First Draft of Report #22:
Accomplice Liability and Related Provisions

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. 22, *Accomplice Liability and Related Provisions*, is July 13, 2018 (eight weeks from the date of issue). Oral comments and written comments received after July 13, 2018 will not be reflected in the Second Draft of Report No. 22. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

§ 22A-210 ACCOMPLICE LIABILITY

(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

(1) Purposely assists another person with the planning or commission of conduct constituting that offense; or

(2) Purposely encourages another person to engage in specific conduct constituting that offense.

(b) PRINCIPLE OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist.

(c) PRINCIPLE OF CULPABLE MENTAL STATE EQUIVALENCY APPLICABLE TO RESULTS WHEN DETERMINING DEGREE OF LIABILITY. An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.

(d) RELATIONSHIP BETWEEN ACCOMPLICE AND PRINCIPAL. An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein, although the other person claimed to have committed the offense:

(1) Has not been prosecuted or convicted; or

(2) Has been convicted of a different offense or degree of an offense; or

(3) Has been acquitted.

COMMENTARY

Explanatory Notes. Subsections (a), (b), (c), and (d) establish the elements of accomplice liability under the Revised Criminal Code (RCC). Collectively, these provisions provide a comprehensive statement of the conduct requirement and culpable mental state requirement of accomplice liability, alongside the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense.

The prefatory clause of subsection (a) establishes two basic principles of accomplice liability. The first is that accomplice liability is a means of holding one person liable for "the commission of an offense by another" (rather than a separate offense). This general principle of derivative liability has two primary implications. First, a person may only be held criminally responsible under RCC § 210 upon proof that

the person aided or abetted by the defendant in fact committed "an offense."[1] Note that this reference to "an offense" includes general inchoate crimes, such as a criminal attempt, solicitation, or conspiracy, all of which may serve as the basis for accomplice liability.[2] Second, a person may be both prosecuted and—contingent upon such proof—punished under RCC § 210 as if he or she were the principal offender.[3]

The second principle contained in the prefatory clause of subsection (a) is that accomplice liability necessarily incorporates "the culpability required by [the target] offense."[4] Pursuant to this principle, a defendant may not be held liable as an accomplice absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any other broader aspect of culpability[5]—required to establish that offense.[6]

Subsections (a)(1) and (a)(2) establish two alternative means of being an accomplice: by rendering assistance and by offering encouragement. The assistance prong envisions direct participation in commission of the crime as well as any support rendered in the earlier, planning stages. Typically, the assistance prong will be satisfied by conduct of an affirmative nature; however, an omission to act may also provide a viable basis for accomplice liability, provided that the defendant is under a legal duty to act (and the other requirements of liability are met).[7] The encouragement prong describes the promotion of an offense by psychological influence. It covers various forms of influence, including (but not limited to) the rational or emotional support afforded by a command, request, or agreement, advice or counsel, and instigation, incitement, or provocation.[8]

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[1] *See* RCC § 210(d) (establishing that the legal disposition of the principal actor's situation is generally immaterial to that of the accomplice).

[2] For example, where A purposely assists P with a bank robbery scheme that ultimately fails because the police intervene right before P is able to enter the bank, A can be convicted as an accomplice to P's attempted robbery.

[3] Which is to say, RCC § 210, like the District's prior complicity statute, is intended to dispense with the traditional common law distinctions between principals and "accessories," thereby authorizing a defendant to be convicted directly of an offense committed by another for whose conduct the defendant is accountable. *See* D.C. Code § 22-1805 ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.").

[4] 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 accomplice liability, see RCC § 210(b) (discussed *infra* notes 12–16 and accompanying text).

[5] For example, if the offense aided or abetted requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction.

[6] Accomplice liability is, of course, 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).

[7] *See generally* RCC § 202(c) (proscribing general principles of omission liability). For example, if A, a corrupt police officer, intentionally fails to stop a bank robbery committed by P, based upon P's promise to provide A with a portion of the proceeds, A may be deemed an accomplice to the robbery. Likewise, if A, a parent, fails to prevent the sexual assault of her young child by P, her boyfriend, based upon P's promise to marry A if she allows it to happen, A may be deemed an accomplice to the sexual assault.

[8] It is immaterial, for purposes of accomplice liability, whether the encouragement is communicated orally, in writing, or through other means of expression.

Whether assistance or encouragement is at issue, there is no requirement that the principal actor have *actually* been aware of the effect of the accomplice's conduct. However, the accomplice's conduct *must have, in fact,* assisted or encouraged the principal actor in some way. An unsuccessful accomplice is not subject to criminal liability under RCC § 210.[9]

Subsections (a)(1) and (2) also clarify that the requisite assistance or encouragement must be purposeful. There are two aspects of this "purposive attitude"[10] that bear comment. First, the defendant must act with the *conscious desire* to assist or encourage. Second, the defendant must also act with a *conscious desire* to bring about criminally prohibited conduct. Mere awareness that one's aid or encouragement is likely to promote or facilitate criminally prohibited conduct is insufficient to establish accomplice liability under subsection (a)(1) or (a)(2).[11]

Subsection (b) provides additional clarity concerning the relationship between the culpable mental state requirement applicable to accomplice liability and the culpable mental state requirement governing the target offense.[12] Whereas the prefatory clause of subsection (a) generally clarifies that accomplice liability 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 must intend for any circumstances required by that offense to exist." The latter requirement incorporates a principle of culpable mental state elevation applicable whenever the target offense is comprised of a circumstance that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[13] To satisfy this threshold culpable mental state requirement, the government must prove that the defendant, in rendering assistance or providing encouragement, acted with either a belief that it was practically certain that the circumstances of the target offense existed, see RCC § 206(b)(4), or, alternatively, that the defendant consciously desired for those circumstances to exist, see RCC § 206(e).[14]

Subsection (c) addresses the appropriate disposition of complicity prosecutions involving the commission of an offense that is divided into degrees based upon distinctions in culpability as to results. In this situation, for example in homicide prosecutions, an accomplice is liable for any grade for which he or she possesses the required culpability, although the person who committed the offense acted with a

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[9] For example, where A attempts to assist P by opening a window to allow P to enter a dwelling unlawfully, but P (unaware of the open window) enters through a door, A *is not* an accomplice to P's trespass. Likewise, if A utters words of encouragement to P who fails to hear them, but nevertheless proceeds to enter the dwelling unlawfully anyways, A *is not* an accomplice to P's trespass.

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

[11] For example, a car salesman who persuades another to purchase a vehicle aware that the vehicle will be used to rob a bank is not an accomplice to that robbery under the RCC unless the car salesman also consciously desires to promote or facilitate that bank robbery. Mere knowledge of probable illegal use is not sufficient to satisfy RCC § 210(a).

[12] *See supra* notes 4-6 and accompanying text (discussing prefatory clause of RCC § 210(a)).

[13] 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.

[14] This principle of culpable mental state elevation does not preclude the government from bringing complicity prosecutions for aiding and abetting target offenses comprised of circumstances subject to recklessness, negligence, or strict liability. However, to secure a complicity-based conviction for such offenses, proof that the accomplice acted with the intent as to those circumstances is necessary.

different kind of culpability. An accomplice may, therefore, be convicted of a grade of an offense that is either higher[15] or lower[16] than that committed by the principal actor where the variance is due to distinctions between the two (or more) actors' states of mind.

Subsection (d) addresses the relation between the prosecution of the accomplice and the treatment of principal actor alleged to have committed the offense. It establishes two main principles. First, accomplice liability entails proof of the defendant's complicity in the commission of an offense that was in fact, committed by another person. Second, assuming the government can meet this standard of proof, the legal disposition of the principal actor's situation is generally immaterial to that of the accomplice. This includes the fact that the principal: (1) has not been prosecuted or convicted; (2) has been convicted of a different offense or degree of offense; or (3) has been acquitted.

RCC § 210 has been drafted in light of, and should be construed in accordance with, prevailing free speech principles.[17] Given the centrality of speech to encouragement, accomplice liability directly implicates a criminal defendant's First Amendment rights. And while the U.S. Supreme Court recently clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,"[18] it also reaffirmed the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[19] RCC § 210 (a)(2) respects this distinction by requiring that the defendant encourage the principal actor to engage in *specific conduct* constituting an offense. To meet this requirement, it is not necessary that the defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. At the very least, though, it must be proven that the defendant's communication, when viewed in the context of the knowledge and position of the intended recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.[20]

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[15] Consider the following scenario: A gives P a knife and encourages P to throw it at V from a distance. If P is intoxicated, and opts to throw the knife for the thrill of it, P may only be reckless if it ultimately hits/kills V. Nevertheless, A may have concocted the scheme with premeditation/intent. On these facts, A can be convicted of assisting a homicide with the mental state necessary for first-degree murder (i.e., intent/absence of mitigating circumstances), although P can only be convicted of acting with the mental state necessary for manslaughter (i.e., recklessness).

[16] Consider again the following scenario: A gives P a knife and encourages P to throw it at V from a distance. If A is intoxicated and encourages P to throw the knife for the thrill of it, A may only be reckless if P ultimately hits/kills V. Nevertheless, P may have thrown the knife with premeditation/intent to kill. On these facts, A can be convicted of assisting a homicide with the mental state necessary for manslaughter (i.e., recklessness), in a case where P can be convicted of acting with the mental state necessary for murder (i.e., intent/absence of mitigating circumstances).

[17] *See generally* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016).

[18] *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

[19] *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928–929 (1982)).

[20] So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to satisfy the encouragement prong of accomplice liability. Nor would a general exhortation to "go out and revolt." *See generally Williams*, 553 U.S. at 300 (distinguishing statements such as "I believe that child pornography should be legal" or

RCC § 210 is intended to preserve existing District law relevant to accomplice liability to the extent existing District law is consistent with the statutory text and accompanying commentary.[21] These provisions therefore incorporate existing legal authorities whenever appropriate.[22]

Relation to Current District Law. Subsections (a), (b), (c), and (d) codify, clarify, and fill in gaps reflected in District law on the culpable mental state requirement and conduct requirement for accomplice liability, as well as the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense.

The D.C. Code addresses accomplice liability through § 22-1805, which establishes that:

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.[23]

This statute "was enacted by Congress in 1901, eight years before its federal analogue."[24] It was the product of a "reform movement," the purpose of which was to

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even "I encourage you to obtain child pornography" with the recommendation of a particular piece of purported child pornography).

[21] So, for example, an indictment does not need not include a charge of aiding and abetting in order for the theory to be presented to the jury. *See, e.g., Price v. United States*, 813 A.2d 169, 176 (D.C. 2002) (citing *Head v. United States*, 451 A.2d 615, 626 (1982)).

[22] This includes all existing District law relevant to the procedural aspects of accomplice liability, such as, for example: (1) charging, *Murchison v. United States*, 486 A.2d 77 (D.C. 1984); (2) jury instructions, *Dickens v. United States*, 163 A.3d 804 (D.C. 2017); (3) juror unanimity, *Tyler v. United States*, 495 A.2d 1180 (D.C. 1985); and (4) evidentiary considerations, *Brooks v. United States*, 599 A.2d 1094 (D.C. 1991). *See generally* D.C. Crim. Jur. Instr. § 3.200.

[23] D.C. Code § 22-1805. This statute is to be distinguished from D.C. Code § 22-1806, the District's criminal statute addressing "accessories after the fact." That statute reads:

> Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than 20 years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than 1/2 the maximum fine or imprisonment, or both, to which the principal offender may be subjected.

D.C. Code § 22-1806. This statute reflects the "modern view" that an accessory after the fact "is not truly an accomplice in the crime," i.e., "his offense is instead that of interfering with the processes of justice and is best dealt with in those terms." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. §§ 13.3, 13.6 (3d ed. Westlaw 2018).

[24] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*); *see also Hackney v. United States*, 389 A.2d 1336, 1342 (D.C. 1978) ("Our aiding and abetting statute does not differ substantially from its federal counterpart."). The original federal aiding and abetting federal statute, initially codified in 18 U.S.C. § 550, provided that "[w]hoever directly commits an act constituting an offense defined in any

enact complicity legislation "abolish[ing] the distinction between principals and accessories and render[ing] them all principals."[25] While the general purposes sought to be achieved by this statute are clear, its precise contours are more ambiguous. The District's general complicity statute—like its federal analogue—does not define any of the relevant statutory terms it employs. This statutory silence has effectively delegated to District courts the responsibility to establish the elements of accomplice liability.

Consistent with the interests of clarity and consistency, subsections (a), (b), (c), and (d) translate existing principles governing the conduct requirement and culpable mental state requirement of accomplice liability, as well as the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense, into a detailed statutory framework. In so doing, these provisions also fill gaps in the District law of complicity.

A more detailed analysis of District law and its relationship with subsections (a), (b), (c), and (d) is provided below. It is organized according to three main topics: (1) the conduct requirement; (2) the culpable mental state requirement; and (3) the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense.

RCC § 210(a): Relation to Current District Law on Conduct Requirement. RCC § 210(a) codifies, clarifies, and fills gaps in District law relevant to the conduct requirement of accomplice liability.

It is well established in the District that *merely intending* to promote or facilitate an offense perpetrated by another is an insufficient basis for accomplice liability; rather, to be held liable as an accomplice, one must have engaged in conduct that in some way contributed to the commission of that offense.[26] At the same time, the essential characteristics of this required contribution are described in a variety of ways.

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law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." The current federal statute, 18 U.S.C. § 2, states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

[25] *Dickens v. United States*, 163 A.3d 804, 818 (D.C. 2017) (quoting *Standefer v. United States*, 447 U.S. 10, 18 (1980) and *Tann v. United States*, 127 A.3d 400, 438 n.19 (D.C. 2015)). As the DCCA in *Brooks v. United States* observed:

> The common law was burdened with obscure and technical distinctions between principals and accessories, and these refinements had the potential for derailing prosecutions for reasons unrelated to the merits. If the defendant were charged as a principal he could not be convicted upon proof that he was an accessory. Likewise, one charged only as an accessory could not be convicted if the evidence established that he was instead a principal. A great deal could depend on the skill and artistry of the pleader.

599 A.2d 1094, 1098–99 (D.C. 1991) (internal quotations and citations omitted).

[26] *Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016) ("Acting with the intent that a knife be used unlawfully does not in and of itself automatically satisfy the requirement that the accomplice himself do something to further the carrying of the knife by the principal. The accomplice may mentally intend for the knife to be used but may not do anything to assist the principal with the carrying and use of the knife."); D.C. Crim. Jur. Instr. § 3.200 ("For [^] [name of defendant] to be guilty of aiding and abetting the offense of [^] [insert possessory firearm offense], the government must prove beyond a reasonable doubt [both that s/he aided and abetted the commission of [^] [insert name of crime of violence or dangerous crime]

For example, the District's general complicity statute utilizes a number of terms to express the conduct requirement of complicity: "*advising*, *inciting*, or *conniving* at the offense, or *aiding* or *abetting* the principal offender."[27] The first three terms in this formulation—"advising," "inciting," and "conniving" rarely show up in the case law.[28] Nevertheless, their meaning, when viewed in historical context, is clear enough: they indicate that one may become an accomplice without being "personally present at the commission" of a crime.[29] Instead, as many modern criminal codes phrase it, "solicitation of the crime is enough."[30]

More typical under District law is judicial reliance on the statute's "aiding" or "abetting" language.[31] The standard formulation for accomplice liability, endorsed by the DCCA's *en banc* opinion in *Wilson Bey* and captured in the Redbook jury instructions, requires proof that the defendant "knowingly associated [himself or herself] with the commission of the crime, that [he or she] participated in the crime as something [he or she] wished to bring about, and that [he or she] intended by [his or her] actions to make it succeed."[32] Textually speaking, this formulation intertwines the culpable mental state

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and also] that s/he aided and abetted the possession of a firearm. To aid and abet the possession of a firearm, [^] [name of defendant] must have engaged in some affirmative conduct to assist or facilitate the principal's possession of a firearm.]"); *see, e.g., Walker v. United States*, 167 A.3d 1191, 1202 (D.C. 2017) (analyzing whether defendant "encouraged or aided the commission of [the victim's] murder with malice aforethought").

