage in or aid the planning or commission of [criminal] conduct."

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> Although the MPC writers apparently believed that the resolution of the question was best left open to subsequent judicial developments, I believe that statutory language should clearly and unequivocally resolve the question. Criminal statutes are constitutionally required to be clear in their designation of the elements of crimes, including mental elements.

Wesson, *supra* note 121, at 209.

[351] Ala. Code § 13A-4-3(a); *see* sources cited *infra* note 357.

[352] *See* Buscemi, *supra* note 161, at 1149. Also worth noting is that the proposed Federal Criminal Code does an even worse job of addressing the *mens rea* of conspiracy. *See id.* (discussing FCC § 1004(1)).

[353] *See supra* note 217 (presenting relevant statutory text).

[354] *See supra* notes 208-09 and accompanying text (discussing statutory treatment of results).

[355] For example, Model Penal Code § 5.01(1) reads: "A person is guilty of an attempt to commit a crime if, *acting with the kind of culpability otherwise required for commission of the crime* . . . ." For state statutes employing this language, see, for example, Ky. Rev. Stat. Ann. § 506.010; Tenn. Code Ann. § 39-12-101.

[356] 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 of a conspiracy might likewise require. A conspiracy to commit such an offense would, pursuant to the prefatory clause of § 303(a), require proof of the same.

A handful of states have followed a similar approach to codification in the sense that they clarify, by statute, that a purpose requirement applies to the conduct that constitutes the object of the agreement.[357] Notably, however, these jurisdictions do so through a different clause that, like the Model Penal Code approach to codifying the culpable mental state requirement of conspiracy, separates the purpose requirement from the agreement requirement.[358] The latter approach is unnecessarily verbose—whereas the drafting technique employed in the RCC allows for a more succinct general statement of the culpable mental state requirement governing conspiracy.[359]

Finally, RCC § 303(b) provides explicit statutory detail, not otherwise afforded by any other American criminal code, concerning the extent to which principles of culpable mental state elevation govern the results and circumstances of the target offense.[360] More specifically, RCC § 303(b) establishes that: "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." This language incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a conspiracy is comprised of a result or 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 two or more parties is required as to the requisite elements under RCC § 303(b).

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the culpable mental state requirement governing a conspiracy, which avoids the flaws and ambiguities reflected in Model Penal Code § 5.03(1).

Another drafting flaw reflected in the Model Penal Code approach to codifying conspiracy liability, which is addressed by the RCC, is that the Model Penal Code's definition of a conspiracy, § 5.03(1), omits reference to the overt act requirement. That requirement is instead articulated through a separate provision, Model Penal Code § 5.03(5), which states that "[n]o person may be convicted of conspiracy to commit a

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[357] For example, Ala. Code § 13A-4-3(a) reads: "A person is guilty of criminal conspiracy if, *with the intent that conduct constituting an offense be performed*, he agrees with one or more persons to engage in or cause the performance of such conduct . . . ." For similar formulations, see, for example, N.Y. Penal Law § 105.10; Me. Rev. Stat. tit. 17-A, § 151; Or. Rev. Stat. Ann. § 161.450.

[358] For example, Model Penal Code § 5.03(1) states, first, that a person must act "with the purpose of promoting or facilitating [] commission" of a crime, and, second, that he must:

> (a) agree[] with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agree[] to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

[359] *Cf. United States v. Piper*, 35 F.3d 611, 614–15 (1st Cir. 1994) (describing conspiracy as, *inter alia*, "intentionally agree[ing] to undertake activities that facilitate commission of a substantive offense"); *Com. v. Weimer*, 602 Pa. 33, 38 1105–06 (2009) ("To sustain a criminal conspiracy conviction, the Commonwealth must establish a defendant entered into an agreement to commit or aid in an unlawful act with another person or persons, with a shared criminal intent.").

[360] *See* RCC § 303(b) ("Notwithstanding subsection (a), to be liable for conspiracy, the parties to the agreement must at least intend to bring about any result or circumstance required by the target offense.")

crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired."

It seems clear that the drafters of the Model Penal Code intended to establish that an overt act is indeed an element of (relevant) conspiracy offenses.[361] If true, however, the preferable approach is to incorporate the overt act requirement into the definition of conspiracy itself, rather than through a separate stand-alone provision. This is the approach that various reform jurisdictions have taken,[362] and it is likewise the approach reflected in the RCC. More specifically, RCC § 303(a)(2) states as an element of the offense that "[o]ne of the parties to the conspiracy engages in an overt act in furtherance of the agreement."