[27] D.C. Code § 22-1805.

[28] *See generally* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85, 135 (2005).

[29] *Maxey v. United States*, 30 App. D.C. 63, 72 (D.C. Cir. 1907); *see, e.g., Thompson v. United States*, 30 App. D.C. 352, 364 (D.C. Cir. 1908) ("By the common law, all persons who command, advise, instigate, or incite the commission of an offense, though not personally present at its commission, are accessories before the fact, and the object of the aforesaid section was to make all such persons principal offenders. For reasons of public policy it obliterated the common-law distinction between accessories before the fact and principals."); *Tomlinson v. United States*, 93 F.2d 652, 655 (D.C. Cir. 1937) ("It was not the contention of the government in this case that Tomlinson was physically present at the time and place of the offense, but that he was guilty as a principal, nevertheless, under section 908 of the D.C. Code 1924 . . . The issue in dispute was whether, prior to the robbery, Tomlinson had advised, incited, connived at, aided, or abetted the commission of the offense."). Nor, pursuant to such language, is it "essential that there be any direct communication between the actual perpetrator and the person aiding and abetting." *Williams v. United States*, 190 A.2d 269, 270 (D.C. 1963) (citing *Maxey*, 30 App.D.C. at 72–73; *Ladrey v. United States*, 155 F.2d 417, 420 (D.C. Cir. 1946)).

[30] LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2 n.10 (collecting statutory authorities); *see also Tann*, 127 A.3d at 505 (defining "incitement" in the field of criminal law as "[t]he act of persuading another person to commit a crime") (quoting BLACK'S LAW DICTIONARY 880 (10th ed. 2014)); *cf. United States v. Simmons*, 431 F. Supp. 2d 38, 48 (D.D.C. 2006), *aff'd sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) ("Convictions for first degree murder while armed . . . may be based on evidence that he solicited and facilitated the murder.") (citing *Collazo v. United States*, 196 F.2d 573, 580 (D.C. Cir. 1952)). With respect to conspiracy, the DCCA has observed that: "Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy." *Tann*, 127 A.3d at 491 (quoting *Pereira v. United States*, 347 U.S. 1, 11, 74 S.Ct. 358, 98 L.Ed. 435 (1954)).

[31] *See also* David Luban, *Contrived Ignorance*, 87 GEO. L. REV. 957, 964 (1999) ("Supervisors implicitly or explicitly encourage their subordinates to meet their targets by any means necessary. That's abetting. Supervisors provide assistance and resources. That's aiding.").

[32] *Wilson-Bey*, 903 A.2d at 825; D.C. Crim. Jur. Instr. § 3.200.

requirement and conduct requirement of accomplice liability together; it is, therefore, not a model of clarity.

More helpful, then, is the DCCA's repeated observation that "one can be found guilty of aiding and abetting by merely encouraging or facilitating a crime."[33] This statement articulates the widely endorsed principle—reflected both inside and outside the District—that aider and abettor liability encapsulates two independently sufficient categories of conduct: *physical assistance* and *psychological encouragement*.[34]

The following cases are illustrative of the breadth of these alternative requirements under current District law.[35] In *Price v. United States*, the DCCA upheld a conviction for theft premised on a complicity theory where the defendant took an item off the shelf at a hardware store, and thereafter carted it over to the principal—located within the store—who then tried to make a fraudulent return.[36]

In *Wesley v. United States*, the DCCA upheld a conviction for armed robbery premised on a complicity theory where the defendant merely engaged in a conversation with a bystander that enabled the principal to "slip into the barbershop" that was ultimately robbed, and perhaps also "serv[ed] as a lookout" for the principal.[37]

And in *Creek v. United States*, the DCCA upheld a conviction for armed robbery premised on a complicity theory based on the mere fact that the defendant was with the robber immediately before the robbery, retraced his steps back to the victim's home, stationed himself by her front gate while his companion seized her purse, and fled with the thief with whom he remained until caught by the police.[38]

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[33] *Evans v. United States*, 160 A.3d 1155, 1161 (D.C. 2017); *Settles v. United States*, 522 A.2d 348, 356 (D.C. 1987).

[34] *See Walker v. United States*, 167 A.3d 1191, 1201–02 (D.C. 2017) (noting the alternative requirements of "encouragement or aid"); *Tann*, 127 A.3d at 499 n.11 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.") (quoting LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2); *see also Tann*, 127 A.3d at 499 n.8 ("Nor has the government been able to find any case, from any jurisdiction, holding a defendant liable as an aider and abettor for the independent criminal act of another that the defendant did not intentionally encourage or assist in some way."); *cf. English v. United States*, 25 A.3d 46, 53–54 (D.C. 2011) ("This is not a case, for example, in which 'there appears to be some indication in the record before us that [Anderson] may have *urged or directed* the driver to take evasive action.'") (quoting *United States v. Cook*, 181 F.3d 1232, 1235 (11th Cir. 1999)).

[35] It is well established under DCCA case law that "[a]lthough mere presence at the scene is not enough to establish guilt under an aiding and abetting theory," little more than such presence is necessary. *Porter v. U.S.*, 826 A.2d 398, 405 (D.C. 2003); *see Settles*, 522 A.2d at 357 ("[M]ere presence at the scene of the crime, without more, is generally insufficient to prove involvement in the crime, but it will be deemed enough if it is intended to [aid] and does aid the primary actors."); *Bolden v. United States*, 835 A.2d 532, 538–39 (D.C. 2003); *compare Perry v. United States*, 276 A.2d 719 (D.C. 1971) (mere presence), *with Forsyth v. United States*, 318 A.2d 292 (D.C. 1974) (presence coupled with flight and other circumstances).

[36] *Price v. United States*, 985 A.2d 434, 438 (D.C. 2009).

[37] *Wesley v. United States*, 547 A.2d 1022, 1026–27 (D.C. 1988).

[38] *Creek v. United States*, 324 A.2d 688, 689 (D.C. 1974); *see In re A.B.H.*, 343 A.2d 573, 575 (D.C. 1975) (sufficient evidence of aiding and abetting where defendant had a close association with co-respondent prior to and after the purse snatching, defendant was present very near the scene of the crime, and fled from the scene with the co-respondent); *Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994) ("[T]he jury could reasonably have found that appellant had participated in planning the robbery, driven his friends across town to the robbery site, waited for them while they robbed the decedent, and then picked them up after the

One issue relevant to the conduct requirement of accomplice liability upon which District law appears to be silent is whether assistance by omission can, under appropriate circumstances, suffice for liability. For example, may a corrupt police officer who fails to stop a crime with the intent to aid the perpetrators be deemed an accomplice to that crime? There does not appear to be any DCCA case law directly on point.[39] Nevertheless, general District authority on omission liability would seem to support imposing liability under these circumstances.[40] So too does the fact that the DCCA has held on multiple occasions that "failure to disassociate" oneself from a criminal scheme alongside "tacit approval" to the offenses perpetrated by the principal will suffice to satisfy the conduct requirement of accomplice liability.[41]

RCC § 210(a) codifies the above District authorities applicable to the conduct requirement of accomplice liability. More specifically, subsections (a)(1) and (a)(2) establish two alternative means of being an accomplice: by rendering assistance and by offering encouragement.[42] The first prong will most frequently be established by proof of

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crime. This evidence was sufficient to support the conviction of appellant as an aider and abettor of the robbery.").

[39] Note, however, that the commentary to the D.C. Criminal Jury Instruction on attempt liability, § 7.101, states that:

> The court may wish to modify the instruction where an omission might constitute an attempt to commit a crime. For example, if the government alleges that the defendant did not activate the store's alarm system as part of a robbery attempt, the court might wish to modify the instruction that the "defendant omitted to do an act . . . ."

See also English v. United States, 25 A.3d 46, 54 (D.C. 2011) ("Although not directly on point, we note that there is authority for the proposition that, depending on the evidence in a particular case, if the vehicle in which a passenger is riding is involved in an accident causing death or injury, and if he or she fails to stop or to render assistance to the injured person, the passenger may be liable as an aider and abettor.") (collecting cases).

[40] *See* Commentary to RCC § 202(c): Relation to Current District Law.

[41] *Johnson v. United States*, 883 A.2d 135, 143 (D.C. 2005) ("[H]aving knowledge of the offenses and failing to withdraw can be sufficient to establish implied approval, and hence aiding and abetting."); *Prophet v. United States*, 602 A.2d 1087, 1093 (D.C. 1992)("[T]he jury could reasonably conclude that [the defendant] failed to disassociate himself from [his co-defendant] and tacitly approved [his] actions" when he fled with the co-defendant even after "watch[ing] the robbery and murder"); *Clark v. United States*, 418 A.2d 1059 (D.C. 1980) (sidewalk robbery by co-defendant, who ran through alley into defendant's car; defendant drove at normal speed for one block and stopped car once police emergency lights activated); *Gayden v. United States*, 584 A.2d 578, 582–83 (D.C. 1990) (there was sufficient evidence to support instruction on aiding and abetting where the defendant "traveled to the scene of the crime [,] . . . was present at the killing[,] and . . . fled the scene with [two possible killers]"); *Settles v. United States*, 522 A.2d 348, 358 (D.C. 1987) (there was sufficient evidence of aiding and abetting where the defendant was potentially a lookout and "was with Settles before the crime, was present during the crime, and fled with Settles after the crime" because the defendant "must have had actual knowledge that a crime was being committed, but . . . he did nothing to disassociate himself from the criminal activity"). *Compare Jones v. United States*, 625 A.2d 281 (D.C. 1993) (fact that defendant brushed by the complainant shortly before co-defendant stabbed complainant, then walked away with co-defendant "laughing and talking" insufficient to prove aiding and abetting) *with Acker v. United States*, 618 A.2d 688 (D.C. 1992) ("jovial quip" to school friend before robbery and failure to prevent robbery of friend insufficient to prove aiding where defendant also failed to facilitate getaway of those actively engaged in the robbery).

[42] Whether assistance or encouragement is at issue, there is no requirement that the principal actor have *actually* been aware of the effect of the defendant's conduct. However, the defendant's conduct *must have*,

physical assistance rendered by affirmative conduct; however, an omission to act may also provide a viable basis for establishing the assistance prong, provided that the defendant is under a legal duty to act (and the other requirements of liability are met).[43] The encouragement prong, in contrast, encompasses promotion of an offense by psychological influence. It includes various forms of influence, including (but not limited to) the encouragement afforded by a command, request, or agreement, as well as advice, counsel, instigation, incitement, and provocation.

RCC §§ 210 (a), (b), & (c): Relation to Current District Law on Culpable Mental State Requirement. RCC §§ 210 (a), (b), and (c) both codify and clarify District law concerning the culpable mental state requirement governing accomplice liability.

The DCCA has addressed the culpable mental state requirement of accomplice liability on numerous occasions. Generally speaking, it is well established by such case law that "[t]here is a dual mental state requirement for accomplice liability."[44] The first requirement speaks to the relationship between the accomplice's state of mind and the promotion or facilitation of the requisite criminal conduct committed by the principal. The second requirement, in contrast, speaks to the relationship between the accomplice's state of mind and the results and/or circumstances brought about by the principal (and which are prohibited by the target offense).

As it relates to the first of these two culpable mental state requirements, DCCA case law establishes that the defendant must have acted with the *purpose* of promoting or facilitating criminal conduct. The basis for this requirement is the DCCA's *en banc* decision in *United States v. Wilson-Bey*, which holds that, "[t]o establish a defendant's criminal liability as an aider and abettor, [] the government must prove . . . that the accomplice . . . *wished to bring about* [the criminal venture], and [] *sought by his action to make it succeed*."[45]

This requirement of a "purposive attitude" is, as the *Wilson-Bey* court explained, drawn from Judge Hand's well-known decision in *United States v. Peoni*.[46] As the DCCA observed:

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in fact, assisted or encouraged the principle actor in some way (i.e., an unsuccessful accomplice is not subject to criminal liability under RCC § 210).

[43] *See generally* RCC § 202(c) (setting forth the requirements of omission liability under the RCC).

[44] *Tann*, 127 A.3d at 491 ("There is a dual mental state requirement for accomplice liability: the accomplice not only must have the culpable mental state required for the underlying crime committed by the principal; he also must assist[ ] or encourage[ ] the commission of the crime committed by the principal with the intent to promote or facilitate such commission.").

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

[46] 100 F.2d 401 (2d Cir. 1938). After considering an array of common law authorities, Judge Hand concluded that:

> [A]ll these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; . . . . [T]hey all demand *that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.* All the words used-even the most colorless, "abet"-carry an implication of purposive attitude towards it.

Id.

> Although *Peoni* was decided sixty-eight years ago, it remains the prevailing authority defining accomplice liability. In 1949 the Supreme Court explicitly adopted *Peoni's* purpose-based formulation. *Nye & Nissen v. United States*, 336 U.S. 613, 618, 69 S.Ct. 766, 93 L.Ed. 919 (1949). This court has likewise followed *Peoni*, *see, e.g.*, [*Reginald B.*] *Brooks v. United States*, 599 A.2d 1094, 1099 (D.C.1991); *Hackney*, 389 A.2d at 1342, and we have held that an accomplice "must be concerned in the commission of *the specific crime with which the principal defendant is charged* [;] he must be an associate in guilt of *that crime.*" *Roy v. United States*, 652 A.2d 1098, 1104 (D.C. 1995) (emphasis in original).
>
> Every United States Circuit Court of Appeals has adopted *Peoni's* requirement that the accomplice be shown to have intended that the principal succeed in committing the charged offense, and the federal appellate courts have thus rejected, explicitly or implicitly, a standard that would permit the conviction of an accomplice without the requisite showing of intent. The majority of state courts have also adopted a purpose-based standard. *See also* LaFave § 13.2(d), at 349 & n. 97. Federal and state model jury instructions are also generally consistent with *Peoni*, and require proof that the accomplice intended to help the principal to commit the charged offense.[47]

Since *Wilson-Bey*, *Peoni's* purpose-based standard has been incorporated into the District's jury instructions,[48] and reaffirmed in numerous DCCA cases.[49] At the same time, this standard is not a model of clarity, and has led to subsequent litigation.[50]

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

[48] D.C. Crim. Jur. Instr. § 3.200.

[49] *See, e.g.*, *Robinson v. United States*, 100 A.3d 95, 106 (D.C. 2014); *Gray v. United States*, 79 A.3d 326, 338 (D.C. 2013); *Joya v. United States*, 53 A.3d 309, 314 (D.C. 2012); *Ewing v. United States*, 36 A.3d 839, 846 (D.C. 2012).

[50] For example, in *Tann v. United States*, a split panel of the DCCA disagreed over the specificity of the purpose requirement, questioning whether an "aider and abettor who acts, as *Wilson–Bey* requires, with the same purpose and intent as the principal must also 'intentionally associate' with that specific principal." 127 A.3d at 440. Which is to say, "[m]ore pointedly, the question [raised in *Tann* was] whether the aider and abettor must know of the presence and conduct of the specific principal and form the intent to help *him or her* with the commission of his or her crime, as opposed to share simply (with whoever shared the aider and abettor's purpose) in the *mens rea* required to commit the crime itself." *Id.* The majority opinion answered this question in the negative, determining that:

> [T]he case law supports the following propositions rooted in the common law and incorporated in our aiding-and-abetting statute: (1) the aider and abettor must have the *mens rea* of the principal actor, see *Wilson–Bey*, 903 A.2d at 822, and must have the "purposive attitude towards" the criminal venture described in *Peoni*, 100 F.2d at 402; (2) a defendant is not responsible for the actions of a third-party who, wholly unassociated with and independent of the defendant, enters into a crime when there is no community of purpose between the defendant and the third-party . . . however, (3) the defendant need not know of the presence of every participant in a group crime (including the principal) in order to be found guilty under an aiding-and-abetting theory of liability . . . and (4) where the criteria in (1) above are met and the evidence at trial proves that the defendants by their action, foreseeably (and thus, the factfinder may conclude, intentionally) incited

Nevertheless, this much appears to be clear from the relevant District authorities: in order to be held liable as an accomplice, the defendant must, at minimum, have "designedly encouraged or facilitated" the commission of criminal conduct by another.[51]

As DCCA case law relates to the second culpable mental state requirement applicable to accomplice liability, the relationship between the accomplice's state of mind and the results and/or circumstances brought about by the principal (and which are prohibited by the target offense), there are a few well established principles.

Most fundamentally, the government must prove that the defendant acted with, at minimum, "the culpable mental state required for the underlying crime committed by the principal."[52] Practically speaking, this means that a defendant may never be held criminally responsible for the conduct of another as an accomplice absent proof that the defendant acted with the culpable mental states governing the results and circumstances that comprise the offense committed by the principal.[53]

> action by a third party who shared in their community of purpose, aiding-and-abetting liability may be found . . . .

127 A.3d at 444-45. Note that the majority opinion still holds that the government had to prove, *inter alia*, that "Harris and Tann intended to aid any of their fellow crew members who were present and participating in doing so." *Id.* at 450.

A partial dissenting opinion written by Judge Glickman reached an opposite conclusion, determining that a person "can[not] be found guilty as an aider and abettor under the law of the District of Columbia without proof that he intended to assist or encourage the principal offender." *Id.* at 499. This is not to say that "the accomplice always must know the identity of the principal offender." *Id.* Indeed, "it is possible in some circumstances to be an aider and abettor—to help or induce another person to commit a crime, and to do so knowingly and intentionally—without knowing who that other person is." *Id.* ("A typical example is the person who knowingly attaches himself to a large group, such as a lynch mob, a criminal gang, or a vigilante body, that is engaged in or bent on breaking the law.") *Id.* Even still, "one cannot be liable as an aider and abettor without having the intent to assist or encourage a principal actor at all." *Id.* That is, "[o]ne cannot be an inadvertent accomplice." *Id.*

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

[52] *Tann*, 127 A.3d at 444-45; *see, e.g., Collins v. United States*, 73 A.3d 974, 981 n.3 (D.C. 2013) (in order to convict a defendant as an aider and abettor "the government was required to show that the accomplice had the same intent necessary to prove commission of the underlying substantive offense by the principal"); *Lancaster v. United States*, 975 A.2d 168, 174 (D.C. 2009) ("Because armed robbery is a specific-intent crime, the government must prove that the aider and abettor shared the same *mens rea* required of the principals."); *Kitt v. United States*, 904 A.2d 348, 356 (D.C. 2006) ("[W]here a specific mens rea is an element of a criminal offense, a defendant must have had that mens rea himself to be guilty of that offense, whether he is charged as the principal actor or as an aider and abettor."); *Carter v. United States*, 957 A.2d 9, 19 (D.C. 2008).

[53] *See, e.g, Appleton v. United States*, 983 A.2d 970, 977 (D.C. 2009) ("Any instruction on aiding and abetting must make clear that a defendant needs to have the *mens rea* required of the underlying crime in order to be convicted of the crime as an aider and abettor."); *Wheeler v. United States*, 977 A.2d 973 (D.C. 2009), *reh'g granted, opinion modified*, 987 A.2d 431, 431 (D.C. 2010) (*per curiam*) (The "charged aider and abettor will have to know and intend the steps taken, amounting to the same mental state required of the principal.").

So, for example, the DCCA in *Wilson Bey* held that, with respect to results, an accomplice to first-degree murder must, like the principal, "be shown to have specifically intended the decedent's death and to have acted with premeditation and deliberation."[54] And, as for circumstances, the DCCA held in *Robinson v. United States* that, "[i]f the principal offender must know he is armed when he is committing a violent or dangerous crime in order to be subject to the 'while armed' enhancement of § 22–4502, then the aider and abettor . . . also must know the principal is armed for the enhancement to be applicable to her as well."[55]

That proof of the culpable mental states governing the results and circumstances that comprise the target offense is *necessary* to support accomplice liability, however, raises the question of whether it is also *sufficient*? With respect to results, it would appear that it is; DCCA case law seems to endorse a principle of culpable mental state equivalency under which proof of the minimum culpable mental state requirement applicable to the results of the target offense will suffice for accomplice liability.

For example, in *Coleman v. United States*, the DCCA held that an accomplice to depraved heart murder must (but need only) possess the extreme recklessness as to death required of the principal of a depraved heart murder.[56] And in *Perry v. United States*, the DCCA held that an accomplice to aggravated assault must (but need only) possess the extreme recklessness as to serious bodily required of the principal of an aggravated assault.[57]

As for circumstances, DCCA case law is more ambiguous. Generally speaking, the government is required to show in all cases in which accomplice liability is charged that the defendant's "participation was with guilty knowledge."[58] In practice, this appears to amount to a principle of culpable mental state elevation, under which proof of awareness or belief as to the target offense's circumstance elements is necessary to secure a conviction based on accomplice liability.

The clearest statement of this approach is reflected in the DCCA's decision in *Robinson v. United States*, which specifically held that "[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved."[59] The basis for such a determination is, as the *Robinson* court explains, the more general idea that, in order for

[54] *Wilson Bey*, 903 A.2d at 840 ("Because the District's aiding and abetting statute requires proof that an accomplice acted with the mental state necessary to convict her as a principal, the government here was required to prove, in order for the jury to find [the defendant] guilty of first-degree murder, that she acted with a specific intent to kill after premeditation and deliberation.").

[55] *Robinson v. United States*, 100 A.3d 95, 105 (D.C. 2014).

[56] *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008); *see Tann*, 127 A.3d at 430-31 ("Because he was convicted of second-degree murder for aiding and abetting Cooper's shooting of Terrence Jones, the government was required to prove that Tann had, at a minimum, a "depraved heart" with regard to Terrence Jones's death.").

[57] *Perry v. United States*, 36 A.3d 799, 817–18 (D.C. 2011); *see also Story v. United States*, 16 F.2d 342, 344 (D.C. Cir. 1926) (upholding accomplice liability based on "criminal negligence" as to causing death).

[58] *Tyree v. United States*, 942 A.2d 629, 636 (D.C. 2008); *see, e.g., Evans v. United States*, 160 A.3d 1155, 1162 (D.C. 2017); *Tann*, 127 A.3d at 434; *Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016); *Wheeler v. United States*, 977 A.2d 973, 986 (D.C. 2009), *reh'g granted, opinion modified*, 987 A.2d 431 (D.C. 2010).

[59] *Robinson*, 100 A.3d at 105–06.

an accomplice to be deemed "guilty of a crime"—for example, "an offense committed while armed"—the defendant "must, *inter alia*, intend to facilitate the *entire offense*."[60]

This effective principle of culpable mental state elevation is, as the *Robinson* court proceeds to explain, both rooted in the DCCA's *en banc* opinion in *Wilson-Bey*, as well as the U.S. Supreme Court's recent decision in *Rosemond v. United States*, which held that "an 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."[61] (Which is to say, as the *Rosemond* Court explained, "[t]he intent must go to the specific and entire crime charged," such as "predicate crime plus gun use."[62]) Since *Robinson* was handed down, this rationale has been reaffirmed by the DCCA on multiple occasions.[63]

There exists one additional principle governing the culpable mental state of accomplice liability under District law that bears notice. While an accomplice may never be convicted of an offense absent proof of a culpable mental state that satisfies the requirements of the offense charged,[64] "the principal and the aider and abettor(s) need not have the same *mens rea* as each other if an offense can be committed with an alternate *mens rea*."[65] Rather, where an offense is divided into degrees based upon distinctions in culpability (e.g., homicide), "each participant's responsibility [turns] on his or her individual intent or *mens rea*."[66]

Consistent with this principle, the DCCA in *Mayfield v. United States* deemed the defendant's conviction for premeditated first-degree murder while armed to be appropriate under an aiding and abetting theory, although the principal who had fired fatal shot was convicted of second-degree murder.[67] Likewise, in at least two other decisions, the DCCA has—again, in accordance with this principle—deemed it

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[60] *Robinson*, 100 A.3d at 106 and n.17 (citing *Wilson–Bey*, 903 A.2d at 831).
[61] *Robinson*, 100 A.3d at 105–06 (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)).
[62] *See Rosemond*, 134 S. Ct. at 1249.
[63] *See, e.g., Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016); *Tann*, 127 A.3d at 434; *see also Evans v. United States*, 160 A.3d 1155, 1162 (D.C. 2017) ("Evans was found guilty of the charges relating to weapons via the aiding and abetting theory and accordingly, the government was required to prove Evans's guilty knowledge.").
[64] *Kitt v. United States*, 904 A.2d 348, 356 (D.C. 2006).
[65] Commentary on D.C. Crim. Jur. Instr. § 3.200.
[66] *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008) (quoting *Wilson–Bey v. United States*, 903 A.2d 818 (D.C. 2006) (*en banc*)).
[67] 659 A.2d 1249, 1254 (D.C. 1995). The U.S. Court of Appeals for the D.C. Circuit, discussing District case law on this point, observes that "[t]here is nothing unfair about [such an outcome]." *United States v. Edmond*, 924 F.2d 261, 267 (D.C. Cir. 1991).

> First-degree murder requires premeditation, as when a killing is planned and calculated; second-degree murder does not involve planning, although the homicide is committed intentionally and with malice aforethought. *Harris v. United States*, 375 A.2d 505, 507–08 (D.C.1977); *Austin v. United States*, 382 F.2d 129, 137 (D.C.Cir.1967). In a joint trial, if a jury thought an aider and abettor carefully conceived a murder but enlisted an executioner only at the last possible moment, it could consistently convict the abettor of first-degree murder while finding the actual perpetrator guilty only of the lesser offense. There is no reason why separate juries in separate trials of the principal and the aider and abettor would be acting inconsistently or unfairly if they did the same. The degree of murder in each case depends on the *mens rea* of the defendant who is on trial.

Id.

appropriate to hold a secondary party liable for second-degree murder, although the principal party committed a premeditated first-degree murder.[68]

Viewed collectively, the above analysis of District law supports four propositions. First, an accomplice must act with the purpose of assisting or encouraging the criminal conduct of another. Second, an accomplice need only act with the culpable mental state applicable to the result element of the offense perpetrated by another. Third, an accomplice must act with at least knowledge of—or intent as to—the circumstances of the offense perpetrated by another, regardless of whether the principal may be convicted based upon some lesser culpable mental state. Fourth, and finally, where an offense is graded based upon distinctions in culpability, an accomplice may be held liable for any grade for which he or she possesses the required culpability.

RCC §§ 210(a), (b), and (c) codify these propositions as follows. The prefatory clause of § 210(a) establishes that the culpability requirement applicable to accomplice liability necessarily incorporates "the culpability required by [the target] offense." Subsections (a)(1) and (2) thereafter establish that a requirement of purpose is applicable to both the assistance/encouragement as well as to the conduct sought to be brought about by that assistance/encouragement. Next, RCC § 210(b) incorporates a principle of culpable mental state elevation under which proof of intent on behalf of the accomplice is required—regardless of whether the target offense is comprised of a circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). Finally, RCC § 210(c) clarifies where an offense "is divided into degrees based upon distinctions in culpability as to results," an accomplice may be held "liable for any grade for which he or she possesses the required culpability."

RCC § 210(d): Relation to Current District Law on Relationship Between Accomplice and Principal. RCC § 210(d) both codifies and clarifies current District law concerning the nature of the relationship between an accomplice and the principal.

It is well established, both inside and outside of the District, that complicity is not a separate crime; rather, it delineates a theory of liability through which one person can be held legally responsible for one or more crimes committed by another person.[69] This is clearly reflected in the District's complicity statute, which establishes that "all persons advising, inciting, or conniving at the offense, or aiding and abetting the principal offender, shall be charged as principals and not as accessories."[70]

One important implication of this aspect of complicity is that liability for "aiding and abetting is predicated upon a proper demonstration of all of the necessary elements of the underlying criminal act."[71] Which is to say, as the District's criminal jury instructions

[68] *McKnight v. United States, 102* A.3d 284, 285 (D.C. 2014); *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008); *see Branch v. United States*, 382 A.2d 1033, 1035 (D.C. 1978) ("As voluntary manslaughter while armed is a lesser included offense within second-degree murder while armed, the jury necessarily found that codefendant Simpson's conduct included voluntary manslaughter while armed. Having so found, the jury's conviction of appellant for aiding and abetting that offense is proper.").

[69] *See, e.g., Hawthorne v. United States*, 829 A.2d 948, 952–53 (D.C. 2003); *Payton v. United States*, 305 A.2d 512, 513 (D.C. 1973).

[70] D.C. Code § 22-1805.

[71] *Matter of J. W. Y.*, 363 A.2d 674, 677 (D.C. 1976); *see, e.g., United States v. Wiley*, 492 F.2d 547, 551 (D.C. Cir. 1973); *Hawthorne*, 829 A.2d at 952; *Gray v. United States*, 260 F.2d 483, 484 (D.C. Cir. 1958); *see also* D.C. Crim. Jur. Instr. § 3.200 ("[It is not necessary that all the people who committed the crime be

phrase the point: "[f]or a defendant to be convicted as an aider and abettor, the government must prove beyond a reasonable doubt all of the elements of the underlying crime, including commission of the crime by someone other than the accused."[72]

A good illustration of this basic requirement is the DCCA case law on the intersection of complicity and the District offense of carrying a pistol without a license (CPWL). Where a CPWL charge is in play, it is well-established that a "defendant cannot be convicted . . . on an aiding and abetting theory where there is no proof that the person in actual possession of the pistol did not have a license to carry it."[73] Relying on this legal proposition, the DCCA has, in turn, overturned complicity-based convictions for CPWL premised upon proof that the defendant him or herself, rather than the principal, lacked the requisite license.[74]

District case law also provides additional clarity on four important aspects of this basic requirement. First, while proof that a criminal offense was committed is a necessary component of accomplice liability, that offense need not be a *completed* offense. Rather, a person may be held liable for aiding and abetting an *attempt* to commit an offense, so long as it is shown that the principal him or herself committed that attempt.[75] Second, "[a]n aider and abettor may be convicted of an offense even though the principal has not been convicted."[76] Third, an aider and abettor may be convicted of an offense even though the principal has been acquitted.[77] And fourth, an "aider and abettor may be convicted of a lesser or greater offense than the principal."[78]

Consistent with the above analysis of District law, RCC § 210(d) addresses the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense as follows. Subsection (d) first establishes that

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caught or identified. It is sufficient if you find beyond a reasonable doubt that the crime was committed by someone and that the defendant knowingly and intentionally aided and abetted in committing the crime.]").