One final codification point concerning the general definition of conspiracy incorporated into the RCC worth noting is that it clearly codifies the bilateral approach to conspiracy—in contrast to the Model Penal Code's problematic attempt at codifying a unilateral approach to conspiracy.[363] In most jurisdictions that retain a bilateral approach, the common law "two or more persons" formulation is employed as the basis for statutorily articulating a plurality requirement.[364] The general definition of conspiracy incorporated into the RCC, in contrast, more clearly communicates the bilateral nature of the offense alongside RCC § 303(a)'s articulation of each of the offense's particular elements. Specifically, the prefatory clause of RCC § 303(a) establishes that: "[a] person is guilty of a conspiracy to commit an offense when . . . *that person and at least one other person*" meet the elements of a criminal conspiracy.[365]

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[361] *See* Model Penal Code § 5.03(5) cmt. at 452-56; *see also People v. Russo*, 25 Cal. 4th 1124, 1131–34, (2001); *People v. Swain*, 12 Cal.4th 593, 600 & fn.1 (1996).

[362] For example, Haw. Rev. Stat. Ann. § 705-520 reads:

> A person is guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a crime:
>
> (1) He agrees with one or more persons that they or one or more of them will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and
>
> (2) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

For similar statutory approaches, see, for example, Ark. Code Ann. § 5-3-401; Ala. Code § 13A-4-3; Delaware Reform Code § 703(a)(4).

[363] As one commentator observes:

> The language chosen by the MPC's authors is not entirely unambiguous in its choice of a unilateral theory of conspiracy; it could be argued that the term "agrees" implies the subjective assent of two or more parties to a common plan or scheme.

Wesson, *supra* note 121, at 206; *see also supra* notes 134-35 (authorities interpreting Model Penal Code language in conflicting ways).

[364] *See, e.g.*, D.C. Code § 22-1805a; Cal. Penal Code § 182.

[365] This language is drawn directly from DCCA case law. *See In re T.M.*, 155 A.3d 400, 411 (D.C. 2017). For a legislative proposal that employs similar language, see Wesson, *supra* note 121, at 220 (A conspiracy

**2. §§ 22A-303(c), (d), & (e)—Jurisdiction When Object of Conspiracy is Located Outside the District of Columbia; Jurisdiction When Conspiracy is Formed Outside the District of Columbia; & Legality of Conduct in Other Jurisdiction Irrelevant.**

*Explanatory Note*. Subsections (c), (d), and (e) address two jurisdictional issues relevant to general conspiracy liability under the RCC. The first is whether and to what extent general conspiracy liability applies to conspiracies to commit target offenses outside the District of Columbia. The second is whether and to what extent general conspiracy liability applies to conspiracies formed outside the District of Columbia.

Subsection (c) addresses the first situation, where the requisite agreement is formed within the District of Columbia, but where the object of the agreement is to engage in conduct outside the District of Columbia. It establishes that general conspiracy liability under the RCC applies if the conduct to be performed outside the District of Columbia would constitute a criminal offense under the D.C. Code if performed in the District of Columbia, RCC § 303(c)(1), provided that one of the two following conditions is met. First, that conduct would constitute a criminal offense under the laws of that other jurisdiction if performed in that jurisdiction, RCC § 303(c)(2)(A). Second, and alternatively, that conduct would constitute a criminal offense under the D.C. Code even if it was performed outside the District of Columbia, RCC § 303(c)(2)(B).

Subsection (d) addresses the second situation, where the requisite agreement is formed outside the District of Columbia, but where the object of the agreement is to engage in conduct inside the District of Columbia. It establishes that general conspiracy liability under the RCC applies if the conduct to be performed inside the District of Columbia would constitute a criminal offense under the D.C. Code, RCC § 303(d)(1), provided that an overt act in furtherance of the conspiracy is committed within the District of Columbia, RCC § 303(d)(2). Under these circumstances, subsection (e) further clarifies, it is irrelevant that the conduct which is the object of the conspiracy would not constitute a criminal offense under the laws of that other jurisdiction.

Subsections (c), (d), and (e) recodify the jurisdictional provisions set forth in D.C. Code §§ 22-1805a(c) and (d), while explicitly clarifying that those provisions apply to all criminal offenses in the D.C. Code.[366] Subsections (c), (d), and (e) are intended to incorporate all pre-existing District law relevant to D.C. Code §§ 22-1805a(c) and (d).[367]

*Relation to Current District Law.* Subsections (c), (d), and (e) are in accord with, but may also fill a potential gap in, current District law governing jurisdiction in conspiracy prosecutions.

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exists where, *inter alia*, the defendant and "another person each agree that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime").

[366] *See* D.C. Code §§ 1805a(c) & (d) (referencing "act[s] of Congress exclusively applicable to the District of Columbia").

[367] This includes both those procedural topics explicitly addressed by §§ 303(c) and (d), as well as those that are not such as, for example, joinder, see *McCray v. United States*, 133 A.3d 205 (D.C.), *cert. denied sub nom. Fortson v. United States*, 137 S. Ct. 581, 196 L. Ed. 2d 455 (2016), and the fact-finder's role in determining whether the relevant jurisdictional bases have been met, see *Gilliam v. United States*, 80 A.3d 192 (D.C. 2013).

The District's general conspiracy statute contains two provisions, D.C. Code §§ 22-1805a(c) and (d), which address separate jurisdictional issues. The relevant statutory provisions read:

> (c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:
>
> > (1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or
> >
> > (2) Such conduct would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.
>
> (d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, 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 crime under the laws of the other jurisdiction.[368]

The general import of these provisions, enacted as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, is relatively clear: they proscribe basic jurisdictional principles for dealing with conspiracies formed inside the District to commit crimes outside the District, D.C. Code § 22-1805a(c), as well as for conspiracies formed outside the District to commit crimes inside the District, D.C. Code § 22-1805a(d). However, there is scant District authority illuminating the precise meaning of these provisions. Relevant legislative history in the House Committee Report only indicates a general recognition that this language was "modeled" on the law of conspiracy in New York, "rather than Federal law, because of the need for greater specificity in a statute applicable to a geographically limited area within the United States."[369]

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[368] D.C. Code §§ 22-1805a(c)-(d).

[369] DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970: REPORT OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA ON H.R. 16196, at 66 (March 13, 1970). The relevant provision in the New York Penal Code reads:

> 1. A person may be prosecuted for conspiracy in the county in which he entered into such conspiracy or in any county in which an overt act in furtherance thereof was committed.

One issue that both the statutory text and legislative history leave unclear is whether and to what extent D.C. Code §§ 22-1805a(c) and (d) were intended to apply to criminal offenses *passed by the D.C. Council*. The lack of clarity on this issue is a product of the fact that D.C. Code §§ 22-1805a(c) and (d) make continuous reference to "an act of Congress applicable exclusively to the District of Columbia." This phrasing reflects the pre-Home Rule reality that, when the relevant jurisdictional provisions were enacted in 1970, local criminal laws were written by Congress. Since Home Rule, however, the D.C Council has been responsible for passing nearly all of the District's criminal laws.[370] Which raises the following question: are conspiracies to commit such offenses, enacted by the D.C. Council, covered by the jurisdictional provisions set forth in D.C. Code §§ 22-1805a(c) and (d)?[371]

There does not appear to be any case law addressing this particular issue, and the reported decisions evening mentioning these jurisdictional provisions is scant.[372] However, the one DCCA case directly addressing them, *Gilliam v. United States*, seems to provide indirect support for the proposition that conspiracies to commit offenses enacted by the D.C. Council might be covered by the relevant jurisdictional provisions.[373]

After quoting to the text of D.C. Code § 22-1805a(d), for example the *Gilliam* decision states that:

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> 2. An agreement made within this state to engage in or cause the performance of conduct in another jurisdiction is punishable herein as a conspiracy only when such conduct would constitute a crime both under the laws of this state if performed herein and under the laws of the other jurisdiction if performed therein.
>
> 3. An agreement made in another jurisdiction to engage in or cause the performance of conduct within this state, which would constitute a crime herein, is punishable herein only when an overt act in furtherance of such conspiracy is committed within this state. Under such circumstances, it is no defense to a prosecution for conspiracy that the conduct which is the objective of the conspiracy would not constitute a crime under the laws of the other jurisdiction if performed therein.

N.Y. Penal Law § 105.25.

[370] *See, e.g.*, D.C. Code § 22-3002 (sexual abuse); D.C. Code § 22-3053 (revenge porn).

[371] Note that D.C. Code §§ 22-1805a(c)-(d) do not purport to address jurisdiction over all conspiracy prosecutions, only those where: (1) "the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia"; or (2) "[a] conspiracy [is] contrived in another jurisdiction to engage in conduct within the District of Columbia"); *see Gilliam v. United States*, 80 A.3d 192, 209-10 (D.C. 2013) (noting that these provisions address two particular situations).

[372] *See United States v. Lewis*, 716 F.2d 16, 23 (D.C. Cir. 1983) (noting that the "venue and jurisdiction" provisions of D.C. Code § 22-1805a reflect the "necessity of greater specificity in a statute applicable to a geographically limited area within the United States").