[72] D.C. Crim. Jur. Instr. § 3.200.

[73] *Jefferson v. U.S.*, 558 A.2d 298, 303-04 (D.C. 1989); *see Halicki v. United States*, 614 A.2d 499, 503–04 (D.C. 1992) ("[W]e have repeatedly held that, in order to convict of CPWL on an aiding and abetting theory, the government must show that the principal (not the aider and abettor) was not licensed to carry the pistol."); *Jackson v. U.S.*, 395 A.2d 99, 103 n.6 (D.C. 1978).

[74] *Jefferson*, 558 A.2d at 303-04; *Jackson*, 395 A.2d at 103 n.6.

[75] *See, e.g., Ladrey v. United States*, 155 F.2d 417 (D.C. Cir. 1946) (attempted bribery of witness premised on complicity theory); *Williams v. United States*, 190 A.2d 269 (D.C. 1963) (attempted petit larceny premised on complicity theory); *Montgomery v. United States*, 384 A.2d 655 (D.C.1978) (same); *Carter v. United States*, 957 A.2d 9, 17 (D.C. 2008) (attempted armed robbery premised on complicity theory); *Felder v. United States*, 595 A.2d 974, 975 (D.C. 1991) (same).

[76] *Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 (D.C. 1995); *Murchison v. United States*, 486 A.2d 77, 81 (D.C. 1984).

[77] *Morriss v. United States*, 554 A.2d 784, 790 (D.C. 1989) ("[T]he acquittal of a principal does not preclude conviction of an aider and abettor"); *Gray v. U.S.*, 260 F.2d 483 (D.C. Cir. 1958) (conviction of aider and abettor sustained despite acquittal of the principal); *United States v. McCall*, 460 F.2d 952, 958 (D.C. Cir. 1972) (acquittal of principal in separate trial does not preclude conviction of aider and abettor); *see Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 (D.C. 1995) (citing *Standefer v. United States*, 447 U.S. 10, 14–20 (1980) (conviction of principal is not a prerequisite to an aiding and abetting conviction, even where principal is acquitted in a separate trial)); *United States v. McCall*, 460 F.2d 952, 958 (D.C. Cir. 1972) (acquittal of principal in separate trial does not preclude conviction of aider and abettor); *U.S. v. Edmond*, 924 F.2d 261 (D.C. Cir. 1991) (defendant could be convicted as aider and abettor to first degree murder after gunman had been acquitted of offense).

[78] *Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 (D.C. 1995) (citing *Branch v. United States*, 382 A.2d 1033, 1035 (D.C. 1978) (aider and abettor convicted of lesser offense).

"[a]n accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein." This clarifies that accomplice liability entails proof of the defendant's complicity in the commission of an offense that was in fact, committed by another person. Thereafter, subsection (d) identifies various ways in which the legal disposition of the principal's situation is immaterial to that of the accomplice, namely, it is not a defense to a prosecution premised on a theory of aiding and abetting that "the other person claimed to have committed the offense: (1) has not been prosecuted or convicted; (2) has been convicted of a different offense or degree of an offense; or (3) has been acquitted."

Relation to National Legal Trends. Relation to National Legal Trends. RCC §§ 210(a), (b), (c), and (d) are in part consistent with, and in part inconsistent with, national legal trends.

Comprehensively codifying the culpable mental state requirement and conduct requirement applicable to accomplice liability is in accordance with widespread, modern legislative practice. However, the manner in which RCC § 210 codifies these requirements departs from modern legislative practice in some notable ways.

Most of the substantive policies incorporated into RCC §§ 210(a), (b), (c), and (d)—for example, the conduct requirement, the requirement of purpose as to conduct, and the principle of culpable mental state equivalency applicable to results—reflect majority or prevailing national trends governing the law of complicity. Other policy recommendations—for example, precluding derivative liability for failed accomplices and the principle of intent elevation applicable to circumstances—address issues upon which American criminal law is either divided or unclear.

A more detailed analysis of national legal trends and their relationship to RCC §§ 210(a), (b), (c), and (d) is provided below. The analysis is organized according to four main topics: (1) the conduct requirement; (2) the culpable mental state requirement; (3) the relationship between the accomplice and the principal; and (4) codification practices

RCC § 210(a): Relation to National Legal Trends on Conduct Requirement. The conduct requirement of accomplice liability is comprised of two main kinds of actions: (1) assisting a party with commission of a crime; and (2) encouraging a party to commit a crime.[79] In practice, the categories of assistance and encouragement frequently overlap since knowledge that aid will be given can influence the principal's decision to go forward.[80] Nevertheless, there remains an important analytic difference between the two: whereas assistance is subject to criminal liability because of the accomplice's *material contribution* to the principal's *execution* of a crime, encouragement is subject to criminal liability because of the accomplice's *psychological contribution* to the principal's *decision* to commit a crime.[81]

[79] Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 342 (1985); *see, e.g.*, LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.04 (6th ed. 2012); Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 135–36 (2015); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 226 (2000).
[80] Kadish, *supra* note 79, at 342.
[81] *Id.* at 342-43.

Contemporary American legal authorities—as reflected in case law, legislation, and commentary—express these two alternative means of satisfying the conduct requirement of accomplice liability in a variety of different ways.[82] Phrasing aside, though, modern common law trends, as summarized below, converge on most (though not all) aspects of their meaning and practical import.

The most common and well-established basis for satisfying the conduct requirement of accomplice liability is *assistance by affirmative conduct*.[83] Often, an accomplice will assist the principal actor by furnishing the means of committing a crime—for example, by providing guns,[84] money,[85] supplies[86] or other instrumentalities.[87] Also typical is the situation of an accomplice who assists the principal actor by providing opportunities or lending a hand in preparation or execution of the offense—for example, by serving as a lookout,[88] driving the getaway car,[89] signaling the approach of the victim,[90] sending the victim to the actor,[91] preventing a warning from reaching the victim,[92] or preventing escape by the victim.[93] Importantly, in any of these situations, it need not be proven that the accomplice directly assisted the principal's conduct; rather, working through an intermediary will suffice.[94]

Although less common, *assistance by omission* may also, under appropriate circumstances, provide the basis for satisfying the conduct requirement of accomplice

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[82] *See infra* notes 83-137 and accompanying text.

[83] This is universally reflected in complicity legislation through the use of statutory terms such as "aid," "assist," and "cause." *See, e.g.*, Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Colo. Rev. Stat. Ann. § 18-1-603; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; S.D. Cod. Laws § 22-33-3; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Ga. Code Ann. § 16-2-20; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Cal. Penal Code § 31; Nev. Rev. Stat. Ann. § 195.020; R.I. Gen. Laws Ann. § 11-1-3; S.C. Code Ann. § 16-1-40.

[84] *Commonwealth v. Richards*, 293 N.E.2d 854 (Mass. 1973); *State v. Williams*, 199 S.E. 906 (S.C. 1938).

[85] *Malatkofski v. United States*, 179 F.2d 905 (1st Cir. 1950) (supplying money for bribe).

[86] *Bacon v. United States*, 127 F.2d 985 (10th Cir. 1942) (sale of liquor to illegal importer).

[87] *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969).

[88] *State v. Berger*, 121 Iowa 581 (1903); *Clark v. Commonwealth*, 269 Ky. 833, 108 S.W.2d 1036 (1937).

[89] *People v. Silva*, 143 Cal.App.2d 162 (1956); *Staten v. State*, 519 So.2d 622 (Fla. 1988); *People v. Hartford*, 159 Mich.App. 295 (1987).

[90] *State v. Hamilton*, 13 Nev. 386 (1878).

[91] *United States v. Winston*, 687 F.2d 832 (6th Cir. 1982); *State v. Gladstone*, 78 Wash.2d 306 (1970); *State v. Ryder*, 267 Or.App. 150 (2014).

[92] *State ex rel. Martin v. Tally*, 102 Ala. 25 (1894).

[93] *State v. Davis*, 182 W.Va. 482 (1989); *see also United States v. Ortega*, 44 F.3d 505 (7th Cir. 1995) (defendant, sitting in the backseat of an automobile in which a drug transaction was occurring, pointed to the bag of heroin; held: this act, done knowingly, was sufficient to constitute aiding).

[94] *State v. Ives*, 37 Conn.App. 40 (1995); *Commonwealth v. Stout*, 356 Mass. 237 (1969). And, where aiding an abetting a crime that, by definition, has multiple act-elements is at issue, it need not be proven that the accomplice's physical assistance encompassed each of those elements. LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. Instead, the conduct requirement of accomplice liability is satisfied where the secondary party "facilitate[s] any part—even though not every part—of a criminal venture." *Rosemond v. United States*, 134 S. Ct. 1240, 1246–47 (2014). So, for example, one is an accomplice to the crime of using or carrying a gun in connection with a drug trafficking crime if one's conduct facilitates or promotes either the drug transaction or the firearm use. *See id.*

liability.[95] Generally speaking, those circumstances are understood to exist when an accomplice, with the intent to aid the commission of an offense: (1) fails to fulfill a legal duty to act; and (2) the failure to do so assists the principal actor.[96] So, for example, a corrupt police officer who fails to stop a crime with the intent to aid the perpetrators may be deemed an accomplice to that crime.[97] Likewise, a conductor on a train may be held criminally liable for failing to take steps to prevent the transportation of illegal substances on his or her train.[98] And a parent may be convicted as an accomplice in the perpetration of an assault, battery, or criminal homicide upon his or her child by another person if the parent fails to make efforts to prevent commission of the offense.[99]

Encouragement provides an alternative and broad means of satisfying the conduct requirement of accomplice liability.[100] Generally speaking, encouragement entails

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[95] LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. This common law principle is "often not explicitly stated in accomplice liability statutes." *Id.* at n. 51. Those statutes that do so, however, are based upon Model Penal Code § 2.06(3), which establishes that one may be deemed an accomplice if, "having a legal duty to prevent the commission of the offense, [he or she] fails to make proper effort to do so." For reform codes that adopt a similar approach, see Ala. Code § 13A-2-23; Ark. Code Ann. § 5-2-403; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ky. Rev. Stat. Ann. § 502.020; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-13; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02. *Cf. State v. Jackson*, 137 Wash.2d 712 (1999) (where state's accomplice liability statute "was modeled, in part, on the accomplice liability provision in the Model Penal Code," but did not include the subsection specifically dealing with liability based on omission, this manifests legislative "intent to reject the concept of extending accessory liability for omissions to act").

[96] *See, e.g,* LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 79, at § 30.04; *Burkhardt v. United States*, 13 F.2d 841, 842 (6th Cir. 1926).

[97] *See, e.g.*, Model Penal Code § 2.06 cmt. at 320 ("The policeman or the watchman who closes his eyes to a robbery or burglary fails to present an obstacle to its commission that he is obliged to interpose. If his purpose is to promote or facilitate its perpetration, a fact that normally can be proved only by preconcert with the criminals, no reason can be offered for denying his complicity.").

[98] *Powell v. United States*, 2 F.2d 47 (4th Cir. 1924).

[99] *People v. Rolon*, 160 Cal. App. 4th 1206, 1209 (Ct. App. 2008); *see, e.g, State v. Oliver*, 85 N.C.App. 1 (1987) (mother an accomplice in sexual assault on her child where she was in bed with the child when the child was raped and she failed to take any steps to avert the assault); *State v. Walden*, 306 N.C. 466 (1982) (mother an accomplice to another's beating of her child where she present but did not intervene); *State v. Williquette*, 125 Wis.2d 86 (1985). *But see Commonwealth v. Raposo*, 413 Mass. 182 (1992) (mother not accomplice on theory that she failed to intervene to prevent rape by third party).

[100] This proposition is articulated by "accomplice liability statutes in the modern recodifications [in] various [ways]." LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2 n.10. The Model Penal Code approach is to state generally that solicitation of the crime is sufficient. *See* Model Penal Code § 2.06(3) ("A person is an accomplice of another person in the commission of an offense if . . . he . . . solicits such other person to commit it."). Many reform codes similarly use the term "solicits." *See* Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.Y. Penal Law § 20.00; Ohio Rev. Code Ann. § 2923.03; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020. And some of these statutes also employ the term "encourages." Ark. Code Ann. § 5-2-403; Ga .Code Ann. § 16-2-20; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201.

Others accomplice liability statutes specify certain kinds or degrees of encouragement. For example, some use "procures" or "hires." *See* Ala. Code § 13A-2-23; Fla. Stat. Ann. § 777.011; Ga. Code Ann. § 16-2-20; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; La. Rev. Stat. Ann. § 14:24; Minn. Stat. Ann. § 609.05; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Wis. Stat.

providing another person with either reasons or incentives to engage in a particular course of conduct.[101] In practice, there are a variety of ways in which this kind of psychological influence manifests itself.[102] For example, one may become an accomplice by advising or counseling[103] another to commit a crime; by commanding, directing, or requesting[104] another to commit a crime; or by procuring, inducing, or coercing[105] another person to commit a crime.[106] These pathways of influence may, in turn, be communicated directly or by an intermediary,[107] through words or gestures,[108] via threats

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Ann. § 939.05; Wyo. Stat. § 6-1-201. Some use "induces" or "coerces." *See* Ala. Code § 13A-2-23; Ark. Code Ann. § 5-2-403; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.D. Cent. Code § 12.1-03-01. Some use "commands" or "directs." *See* Ariz. Rev. Stat. Ann. § 13-301; Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; Ky. Rev. Stat. Ann. § 502.020; N.Y. Penal Law § 20.00; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201. And some use "requests" or "importunes." *See* Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; N.Y. Penal Law § 20.00; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020.

[101] Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 343 (1985); *see also* Model Penal Code § 5.02 cmt. at 372 (1985) ("[Encouragement] encompasses actors who bolster the fortitude of those who have already decided to commit crimes, so long as the encouragement is done with the requisite criminal purpose. It also covers forms of communication designed to lead the recipient to act criminally, even if the message is not as direct as a command or request.").

[102] LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2 n.10; *see also* Model Penal Code § 5.02 cmt. at 372 (1985) ("Encouragement also covers forms of communication designed to lead the recipient to act criminally, even if the message is not as direct as a command or request. Whether one can 'encourage' without communicating a desire that a crime be committed may be more arguable….").

[103] *See* Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Colo. Rev. Stat. Ann. § 18-1-603; Del. Code Ann. tit. 11, § 271; Fla. Stat. Ann. § 777.011; Ga. Code Ann. § 16-2-20; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.020; La. Rev. Stat. Ann. § 14:24; Minn. Stat. Ann. § 609.05; N.M. Stat. Ann. § 30-1-13; S.D. Cod. Laws. § 22-3-3; Wis. Stat. Ann. § 939.05; Wyo. Stat. § 6-1-201.

[104] *See* Ariz. Rev. Stat. Ann. § 13-301; Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; Ky. Rev. Stat. Ann. § 502.020; N.Y. Penal Law § 20.00; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201; Or. Rev. Stat. § 161.155; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201.

[105] *See* Ala. Code § 13A-2-23; Fla. Stat. Ann. § 777.011; Ga. Code Ann. § 16-2-20; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; La. Rev. Stat. Ann. § 14:24; Minn. Stat. Ann. § 609.05; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Wis. Stat. Ann. § 939.05; Wyo. Stat. § 6-1-201; Ark. Code Ann. § 5-2-403; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302.

[106] One commentator explains the nuances of these terms as follows:

> *Advise*, like counsel, imports offering one's opinion in favor of some action. *Persuade* is stronger, suggesting a greater effort to prevail on a person, or counseling strongly. *Command* is even stronger, implying an order or direction, commonly by one with some authority over the other. *Encourage* suggests giving support to a course of action to which another is already inclined. *Induce* means to persuade, but may suggest influence beyond persuasion. *Procure* seems to go further, suggesting bringing something about in the sense of producing a result.

Kadish, *supra* note 101, at 343.

[107] *See People v. Wright*, 26 Cal.App.2d 197 (1938).

or promises,[109] and occur either before or at the actual time the crime is being committed.[110]

The breadth of accomplice liability for encouragement is borne out in case law. It is well established, for example, that while mere presence at the scene of the crime cannot, by itself, provide a sufficient basis for satisfying the encouragement prong,[111] presence coupled with minimal other conduct can justify such a finding. This includes proof that the defendant was standing at the scene of the crime ready to give some aid, if needed, where the principal was aware of the defendant's intentions,[112] where a prior agreement to assist existed,[113] or where the defendant uttered the words "[l]et's get out of here."[114] It also includes proof of the defendant's presence during the planning stages of a burglary coupled with a general exhortation that the principal parties take some minor item from the site of the planned intrusion.[115]

One noteworthy point of disagreement among contemporary common law authorities relevant to the conduct requirement of accomplice liability is whether an accomplice's conduct must *actually* facilitate or promote the commission of the offense by the principal actor. At stake in the dispute is the treatment of an unsuccessful accomplice, who has attempted, but ultimately failed, to assist or encourage the principal's conduct. For example, where A attempts to assist P by opening a window to allow P to enter a dwelling unlawfully, but P (unaware of the open window) enters through a door, is A an accomplice to P's trespass?[116] Alternatively, if A utters words of

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[108] *See United States v. Whitney*, 229 F.3d 1296 (10th Cir. 2000); *Alonzi v. People*, 198 Colo. 160 (1979); *State v. Wilson*, 39 N.M. 284 (1935); *McGhee v. Commonwealth*, 221 Va. 422 (1980); *State v. Haddad*, 189 Conn. 383 (1983*); Commonwealth v. Richards*, 363 Mass. 299 (1973).

[109] *See State v. Scott*, 80 Conn. 317 (1907).

[110] *See Workman v. State*, 216 Ind. 68 (1939).

[111] For example, in *Pope v. State*, the Maryland Court of Appeals held that a defendant who "stood by while the mother killed the child," but "neither actually aided the mother in the acts of abuse nor did she counsel, command or encourage her," was not an accomplice. 284 Md. 309 (1979). *See, e.g. United States v. Andrews*, 75 F.3d 552 (9th Cir. 1996); *United States v. Minieri*, 303 F.2d 550 (2d Cir. 1962); *State v. Gomez*, 102 Ariz. 432, 432 P.2d 444 (1967); *McGill v. State*, 252 Ind. 293, 247 N.E.2d 514 (1969); *Rodriguez v. State*, 107 Nev. 432, 813 P.2d 992 (1991); *State v. Scott*, 289 N.C. 712, 224 S.E.2d 185 (1976); *Commonwealth v. Flowers*, 479 Pa. 153, 387 A.2d 1268 (1978); State v. Gazerro, 420 A.2d 816 (R.I. 1980*); State v. Hoselton*, 179 W.Va. 645, 371 S.E.2d 366 (1988). *See also* Ill. Comp. Stat. Ann. ch. 720, § 5/5-2 ("Mere presence at the scene of a crime does not render a person accountable for an offense; a person's presence at the scene of a crime, however, may be considered with other circumstances by the trier of fact when determining accountability").

[112] *Commonwealth v. Morrow*, 363 Mass. 601 (1973); *Skidmore v. State*, 80 Neb. 698 (1908); *State v. Chastain*, 104 N.C. 900 (1889); *Andrew v. State*, 237 P.3d 1027 (Alaska App. 2010); *State v. Arceneaux*, 983 So.2d 148 (La. App. 2008); *Jones v. State*, 173 Md.App. 430 (2007).

[113] *Hicks v. United States*, 150 U.S. 442 (1893).

[114] *Fuller v. State*, 198 So. 2d 625, 630 (Ala. Ct. App. 1966).

[115] *State v. Helmenstein*, 163 N.W.2d 85 (N.D. 1968). For case law from other common law countries, see, for example, *R v. Giannetto*, [1997] 1 Cr. App. R. 1 (trial judge instructed the jury, "[s]uppos[e] somebody came up to [him] and said, 'I am going to kill your wife,' if [the secondary party] played any part, . . . [like] patting him on the back, nodding, saying 'oh goody,' that would be sufficient . . . ."); *Wilcox v. Jeffery*, [1951] 1 All E.R. 464 (K.B.) (presence in the audience of an illegal concert in order to write a story about it for a periodical rendered D an accomplice as he was "present, taking part, concurring, or encouraging" the illegal events; "[i]f he had booed, it might have been some evidence that he was not aiding and abetting"); *R v. Coney*, [1882] 8 Q.B.D. 534 (D was a spectator at an illegal boxing match; the court did not disagree that, assuming the requisite *mens rea*, a spectator could be held as an accomplice).

[116] Kadish, *supra* note 101, at 358-59.

encouragement to P who fails to hear them, but nevertheless proceeds to enter the dwelling unlawfully anyways, is A an accomplice to P's trespass?[117]

There are two main approaches to dealing with these kinds of questions: that of the common law and that of the Model Penal Code. Under the common law approach, one cannot be an accomplice if he or she performs an act of assistance or encouragement, but that assistance or encouragement is wholly ineffectual.[118] On this accounting, the "words used to define the scope of accomplice liability"—namely, assistance and encouragement—are understood to "contain an implicit requirement that the defendant's words or actions contribute somehow to the criminal venture."[119] Importantly, this contribution need not, in the eyes of the common law, be substantial[120] or even causally necessary.[121] Nevertheless, absent proof that the defendant's conduct *in some way*

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[117] *Id.*

[118] *See, e.g.*, Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 (1983); ("At common law, an unsuccessful attempt to aid, one that was unknown to the perpetrator and that neither encouraged nor assisted him, would not support accomplice liability."); DRESSLER, *supra* note 79, at § 30.06.

[119] Eric A. Johnson, *Criminal Liability for Loss of A Chance*, 91 IOWA L. REV. 59, 110–11 (2005); *see State v. Hunter*, 227 S.E.2d 535, 548 (N.C. 1976) (finding that the causal connection is "inherent" in the words "counsel, procurement, command, or aid"); Robinson & Grall, *supra* note 118, at 758 ("Courts often employ language that appears to require actual assistance.")

[120] DRESSLER, *supra* note 79, at § 30.06; *State v. Noriega*, 928 P.2d 706, 709 n.2 (Ariz. Ct. App. 1996); *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. 2004) (amount of aid "need not be substantial"); *Fuson v. Commonwealth*, 251 S.W. 995, 997 (Ky. Ct. App. 1923); *see* Kinports, *supra* note 79, at 135-36 ("Any voluntary act of aid or encouragement, no matter how trivial, suffices.").

[121] "The prosecution is not required," as one commentator observes, "to establish that the crime would not have occurred but for the accessory or that the accomplice contributed a substantial amount of assistance." DRESSLER, *supra* note 79, at § 30.06. "Rather than basing liability on the theory that the accomplice caused the crime, the accomplice is convicted because her voluntary association with the offense makes her blameworthy." *Id.* What the courts mean by "contribute," then, "is something closely akin to lost chance." Johnson, *supra* note 119, at 111. Here, for example, is one famous description provided by the Alabama Supreme Court in *State v. Tally*:

> It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it. If the aid in homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a single chance of life which but for it he would have had, he who furnishes such aid is guilty, though it cannot be known or shown that the dead man, in the absence thereof, would have availed himself of that chance; as, where one counsels murder, he is guilty as an accessory before the fact, though it appears to be probable that murder would have been done without his counsel; and as, where one being present by concert to aid if necessary is guilty as a principal in the second degree, though, had he been absent murder would have been committed, so, where he who facilitates murder even by so much as destroying a single chance of life the assailed might otherwise have had, he thereby supplements the efforts of the perpetrator, and he is guilty as principal in the second degree at common law, and is principal in the first degree under our statute, notwithstanding it may be found that in all human probability the chance would not have been availed of, and death would have resulted anyway.

102 Ala. 25, 69–70, 15 So. 722, 738–39 (1894).

assisted or influenced the commission of the offense, he or she cannot, under the common law approach, be deemed an accomplice.

Under the Model Penal Code approach, in contrast, there is no requirement that an accomplice have actually aided or encouraged the principal's conduct in any way. Instead, as Model Penal Code § 2.06(3) phrases it, any person who "*agrees* or *attempts* to aid [an]other person in planning or committing of an offense" may—assuming the requisite culpable mental state—be held criminally liable for the conduct of another.[122] Practically speaking, this language "removes the need for the accomplice to make any contribution to the commission of the offense or to an attempt."[123]

Since completion of the Model Penal Code, "[a] substantial minority of states" have adopted the drafters' recommended approach to dealing with unsuccessful accomplices.[124] Policies of this nature are common among reform jurisdictions; however, quite a few of those jurisdictions most influenced by the Model Penal Code in general nevertheless opted to drop the "agrees or attempts to aid" clause recommended by the

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[122] Model Penal Code § 2.06(3)(a)(ii) ("aids or agrees or attempts to aid such other person in planning or committing" the offense). As the accompanying commentary explains:

> So long as [a purpose to facilitate an offense] is proved, there is, it would seem, little risk of innocence; nor does there seem to be occasion to inquire into the precise extent of influence exerted on the ultimate commission of the crime. The inclusion of attempts to aid may go in part beyond-present law, but attempted complicity ought to be criminal, and to distinguish it from effective complicity appears unnecessary where the crime has been committed. Where complicity is based upon agreement or-solicitation, one does not for evidence that they were actually operative psychologically on the person who committed the offense; there ought to be no difference in the case of aid.

Model Penal Code § 2.06(3)(a)(ii) cmt. at 314.

[123] Robinson & Grall, *supra* note 118, at 736. Allowing for attempts to aid to satisfy the conduct requirement of accomplice liability constitutes a clear and "significant departure" from the common law approach. DRESSLER, *supra* note 79, at § 30.06.

More nuanced is the import of allowing for agreements to aid to provide the basis for accomplice liability. In most cases, for example, A's agreement to aid in the commission of an offense serves as encouragement to P and, therefore, functions as a basis for common law accomplice liability. *Id.* The Model Penal Code does not, however, require proof of such encouragement; rather, it is enough that A manifested his participation in the offense by agreeing to aid. *Id.*

[124] Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 140 (1985); Weisberg, *supra* note 79, at 234 ("This equation of "attempted complicity" with attempt to perpetrate a substantive offense has been incorporated into the penal codes of about a dozen states."); *see* Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02. *See also* Del. Code Ann. tit. 11, § 271 ("attempts to cause").

For jurisdictions that adopt "an agreement to aid," see Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; Wash. Rev. Code § 9A.08.020.

Code's drafters.[125] Such variance is not surprising, though, once one considers the potential consequences at stake.

Although pitched as a matter of criminal law doctrine, the issue of failed accomplices is primarily a matter of grading. For example, under the common law approach, a failed accomplice would likely be guilty of an attempt to commit the target of the complicity based upon an individual assessment of his or her conduct.[126] In those jurisdictions (a strong majority) that grade attempts less severely, this would ultimately subject the failed accomplice to a lower level of potential punishment than the successful principal.[127] Under the Model Penal Code approach, in contrast, "an unfulfilled agreement or unsuccessful attempt to assist or encourage is graded the same as the substantive offense that does not materialize."[128] In practical effect, this means that the failed accomplice is subject to the same level of potential punishment as the successful principal.[129]

So, then, which outcome is preferable? At its core, the choice is between objectivist and subjectivist policies. The common law approach to dealing with failed accomplices reflects a more objectivist view of the criminal law, under which causing harm or evil is the gravamen of a criminal offense. Where the defendant's conduct is ineffectual, therefore, his or her punishment ought to be reduced accordingly.[130] The Model Penal Code approach, in contrast, "is consistent with the subjectivist view that an actor's liability ought to be based on the actor's own conduct and attendant state of mind, rather than on subsequent events over which the actor has no control, such as whether the attempt to aid is successful."[131]

Both objectivist and subjectivist policies stand on firm theoretical ground.[132] However, community sentiment favors objectivist grading policies—both generally[133] and as it relates to the treatment of accomplices in particular.[134] And, insofar as legislative practice is concerned, the sentencing policies employed in most jurisdictions

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[125] *See* Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 322 (1994) (citing Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110(2)(B); Colo. Rev. Stat. Ann. § 18-1-603; Minn. Stat. Ann. § 609.05; N.Y. Penal Code § 20.00; N.D. Cent. Code § 12.1-03-01(1)(b); Ohio Rev. Code Ann. § 2923.03(A)(2); Utah Code Ann. § 76-2-202).

[126] Robinson, *supra* note 125, at 305.

[127] *Id.* So, for example, "[w]here the actor tries but fails to aid an arsonist, unbeknownst to the arsonist, and therefore has no causal connection with the offense harm or evil, his liability [] is attempt liability not substantive offense liability, and accordingly graded less." *Id.*

[128] *Id.* at 304. So, for example, an actor who unsuccessfully attempts to assist a perpetrator bent on arson is liable for arson even though he gets the date confused and does not actually aid the perpetrator. *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 304–05.

[132] *See* RCC § 301(c): Relation to National Legal Trends (detailing the extent to which most jurisdictions discount the penalties for criminal attempts in comparison to the penalties applicable to completed offenses).

[133] For example, public opinion surveys seem to consistently find that lay judgments of relative blameworthiness view the consummation of results as an important and significant grading factor. *See, e.g.,* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 14-28, 157-97 (1995).

[134] For example, one survey evaluating community sentiment on unsuccessful accomplices in particular, finds that in cases where an "accomplice provides no real assistance or encouragement of any kind," lay jurors report "a very low assignment of liability." *Id.* at 263-64.

reflect the more objectivist approach to grading.[135] Where, as in the District, this is the case, it can be argued that acceptance of the Model Penal Code approach to dealing with failed accomplices produces a "particularly troublesome result," namely, it affords unsuccessful accomplices and successful perpetrators the same punishment, notwithstanding the fact that attempts and completed offenses are typically punished differentially.[136] "To be consistent," therefore, more objectivist states ought to "reject that portion of the Model Penal Code complicity provision that rests accomplice liability—i.e., liability for the full substantive offense—on an ineffective attempt or agreement to aid."[137]

One other issue relevant to the conduct requirement of accomplice liability relates to the nature of the communication implicated by the would-be accomplice's conduct where it is based solely on encouragement, namely, just how detailed must the communication be? The question is significant given the free speech interests implicated by solicitations to engage in criminal conduct.[138]

As a constitutional matter, the U.S. Supreme Court case law surrounding the relationship between the First Amendment and criminalization of speech has historically been murky.[139] Most recently, in *United States v. Williams*, the U.S. Supreme Court clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection."[140] But it also reaffirmed the crucial yet nevertheless ambiguous distinction "between a proposal to engage in illegal activity and the abstract advocacy of illegality," the latter being entitled to constitutional protection.[141]

Constitutional considerations aside, there "remains a legislative question" concerning whether and to what extent criminal liability based upon encouragement

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[135] *See id.*

[136] Robinson, *supra* note 125, at 305.