[373] At issue in *Gilliam* were indictments charging "that appellants entered into an agreement within the District of Columbia to murder [the victim]" in Maryland. 80 A.3d at 192. More specifically, the indictments alleged that the appellants "committed nine overt acts during and in furtherance of that conspiracy—four acts in Maryland [] and five acts in the District[]." *Id.* At trial, the court instructed the jury that "proof of any one of [these overt acts] would support a conviction for conspiracy." *Id.* The appellants were thereafter convicted by the jury. On appeal, the appellants argued that "the trial court improperly allowed the jury to convict them for conspiracy based solely on acts occurring outside the District of Columbia over which . . . the Superior Court lacked jurisdiction." *Id.* at 209. The DCCA ultimately agreed, deeming it "plausible that the jury relied solely on overt acts in Maryland in convicting appellants of conspiracy." *Id.*

> We understand this provision to mean that when a prosecution for conspiracy is predicated on an agreement made in another jurisdiction, the government must prove that an overt act pursuant to the conspiracy was committed within the District of Columbia in order to prove the offense.[374]

Notably absent from this statement is any reference to conspiracies to commit offenses specifically passed by Congress; instead, the court merely references "a prosecution for conspiracy."[375]

One final point worth mentioning is that in 2009 the D.C. Council amended the District's general conspiracy statute to more severely punish conspiracies "to commit a crime of violence as defined in § 23-1331(4)."[376] The latter category of offenses specifically includes a variety of crimes enacted by the D.C. Council since Home Rule.[377] With that in mind, it seems unlikely that the D.C. Council would have declined to revise the relevant jurisdictional provisions had they been understood to exclude many of the very offenses that were receiving enhanced penalties under the Omnibus Public Safety and Justice Amendment Act.

Subsections (c), (d), and (e) accord with the previously discussed District authorities. These three subsections recodify D.C. Code §§ 22-1805a(c) and (d), making one potential change to District law and three kinds of non-substantive revisions to the current statutory text.

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[374] *Id.* at 209–10. The DCCA ultimately concluded that the foregoing "statutory requirement was overlooked" by the trial court given that:

> the jury could have convicted appellants of conspiracy based solely on a finding that they entered into an agreement in Maryland and that they committed an overt act in Maryland—i.e., without finding any conspiratorial agreement made or joined, or overt act committed, within the District of Columbia.

*Id.*

[375] Note, however, that such a reference would not have been necessary because the charge at issue in the *Gilliam* case was conspiracy to commit murder.

[376] This new penalty provision was part of the Omnibus Public Safety and Justice Amendment Act of 2009. *See* D.C. Law 18-88, § 209, 56 DCR 7413, 2009 District of Columbia Laws 18-88 (Dec. 10, 2009).

[377] Under District law, a "crime of violence" means:

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4). Many of these offenses—for example, aggravated assault, carjacking, sexual abuse, and child sex abuse, among others—were enacted by the D.C. Council.

The potential change is that the revised jurisdictional provisions replace the phrase "an act of Congress applicable exclusively to the District of Columbia" with a reference to "D.C. Code." This definitively resolves the issue discussed above: conspiracies to commit offenses enacted by the D.C. Council are explicitly covered by the jurisdictional provisions set forth in D.C. Code §§ 22-1805a(c) and (d). It is unlikely this constitutes a departure from current District law, but, to the extent it does, it fills an unjustifiable (and likely unintended) gap created by a lack of congressional foresight.

The three kinds of non-substantive revisions, which improve the clarity and consistency of current District law governing jurisdiction in conspiracy prosecutions, are as follows. First, the revised jurisdictional provisions rephrase the current jurisdictional provisions in a more accessible manner. For example, the legalistic term "contrived," employed in both D.C. Code §§ 22-1805a(c) and (d), is replaced with the simpler term "formed" in both §§ 303(c) and (d).

Second, the revised jurisdictional provisions reorganize the current jurisdictional provisions in a more intuitive way. For example, the substantive requirement that the relevant conduct "constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein," employed in both D.C. Code §§ 22-1805a(c) and (d), is broken out into its own separate subsection in both RCC §§ 303(c) and (d). In addition, the clarification stated in D.C. Code § 22-1805a(d)—that "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 crime under the laws of the other jurisdiction" where the substantive requirements stated in § (d) are met—is placed in its own subsection, RCC § 303(e).

Third, the revised jurisdictional provisions rephrase the current jurisdictional provisions in a more descriptively accurate manner. For example, the vague use of "therein" employed throughout §§ 1805a(c) and (d) is replaced with a more specific reference to the relevant location in both RCC §§ 303(c) and (d).

When viewed collectively, RCC §§ 303(c), (d), and (e) both improve upon and preserve current District law governing jurisdiction in conspiracy prosecutions.[378]

[378] Because this provision is both procedural and merely a recodification, relevant national legal trends are not analyzed in this memorandum.