[137] *Id.*

[138] DRESSLER, *supra* note 78, at § 28.01 (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645); *see* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016) ("Solicitation may help cause crime by encouraging people to commit it. Aiding and abetting may help cause crime by informing them how to commit it (or how to avoid being caught)—and may in turn encourage people to commit it as well.").

[139] *See, e.g.*, *Yates v. United States*, 354 U.S. 298, 318 (1957) (holding that, with respect to violations of the Smith Act, there must be advocacy of action to accomplish the overthrow of the government by force and violence rather than advocacy of the abstract doctrine of violent overthrow), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). For discussion of these cases and their progeny, see, for example, Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Model Penal Code § 5.02 cmt. at 378-79; *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 248 (4th Cir. 1997).

[140] *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

[141] *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928–929 (1982)).

"should be curtailed to avoid chilling speech."[142] "The main problem," as the drafters of the Model Penal Code phrase it, is how to prevent

> [L]egitimate agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime. It would not be difficult to convince a jury that inflammatory rhetoric on behalf of an unpopular cause is in reality an invitation to violate the law rather than an effort to seek its change through legitimate criticism. Minority criticism has to be extreme in order to be politically audible, and if it employs the typical device of lauding a martyr, who is likely to have been a lawbreaker, the eulogy runs the risk of being characterized as a request for emulation.[143]

In light of these constitutional and policy considerations, the modern approach to criminalizing encouragement, reflected in both contemporary solicitation and complicity statutes, is to require the solicitation of "specific conduct that would constitute" the target crime.[144] Practically speaking, this requires proof of the utterance of a communication that, when viewed "in the context of the knowledge and position of the intended recipient, [carries] meaning in terms of some concrete course of conduct that it is the actor's object to incite."[145]

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[142] Model Penal Code § 5.02 cmt. at 375-76.

[143] *Id.*

[144] Model Penal Code § 5.02(1). Such language is rooted in the Model Penal Code's general solicitation provision, which reads: "A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in *specific conduct* that would constitute such crime . . ." Model Penal Code § 5.02(1); *see* Model Penal Code § 5.02 cmt. at 376 n.48 (analyzing legislative trends based on, or in accordance with, the "specific conduct" principle incorporated into the Model Penal Code). Thereafter, the Model Penal Code's general provision on accomplice liability incorporates the specific conduct principle through reliance on the term "solicitation" as the basis for codifying the encouragement prong. Model Penal Code § 2.06(3)(a)(i) ("A person is an accomplice of another person in the commission of an offense if . . . with the purpose of promoting or facilitating the commission of the offense, he . . . solicits such other person to commit it."); *see supra* note 125 (collecting legislative authorities that similarly incorporate the term "solicits" into their accomplice liability statutes). For an example of a reform jurisdiction applying this two-step approach, compare Oregon's general solicitation statute, Or. Rev. Stat. Ann. § 161.435(1) ("A person commits the crime of solicitation if with the intent of causing another to engage in *specific conduct* constituting a crime . . . ."), with its general accomplice liability statute, Or. Rev. Stat. Ann. § 161.155 ("A person is criminally liable for the conduct of another person constituting a crime if . . . With the intent to promote or facilitate the commission of the crime the person . . . *Solicits* or commands such other person to commit the crime . . . .").

[145] Model Penal Code § 5.02 cmt. at 375-76.; *see, e.g.*, *State v. Johnson*, 202 Or. App. 478, 483 (2005). This standard is relatively broad. For example, it does not require specificity as to "the details (time, place, manner) of the conduct that is the subject of the solicitation." *Johnson*, 202 Or. App. at 483; *see* Model Penal Code § 5.02 cmt. at 376 ("It is, of course, unnecessary for the actor to go into great detail as to the manner in which the crime solicited is to be committed."). Nor does it require that "the act of solicitation be a personal communication to a particular individual." LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Schleifer*, 99 Conn. 432, 121 A. 805 (Dist. Ct. 1923) (information charging one with soliciting from a public platform a number of persons to commit the crimes of murder and robbery is sufficient). But it does bring with it a few limitations. For example, "general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently specific . . . to constitute criminal solicitation." Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor does criminal liability extend to "a situation where the defendant makes a general solicitation

Consistent with national legal trends outlined above, RCC § 210 codifies the following policies relevant to the conduct requirement of accomplice liability. Subsection (a)(1) establishes the first of two alternative means of being an accomplice: by "assist[ing] another person with the planning or commission of conduct constituting that offense." Subsection thereafter (a)(2) establishes that "encourag[ing] another person to engage in specific conduct constituting that offense" provides an alternative means of being an accomplice. Omitted from either formulation is an "agreement or attempt to aid," which clarifies that an unsuccessful attempt at facilitating or promoting an offense will not suffice to establish accomplice liability. Rather, it must be proven that the defendant's conduct, in fact, assisted or influenced the commission of an offense by another.

RCC § 210(a), (b), & (c): Relation to National Legal Trends on Culpable Mental State Requirement. It has been observed that the culpable mental state requirement of accomplice liability is a "very difficult" topic,[146] which has been the subject of "a long history of disagreement"[147] as well as "[c]onsiderable confusion."[148] Legal authorities generally agree that "a person is an accomplice in the commission of an offense if he intentionally aids the primary party to commit the offense charged."[149] Upon closer analysis, however, this broad statement obscures a range of complexities surrounding the culpable mental state requirement of accomplice liability.[150] The relevant complexities follow the same pattern as those surrounding the general inchoate offenses of solicitation and conspiracy.[151]

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

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(however reprehensible) to a large indefinable group to commit a crime." *People v. Quentin*, 296 N.Y.S.2d 443, 448 (Dist. Ct. 1968); *see Johnson*, 202 Or. App. at 484 (observing that a "general exhortation to 'go out and revolt' does not constitute solicitation).

[146] Weisberg, *supra* note 79, at 232.

[147] Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131, 131 (2015).

[148] LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2.

[149] DRESSLER, *supra* note 79, at § 30.05.

[150] Here, for example, is how one commentator has summarized some of the relevant questions:

> [A]re there two mens rea requirements here, a "primary" mens rea having as its object the aiding of the conduct of another person, and a second requirement having as its object the elements of the underlying crime aided? If so, does the secondary requirement expand or limit the liability otherwise permitted by the primary requirement? What is the relationship between the mens rea required for conviction of guilty principals and the secondary mens rea required for conviction as an accomplice? Does this vary depending on the kind of element (circumstance or result) of the underlying offense involved?"

Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 396 (2007).

[151] *See generally* RCC § 302: Relation to National Legal Trends on Culpable Mental State Requirement; RCC § 303: Relation to National Legal Trends on Culpable Mental State Requirement.

offense.[152] The same is also true of the culpable mental state requirement applicable to accomplice liability, which—like that of solicitation and conspiracy liability—must be analyzed with respect to the culpable mental state requirement applicable to the target offense.[153] At the same time, the multi-participant nature of this theory of liability raises its own set of culpable mental state considerations, namely, the relationship between the actor's mental state and future conduct (committed by someone else), which culminates in commission of the target offense.[154] For this reason, it is often said that accomplice liability—like solicitation[155] and conspiracy liability[156]—is comprised of "dual intent" requirements.[157]

More specifically, the first intent requirement relates to the accomplice's culpable mental state with respect to the future conduct of the principal: generally speaking, the accomplice must "intend," by his or her assistance, to promote or facilitate conduct planned to culminate in an offense.[158] The second intent requirement, in contrast, relates to the accomplice's culpable mental state with respect to the results and/or circumstance elements that comprise the target offense: generally speaking, the accomplice must "intend," by his or her assistance, to bring them about.[159]

To illustrate how these dual intent requirements fit together, consider the following scenario.[160] Police receive a report that someone posing as a janitor in a District of Columbia government building, P, intends to murder a plain-clothes police officer sitting in the lobby to the entrance, V. According to this reliable tip, P's plan is to quickly unhinge a large television that stands high above V, with the hopes that it will kill V upon impact. Soon thereafter, two officers arrive at the front of the building, only to observe an individual, A, with a large collection of packages blocking the front entrance to the building. The officers' entry into the building is delayed due to A's blockage, which in turn enables P to successfully carry out the assassination. If A later finds herself in D.C. Superior Court charged with aiding the murder of a police officer committed by P, can she be convicted as an accomplice?

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[152] 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).

[153] *Id.*

[154] *See, e.g.*, Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).

[155] For discussion of the dual intent requirement in the context of solicitation, see, for example, DRESSLER, *supra* note 79, at § 28.01; *State v. Garrison*, 40 S.W.3d 426 (Tenn. 2000).

[156] For discussion of the dual intent requirement in the context of conspiracy, see, for example, *State v. Maldonado*, 2005-NMCA-072, ¶ 10, 137 N.M. 699, 702; *United States v. Piper*, 35 F.3d 611, 614-15 (1st Cir. 1994).

[157] For discussion of the dual intent requirement in the context of complicity, see, for example, DRESSLER, *supra* note 79, at § 30.05; *People v. Childress*, 363 P.3d 155, 164 (Colo. 2015); *State v. Foster*, 522 A.2d 277, 281 (Conn. 1987).

[158] Robinson, *supra* note 125, at 864. *See also* Robinson & Grall, *supra* note 118, at 758 ("The verb aids . . . actually combines conduct and results elements; the actor must engage in conduct that provides aid. The significant culpability here is culpability as to that result."); Kadish, *supra* note 101, at 349 ("In addition to having the mens rea for the underlying crime, the accomplice must intend that the principal commit the acts that give rise to the principal's liability.").

[159] Robinson, *supra* note 125, at 864; *see* Kadish, *supra* note 101, at 349 ("[T]o be liable as an accomplice in the crime committed by the principal, the secondary party must act with the *mens rea* required by the definition of the principal's crime.").

[160] This scenario is a modified version of that offered in Kinports, *supra* note 79, at 135.

The answer to this question depends upon whether A's state of mind fulfills both of the dual intent requirements governing accomplice liability. For example, if A was blocking the entrance to the building because she accidentally dropped her packages, then neither requirement is met: A did not intentionally assist the conduct of P which, in fact, resulted in the death of a police officer; nor did she act with the intent that, by her conduct, a police officer be killed.[161]

Alternatively, if A was blocking the entrance to the building because P, posing as a janitor, had asked A to stop anyone from entering the building so that a damaged television could be quickly unhinged, the first requirement is met: A intentionally assisted the conduct of P which, in fact, resulted in the death of a police officer. But the second requirement is not met: A did not intend, through her conduct, to cause the death of anyone, let alone a police officer.

Lastly, if A was blocking the entrance to the building because P had approached her with an opportunity to seek retribution against the same officer responsible for disrupting a drug conspiracy A was involved with years ago, then A fulfills both requirements: A acted with both the intent to facilitate D's conduct and the intent that, through such conduct, a police officer be killed.[162]

Unpacking these dual intent requirements provides the basis for more clearly analyzing the culpability-related policy issues at the heart of accomplice liability. With respect to the first intent requirement, for example, the central question is this: may an accomplice be held criminally liable if he or she is *merely aware* (i.e., knows) that, by providing assistance, he or she is promoting or facilitating conduct planned to culminate in an offense. Or, alternatively, must it proven that the accomplice *desires* (i.e., has the purpose) to promote or facilitate such conduct?[163]

Resolution of this issue is crucial to determining whether and to what extent merchants who sell legal goods in the ordinary course of business that end up facilitating

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[161] It's also theoretically possible for the second, but not the first, requirement to exist. This would be the case, for example, if A, having just observed the undercover officer from afar (who had previously arrested her for her participation in a drug conspiracy a few years back), was overcome by the thought, "I should concoct a plan to kill that officer one day" at the moment she dropped the packages. Under these circumstances, A plausibly possessed the intent to kill a police officer, though she nevertheless lacked the intent to assist P's conduct of which she was unaware.

[162] Note that if A lacked awareness that V was a police officer on these facts, then the second intent requirement would probably not be met: although A intended to kill V, A did not intend to kill a *police officer*.

[163] Conceptually, this issue is a product of the fact that the concept of intent is, and "has always been, an ambiguous one." Wechsler et al., *supra* note 152, at 577. "[T]raditionally," for example, intent was "viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of a belief as to a practical certainty." *United States v. U.S. Gypsum Co*., 438 U.S. 422, 445 (1978); *see Tison v. Arizona*, 481 U.S. 137, 150 (1987). In specific contexts, however—such as, for example, in the context of inchoate crimes such as conspiracy and solicitation, "where a heightened mental state separates criminality itself from otherwise innocuous behavior"[163]—the common law employed the term intent as a synonym for purpose, thereby excluding knowledge as a viable basis for liability. *United States v. Bailey*, 444 U.S. 394, 405 (1980). It should be noted, however, "that purpose is rarely the required mens rea for the commission of a crime." Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1571 (2006). As the Model Penal Code drafters recognized, "th[e] distinction [between purpose and knowledge] is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient." Model Penal Code § 2.02 cmt., at 234.

criminal acts may be subjected to criminal liability.[164] For example, imagine a car dealer who tries to convince a prospective purchaser to buy a car knowing that the vehicle will be used in a bank robbery. Or consider a motel operator who tries to rent a room to a man who is with a woman below the age of consent, knowing that it'll be used for sex.[165] 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."[166] What remains to be determined is whether this culpable mental state of knowing indifference provides a sufficient basis for imposing accomplice liability.

There are two different approaches American legal authorities apply to resolving the issue: the "true purpose view" and the "knowledge view." Under a true purpose view, nothing short of a *conscious desire* to promote or facilitate criminal conduct by another will suffice for accomplice liability. As the "canonical formulation"[167] of this approach—originally articulated by Judge Learned Hand in *United States v. Peoni*,[168] but thereafter endorsed by the U.S. Supreme Court in *Nye & Nissen v. United States*[169]—phrases it: "To aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'"[170]

The knowledge view, in contrast, accepts *mere awareness* that one is promoting or facilitating the commission of a crime by another as a sufficient basis for accomplice liability. Under this approach—as Judge Richard Parker famously reasoned in *Backun v. United States*—"[g]uilt as an accessory depends, not on 'having a stake' in the outcome

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[164] *See* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1192 (1997); Model Penal Code § 5.03 cmt. at 403.

[165] Other illustrative situations include:

> A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in commission of a crime. A doctor counsels against an abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist. A utility provides telephone or telegraph service, knowing it is used for bookmaking. An employee puts through a shipment in the course of his employment though he knows the shipment is illegal. A farm boy clears the ground for setting up a still, knowing that the venture is illicit.

Model Penal Code § 2.06, cmt. at 316.

[166] DRESSLER, *supra* note 79, at § 27.07 ("To be criminally liable, of course," this actor "must at least have knowledge of the use to which the materials are being put"; however, "the difficult issue presented is whether knowingly facilitating the commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end.").

[167] *Rosemond v. United States*, 134 S. Ct. 1240, 1248–49 (2014).

[168] 100 F.2d 401, 402 (2d Cir. 1938).

[169] 336 U.S. 613, 619 (1949) (quoting *Peoni*, 100 F.2d at 402).

[170] At issue in *Peoni* was whether the defendant, who had sold counterfeit bills to a purchaser who had then resold the counterfeit money to a third party, could be held criminally responsible for the possession of the counterfeit money by the third party on a complicity theory. 100 F.2d, at 402. On the facts presented, the prosecution could *not* show that the defendant desired for the subsequent transaction to occur, and, therefore, for the third party to possess the counterfeit money. *Id.* Instead, the government's theory was that the subsequent transaction "was a natural consequence of Peoni's original act, with which he might be charged." *Id.* On appeal, the Second Circuit rejected this argument, holding that, in the absence of a desire to aid the third party's possession, the defendant could not be deemed an accomplice. *Id.*

of crime," but rather, on consciously "aiding and assisting the perpetrators" of a criminal scheme in a more conventional sense.[171]

The choice between these two approaches implicates conflicting policy considerations, namely, "that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes."[172] More specifically, underlying the true purpose view is the idea that:

> [T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner. [I]n extending liability to merchants who know harm will occur from their activities, there is a risk that merchants who only suspect their customers' criminal intentions (thus, are merely reckless in regard to their customers' plans) will also be prosecuted, thereby seriously undermining lawful commerce.[173]

The knowledge view, in contrast, reflects the position that:

> [S]ociety has a compelling interest in deterring people from furnishing their wares and skills to those whom they know are practically certain to use them unlawfully. Free enterprise should not immunize an actor from criminal responsibility in such circumstances; unmitigated desire for profits or simple moral indifference should not be rewarded at the expense of crime prevention.[174]

Historically, the choice between these two positions has been the subject of much legal debate and disagreement.[175] Today, however, a "majority of jurisdictions have adopted the Hand approach over Parker's analysis in *Backun* and require a showing of purpose."[176] The true purpose view has prevailed, in large part, due to the recommendations of the Model Penal Code.

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[171] 112 F.2d 635, 637 (4th Cir. 1940). The defendant in *Backun* knowingly sold stolen silverware to a third person, Zucker, in New York. *Id.* Zucker then transported the silverware to North Carolina to sell it. *Id.* The defendant wanted Zucker to sell the silverware and knew Zucker would go out of state to do so, but the defendant did not specifically desire that Zucker leave the state. *Id.* Judge Parker upheld his conviction of interstate transportation of stolen merchandise, finding that conviction of a defendant for knowingly facilitating the interstate transportation of stolen merchandise was appropriate under the circumstances. *Id.*

[172] Model Penal Code § 5.03 cmt. at 403.

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

[174] DRESSLER, *supra* note 79, at § 27.07; *see* Model Penal Code § 2.06 cmt. at 318 n.58 ("Conduct that knowingly facilitates the commission of crimes is by hypothesis a proper object of preventive effort by the penal law, unless, of course, it is affirmatively justifiable. It is important in that effort to safeguard the innocent, but the requirement of guilty knowledge adequately serves this end—knowledge both that there is a purpose to commit a crime and that one's own behavior renders aid.").

[175] Weisberg, *supra* note 79, at 236.

[176] *Id.* Note that the analysis of national legal trends here, as well as below with respect to the relationship between the accomplice's state of mind and the results/circumstances of the target offense, excludes the natural and probable consequence rule, under which "accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided." LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.3. For analysis of the rule, as

Having considered the consequences of holding criminally liable those who knowingly provide goods or services to criminal schemes, the Model Penal Code drafters ultimately opted against it, siding "in the complicity provisions of the Code[] in favor of requiring a purpose to advance the criminal end."[177] This is reflected in the Model Penal Code's general complicity provision, § 2.06(3), which codifies a broad purpose requirement—similarly employed in the Code's general definitions of conspiracy[178] and solicitation[179]—under which the requisite aid or encouragement must be accompanied by "the purpose of promoting or facilitating the commission of the crime."[180]

Textually speaking, the scope of this broadly phrased purpose requirement is ambiguous.[181] Nevertheless, it's clear from the Model Penal Code commentary that the drafter's intended for it to apply, at minimum, to the conduct culminating in an offense.[182] Explicitly endorsing Judge Hand's decision in *Peoni*, the Model Penal Code commentary states that § 2.06(3) was intended to import a requirement that the accomplice have "as his conscious objective the bringing about of conduct that the Code has declared to be criminal."[183] Absent this "purpose to promote or facilitate the particular conduct that forms the basis for the charge," the Model Penal Code would preclude liability as an accomplice.[184]

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well as the policy considerations that support rejecting it, see *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (*en banc*) (rejecting application of the natural and probable consequence rule).

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

[178] Model Penal Code § 5.03(1)

[179] Model Penal Code § 5.02(1).

[180] Model Penal Code § 2.06(1). In a tentative draft of the Model Penal Code, the drafters suggested that accomplice liability be permitted where one *knowingly* provided *substantial assistance*. *See* Model Penal Code § 2.04(3)(b) (Tent. Draft No. 1, 1953) (providing for accomplice liability if "acting with the knowledge that [another] person was committing or had the purpose of committing the crime, [the accomplice] knowingly, substantially facilitated its commission . . . . "). However, after considering the various interests implicated by these alternatives, the drafters instead chose to require purpose. *See* Robinson & Grall, *supra* note 118, at 758.

[181] *See infra* notes 255-66 and accompanying text (discussing ambiguities).

[182] The drafters' decision to incorporate a purpose requirement of this nature serves two different rationales. The first is evidentiary: "because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent," a purpose requirement appropriately avoids the problem of false positives. Model Penal Code § 2.06 cmt. at 312 & n.42, 314-19; *see* Kinports, *supra* note 79, at 137. The second, and perhaps more import, rationale emphasizes culpability, namely, it ensures that those who may have committed minor or equivocal acts of assistance are not held responsible for crimes they did not purposely facilitate. Model Penal Code § 2.06 cmt. at 312 & n.42, 314-19; *see* Kinports, *supra* note 79, at 137.

[183] Model Penal Code § 2.06 cmt. at 310, 316.

[184] Model Penal Code § 2.06 cmt. at 311. Note, however, that this purpose requirement was not understood by the drafters to cover the means with which an offense is committed. As the Model Penal Code commentary phrases it:

> This does not mean, of course, that the precise means used in the commission of the crime must have been fixed or contemplated or, when they have been, that liability is limited to their employment. One who solicits an end, or aids or agrees to aid in its achievement, is an accomplice in whatever means may be employed, insofar as they constitute or commit an offense fairly envisaged in the purposes of the association.

Since publication in 1962, "most states have followed the Model Penal Code's lead" by requiring proof that an accomplice acted with the "purpose" to facilitate the principal's conduct.[185] Legislative adoption of this true purpose approach is a particularly pervasive feature of modern criminal codes, which frequently incorporate general complicity provisions modeled on § 2.06(3) that—in substance if not form—seem to codify the true purpose view.[186] But even in those jurisdictions that have not undertaken comprehensive code reform efforts, the relevant legal authorities—namely, case law and jury instructions—have strongly "rejected, explicitly or implicitly, a standard that would permit the conviction of an accomplice without the requisite [criminal] purpose."[187] The true purpose view is also "particularly popular in the academic community,"[188] where there is significant concern that drawing "the circle of criminal liability any wider" would cast a "pall on ordinary activity."[189]

Model Penal Code § 2.06 cmt. at 310; *see* Kadish, *supra* note 101, at 350–51 ("The intention required is that the principal should commit the acts constituting the crime, not that he should use the means intended by the accomplice.").

[185] Robinson & Grall, *supra* note 118, at 739; *see, e.g.*, Weisberg, *supra* note 79, at 239. Note, however, that some jurisdictions "have created an additional offense of criminal facilitation that imposes reduced punishment for knowing assistance of a substantive offense." Robinson & Grall, *supra* note 118, at 739.

One survey finds that "only four states codify facilitation." Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 116 (1989); *see* Ky. Rev. Stat. Ann. § 506.080 ("A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such a person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime."); Ariz. Rev. Stat. Ann. § 13-1004 ("A person commits facilitation if, acting with knowledge that another person is committing or intends to commit an offense, the person knowingly provides the other person with means or opportunity for the commission of the offense.").

The basis for these statutes is the National Commission on Reform of Federal Criminal Laws included a general facilitation provision in its proposed Federal Criminal Code." *See* Proposed Federal Criminal Code § 1002 ("A person is guilty of criminal facilitation if he knowingly provides substantial assistance to a person intending to commit a felony, and that person, in fact, commits the crime contemplated, or a like or related felony, employing the assistance so provided."); *see also* 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 160 (1970).

For application of these state facilitation statutes, see, for example, *State v. Politte*, 136 Ariz. 117, 121, 664 P.2d 661, 665 (1982); *Luttrell v. Commonwealth*, 554 S.W.2d 75, 79 (Ky. 1977).

[186] Modern criminal codes express this point in various ways. Some, for example, require that one assist or encourage a crime "with the intent to promote or facilitate such commission." LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; *see* Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Colo. Rev. Stat. Ann. § 18-1-603; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Or. Rev. Stat. § 161.155; Pa. Cons. Stat. Ann. tit. 18, § 306; S.D. Cod. Laws § 22-33-3; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020. Others instead require that one "intentionally assist or encourage a crime." LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; *see* Ga. Code Ann. § 16-2-20; Ind. Code Ann. § 35-41-2-4. For a comprehensive overview of legislative trends, see John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237 (2008).

[187] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*) (collecting authorities); *see, e.g.*, *People v. Beeman*, 674 P.2d 1318 (Cal. 1984)

[188] Decker, *supra* note 186, at 239. *See, e.g.*, DRESSLER, *supra* note 79, at §§ 29.05, 30.05; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; Robinson & Grall, *supra* note 118, at 758; Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 53 COLUM. L. REV. 228, 239 (1953); Allen R. Friedman, *Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Nonracketeer Under Rico Section*

The second intent requirement of accomplice liability, in contrast to the first, is comprised of a far broader set of policy issues, which implicate the nature of the relationship between the accomplice's state of mind and the culpability requirement applicable to the target offense.

Generally speaking, there is broad agreement that an accomplice "must not only have the purpose that someone else engage in the conduct which constitutes the particular crime charged, but the accomplice must also share in the *same intent* which is required for commission of the substantive offense."[190] Less clear, and more controversial, however, is what to do about a substantive offense that does not require "intent" at all, but rather, is comprised of one or more objective elements subject to recklessness, negligence, or strict liability? In this situation, one must ask: should proof that an accomplice acted with the requisite non-intentional mental state (or none at all in the case of strict liability) be sufficient—or, alternatively, must a higher level of culpability be proven?

Generally speaking, there are two alternative approaches jurisdictions apply to resolving this question.[191] The first is a principle of *culpable mental state elevation*, under which any non-intentional mental state applicable to the target offense—for example, recklessness or negligence—must be elevated to a higher culpable mental state—for example, purpose or knowledge—when the government proceeds upon an accomplice theory of liability. The second, and alternative, principle is one of *culpable mental state equivalency*, under which proof of the culpable mental state requirement (if any) applicable to the target offense will suffice for purposes of accomplice liability.

The choice between these two principles is a consequential one, which American legal authorities separately address in the context of result elements and circumstance

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1962(a), 82 COLUM. L. REV. 574, 585 (1982). *See also* Alexander & Kessler, *supra* note 164, at 1192 (advocating for application of a general recklessness requirement but nevertheless endorsing a carve out, which establishes that "an actor who sells goods or services in the regular course of his trade shall not be deemed to have rendered aid or encouragement that is sufficient for solicitation liability"). *Cf.* Tyler B. Robinson, *A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under S 924(c)*, 96 MICH. L. REV. 783, 788 (1997) (analyzing ambiguity concerning the purpose requirement where multi-element crimes are at issue). For discussion of the ways in which the traditional purpose vs. knowledge debate misses important aspects of the culpability of accomplice liability, see Gideon Yaffe, *Intending to Aid*, 33 L. & PHIL. 1 (2014); Sarch, *supra* note 147, at 131; Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460 (2013).

[189] Kadish, *supra* note 101, at 353. More specifically, the commonly expressed concern is that if the criminal law prohibited conduct that knowingly facilitates the commission of crime, that would give us reason to "fear criminal liability for what others might do simply because our actions made their acts more probable." *Id.* Such a phenomenon, it is argued, is particularly problematic in the commercial context, wherein "people otherwise lawfully conducting their affairs should not be constrained by fear of liability for what their customers will do." *Id.*

[190] *State v. Williams*, 718 A.2d 721, 723 (N.J. Super. Ct. Law Div. 1998) (citations omitted). For authority in support of the proposition that an accomplice may never be held liable absent proof of a mental state requirement that is *at least as demanding* as that applicable to the results and circumstances of the target offense, see, for example, DRESSLER, *supra* note 79, at § 30.05; *State v. White*, 622 S.W.2d 939, 945 (Mo. 1981); *Commonwealth v. Henderson*, 249 Pa. Super. 472, 482 (1977); *Morrison v. State*, 608 S.W.2d 233, 234 (Tex. Crim. App. 1980).

[191] For one jurisdiction that has applied both, compare *Echols v. State*, 818 P.2d 691 (Alaska Ct. App. 1991) (applying a principle of culpable mental state elevation to result element crimes) *with Riley v. State*, 60 P.3d 204 (Alaska Ct. App. 2002) (overruling *Echols*, and adopting a principle of culpable mental state equivalency to result element crimes).

elements. Consider first the nature of, and legal trends relevant to, the decision in the context of result elements. The following scenario is illustrative of how the issue may often arise. Passenger A tells driver P to exceed the legal speed limit so that they can both get to a party on time, notwithstanding the fact that they're currently on a narrow road near an elementary school. P is responsive to the request and quickly steps on the gas. Soon thereafter, P loses control of his car and fatally crashes into V, a nearby child leaving school for the day.

Assuming both A and P were aware that P's speeding created a substantial risk of death to V, P is clearly guilty of reckless homicide for his own conduct. But can A be convicted of the same under an accomplice theory of liability? Under a principle of culpable mental state elevation, the answer is no: A is not liable for reckless homicide because—although A purposely encouraged the requisite criminal conduct—he lacked the intent to kill. Under a principle of culpable mental state equivalency, in contrast, the answer is yes: A is liable because he purposely encouraged P's criminal conduct with the culpable mental state applicable to reckless homicide, consciously disregarding a substantial risk of death.

It's important to note that accepting a principle of culpable mental state equivalency as to results opens the door to a corollary culpability-based grading issue, which arises where an accomplice and principal participate in a criminal scheme that involves causing a prohibited result with *differing states of mind*. If the accomplice is subsequently prosecuted under a statute that grades based upon those distinctions, the court must then determine the legal relevance of the variance in culpability. To illustrate, consider two variations on the following fact pattern: A gives P a knife and encourages P to throw it at V from a distance; soon thereafter, P throws the knife, which causes V to suffer a fatal injury.

Scenario One. At the time A gave P the knife, A was in an intoxicated state and possessed only a minimal awareness of the possibility that V would be fatally injured. P, in contrast, was in a sober state, and threw the knife with the express desire of killing V.

Scenario Two. At the time A gave P the knife, A was in a sober state and possessed the express desire of killing V. P, in contrast, was in an intoxicated state and possessed only minimal awareness of the possibility that V would be fatally injured.

In the first scenario, A has acted with reckless as to causing V's death, the culpability of manslaughter, while P has acted with an intent to kill, the culpability of murder. In the second scenario, in contrast, the variance in culpability is flipped: A has acted with the culpability of murder, while P has acted with the culpability of manslaughter. In both scenarios, the following question presents itself: should A's liability as an accomplice be individualized (i.e., based upon his own culpable mental state), or, alternatively, linked in some way to the mental state of P?

Contemporary American legal authorities have resolved the above culpability issues relevant to result elements in a relatively uniform fashion, which is characterized by two basic principles. The first is a principle of culpable mental state equivocation, under which "[c]onviction of an accomplice in the commission of a crime of recklessness or negligence is permitted" based upon proof that he or she purposely assisted the

principal party to engage in the conduct that forms the basis of the offense with "the mental state—intent, recklessness, or negligence, as the case may be—required for commission of the substantive offense."[192] The second is a principle of individualized culpability, under which an accomplice prosecuted for an offense graded by distinctions in mental state as to result elements is subject to any grade for which he or she—rather than the principal—possesses the requisite form of culpability.[193]

The modern legislative basis for both of these principles is Model Penal Code § 2.06(4), which reads:

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

This provision, as the accompanying explanatory note explains, was intended to serve two functions. The first was to establish that "complicity in conduct causing a particular criminal result entails accountability for that result so long as the accomplice is personally culpable with respect to the result to the extent demanded by the definition of the crime."[194] Beyond adopting a principle of culpable mental state equivalency, however, the drafters of the Model Penal Code also intended for § 2.06(4) to establish that, in those situations where two or more criminal actors jointly commit a crime that is divided into degrees based upon distinctions in culpability as to result elements, the liability of each participant in the criminal scheme should be "measured by his own degree of culpability toward the result."[195]

Since completion of the Model Penal Code, the drafters recommended approach to dealing with the culpability of accomplice liability in the context of result elements has gone on to become "the overwhelming majority rule."[196] Legislatively speaking, only a handful of modern criminal codes explicitly adopt statutory language based on Model Penal Code § 2.06(4).[197] Nevertheless, a few other reform jurisdictions communicate the same policies through other legislative means.[198] And case law from

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[192] DRESSLER, *supra* note 79, at § 30.05.
[193] *Id.*
[194] Model Penal Code § 2.06(4): Explanatory Note.
[195] *Id.* So, for example, "if the accomplice recklessly endangers life by rendering assistance to another, he can be convicted of manslaughter if a death results, even though the principal actor's liability is at a different level." Model Penal Code § 2.06 cmt. at 311.
[196] DRESSLER, *supra* note 79, at § 30.05.
[197] *See* Ariz. Rev. Stat. Ann. §13-303(B); Ark. Code Ann. §5-2-403(b); Haw. Rev. Stat. Ann. § 702-223; Ky. Rev. Stat. Ann. §502.020(2); N.H. Rev. Stat. Ann. §626:8(IV); 18 Pa. Cons. Stat. Ann. § 306(d).
[198] For example, a few reform jurisdictions incorporate prefatory language—"acting with the mental state required for commission of an offense"—into their accomplice liability statutes that appears to be indicative of a principal of culpable mental state equivalency applicable to results. *See* Conn. Gen. Stat. Ann. § 53a-8; N.Y. Penal Law § 20.00; Kan. Stat. Ann. § 21-5210(a). And a few other reform jurisdictions incorporate a grading provision indicative of the same. *See, e.g.*, Del. Code Ann. tit. 11, § 274; N.Y. Penal Law § 20.15; Mo. Rev. Stat. § 562.051; Ark. Code Ann. § 5-2-406.

both inside[199] and outside[200] reform jurisdictions appears to be consistent with the relevant culpability principles.[201] Contemporary legal commentary is also in accordance, supporting both the general application of a principal of culpable mental state equivalency for results[202]; and, where a result element crime is graded by distinctions in culpability, assessing each actor's liability "according to his own *mens rea*," without regard to whether the principal's culpability "is greater or less than that of the primary party."[203]

The relatively uniform and well-developed state of national legal trends relevant to result elements is to be contrasted with national legal trends on the culpable mental

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[199] For case law applying a principle of culpable mental state equivalency, see *Ex parte Simmons*, 649 So.2d 1282, 1284–85 (Ala. 1994) (A may be convicted of reckless murder if he purposely aided or encouraged D to fire a weapon on a public street, recklessly resulting in the death of a child); *State v. Garnica*, 98 P.3d 207, 209 (Ariz. Ct. App. 2004) (upholding homicide conviction based upon accomplice liability for recklessness as to causing death); *People v. Wheeler*, 772 P.2d 101, 103 (Colo. 1989) (upholding homicide conviction based upon accomplice liability for negligence as to causing death); *State v. Anthony*, 861 A.2d 773, 776 (N.H. 2004) (upholding cruelty conviction based upon accomplice liability for negligence as to causing harm); *but see People v. Mickel*, 73 Ill. App. 3d 16, 391 N.E.2d 558 (1979) (intention requirement precluded liability for aiding any homicide other than intentional homicide and implicitly held that the accomplice must act intentionally as to each offense element).

For case law applying an individualized approach to grading based upon culpability, see *State v. Ervin*, 835 S.W.2d 905, 923 (Mo. 1992) ("[T]wo murderous actors may have differing mental states, although they act together. A defendant, in a state of cool blood, may promote a murder by aiding a person who kills in the heat of passion. Such a defendant would be guilty of murder in the first degree though the other person is guilty of a lesser offense."); *Bosnick v. State*, 248 Ark. 846, 454 S.W.2d 311 (1970); *People v. Castro*, 55 N.Y.2d 972, 449 N.Y.S.2d 184, 434 N.E.2d 253 (1982); *Chance v. State*, 685 A.2d 351, 360 (Del. 1996); *see also Maiorino v. Scully*, 746 F. Supp. 331 (S.D.N.Y. 1990).

[200] For case law applying a principle of culpable mental state equivalency, see *Perry v. United States*, 36 A.3d 799, 817–18 (D.C. 2011) (upholding assault conviction based upon accomplice liability for extreme recklessness as to causing serious bodily injury); *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008) (upholding homicide conviction based upon accomplice liability for extreme recklessness as to causing death); *Story v. United States*, 16 F.2d 342, 344 (D.C. Cir. 1926) (upholding homicide conviction based upon accomplice liability for negligence as to causing death); *State v. McVay*, 47 R.I. 292 (1926) (same).

For case law applying an individualized approach to grading based upon culpability, see *People v. McCoy*, 25 Cal. 4th 1111, 1119 (2001) ("An accomplice may be convicted of first-degree murder, even though the primary party is convicted of second-degree murder or of voluntary manslaughter."); *United States v. Edmond*, 924 F.2d 261, 267 (D.C. Cir. 1991) ("In a joint trial, if a jury thought an aider and abettor carefully conceived a murder but enlisted an executioner only at the last possible moment, it could consistently convict the abettor of first-degree murder while finding the actual perpetrator guilty only of the lesser offense.").

[201] *But see, e.g., People v. Marshall*, 362 Mich. 170 (1961) (owner of car who gave keys to person who owner knew was drunk could not be held guilty of manslaughter where the person's operation of the car resulted in death).

[202] DRESSLER, *supra* note 79, at § 30.05 ("Because accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed, it would be illogical to impose liability on the perpetrator of the crime, while precluding liability for an accessory, where both possess the mental state required for the commission of the crime."); Robinson & Grall, *supra* note 118, at 741-43 (same); Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2190 (1988) (describing this position as the "modern scholarly view").

[203] DRESSLER, *supra* note 79, at § 30.6 ("It is fair to say, then, that when P commits the "offense" of criminal homicide, this "crime" is imputed to S, whose own liability for the homicide should be predicated on his own level of mens rea, whether it is greater or less than that of the primary party."); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 386–87 (1997); Robinson & Grall, *supra* note 118, at 741-43.

state requirement applicable to circumstances, which are both less robust and more ambiguous.

This variance is, in one sense, surprising: the policy issues presented by circumstance elements are conceptually the same, namely, the choice is between applying a principle of culpable mental state elevation or one of culpable mental state equivalency. The following scenario is illustrative. A lets P borrow his bedroom to engage in sex with V, a fourteen year-old minor, who P mistakenly believes to be twenty-one and, crucially, who A has never met. Thereafter, P and V have sex in A's room.

Assuming the interaction occurs in a jurisdiction with a statutory rape offense that applies to a fourteen year-old, P can clearly be convicted for his conduct—notwithstanding his mistake of fact—since age is a matter of strict liability. But can A similarly be convicted as an accomplice? Under a principle of culpable mental state elevation, the answer is no: A is not liable for statutory rape because A—although purposely assisting P's criminal conduct—lacked the intent to facilitate sex *with a minor*. Under a principle of culpable mental state equivalency, in contrast, the answer is yes: A is liable for statutory rape because A purposely facilitated P's criminal conduct with the culpable mental state applicable to the circumstance of age—none at all.

Notwithstanding these conceptual symmetries, "[v]ery little attention has been paid in the courts and legislatures to the question of complicity's *mens rea* for circumstance elements."[204] On a legislative level, much of the problem stems from the fact that the Model Penal Code is intentionally silent on the issue,[205] with the hopes of delegating its "resolution [to] the courts."[206] Since completion of the Model Penal Code, most American legislatures have followed suit in that they, too, do not explicitly address

[204] Kinports, *supra* note 79, at 161.

[205] More specifically, Model Penal Code § 2.06(3)'s undifferentiated reference to "[a] purpose of promoting or facilitating the commission of the crime" provides no direction on how to approach the culpable mental state requirement applicable to circumstance elements, while the Code lacks a provision comparable to § 2.06(4) to fill in the gap. *See infra* notes 256-66 and accompanying text (explaining relevant ambiguities).

[206] Model Penal Code § 2.06 cmt. at 311 n.37 ("The result, therefore, is that the actor must have a purpose with respect to the proscribed conduct or the proscribed result, with his attitude towards the circumstances to be left to resolution by the courts."). Note, however, that the Model Penal Code commentary also offers this:

> [The purpose requirement does not entail that [the precise means used in the commission of the crime must have been fixed or contemplated or, when they have been, that liability is limited to their employment. One who solicits an end, or aids or agrees to aid in its achievement, is an accomplice in whatever means may be employed, insofar as they constitute or commit an offense fairly envisaged in the purposes of the association. But when a wholly different crime has been committed, thus involving conduct not within the conscious objectives of the accomplice, he is not liable for it unless the case falls within the specific terms of Subsection (4).

Model Penal Code § 2.06 cmt. at 311. *Compare id.* at 312 n.42 ("[I]f anything, the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.").

the relationship between the accomplice's state of mind and the circumstance elements of the target offense.[207]

And yet, notwithstanding this explicit delegation of policy discretion to the judiciary, "[t]he issue here—whether the intent requirement of accomplice liability applies as well to attendant circumstances—is one that the courts have rarely considered," at least historically speaking.[208] More recently, though, a handful of state and federal courts have confronted the issue, and the resulting case law indicates that a principle of culpable mental state elevation reflects the majority approach.

Illustrative is a body of case law requiring proof of intent as to the aggravating circumstance of whether a crime has been committed while armed when prosecuted under an accomplice theory of liability.[209] Most noteworthy is the U.S. Supreme Court's decision in *Rosemond v. United States*, which deemed it well-established that accomplice liability requires proof that a "person actively participates in a criminal venture with *full knowledge* of the *circumstances* constituting the charged offense."[210] Applying this

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[207] *See generally* Model Penal Code § 2.06 cmt. at 311-13; Kinports, *supra* note 79, at 161. Note that a few jurisdictions incorporate prefatory language—"acting with the mental state required for commission of an offense"—into their accomplice liability statutes, which appears to indicate that a principal of culpable mental state equivalency applies to circumstances. *See* Conn. Gen. Stat. Ann. § 53a-8; N.Y. Penal Law § 20.00; Kan. Stat. Ann. § 21-5210(a); *compare* Conn. Gen. Stat. Ann. § 53a-16b ("In any prosecution for [a while armed] offense . . . in which the defendant was not the only participant, it shall be an affirmative defense that the defendant: (1) Was not armed with a pistol, revolver, machine gun, shotgun, rifle or other firearm, and (2) had no reasonable ground to believe that any other participant was armed with such a weapon.").

Likewise, a few other jurisdictions incorporate a grading provision indicative of the same. For example, the Delaware Criminal Code establishes that: "When, pursuant to § 271 of this title, 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance." Del. Code Ann. tit. 11, § 274; *see* Mo. Rev. Stat. § 562.051; Ark. Code Ann. § 5-2-406; *but see Allen v. State*, 970 A.2d 203, 213 (Del. 2009) ("In Delaware, section 274 contemplates the possibility that an accomplice defendant, *who was wholly unaware of another participant's intent to use a gun* in a robbery, could *not* be convicted of Robbery in the First Degree.") (citing *State v. Hammock*, 214 N.J. Super. 320, 322 (App. Div. 1986)); *State v. Smith*, 229 S.W.3d 85, 95–96 (Mo. Ct. App. 2007), *as modified* (May 1, 2007) (construing Mo. Rev. Stat. § 562.051 to require the jury to determine whether the defendant "acted with the purpose of promoting [a robbery *while armed*]" in order to hold him liable as an accomplice to the most elevated grade of robbery offense).

Conversely, it has been observed that state accomplice liability statutes based on Model Penal Code § 2.06(3) seem to require proof of intent as to circumstances as a textual matter. *See* Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 193 (1981) ("Under [Colorado's codification of the Model Penal Code] formulation, A's unawareness of C's age makes it impossible that he 'intended to promote or facilitate' the offense of patronizing a prostituted child."). For case law consistent with this reading, see, for example, *State v. White*, 98 N.J. 122, 130 (1984); *State v. Rodriguez*, 164 N.H. 800, 811 (2013).

[208] DRESSLER, *supra* note 79, at § 30.6.

[209] For legal authorities exploring whether and to what extent commission of a crime "while armed" is a circumstance element, see Kinports, *supra* note 79, at 156-61; Stephen P. Garvey, *Reading Rosemond*, 12 OHIO ST. J. CRIM. L. 233, 239-45 (2014); Mueller, *supra* note 202, at 2178-79; *see also People v. Childress*, 2015 CO 65M, ¶ 29, 363 P.3d 155, 164, *as modified on denial of reh'g* (Jan. 11, 2016) ("By 'circumstances attending the act or conduct,' we intend those elements of the offense describing the prohibited act itself and the circumstances surrounding its commission . . .").

[210] 134 S. Ct. 1240, 1248–49, 188 L. Ed. 2d 248 (2014) (collecting cases); *see id.* at 1249 ("So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission.").

principle to a complicity-based conviction for the federal crime of using a firearm during a crime of violence, 18 U.S.C.A. § 924(c),[211] the *Rosemond* court determined that: "An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when"—but only when—"he *knows* that one of his confederates will carry a gun."[212]

Post-*Rosemond*, state courts have hued to this line of reasoning.[213] For example, in *Robinson v. United States*, the DCCA held that "[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved."[214] The basis for such a determination is, as the *Robinson* court explains, the more general idea articulated in *Rosemond*, namely, in order for an accomplice to be deemed "guilty of a crime"—for example, "an offense committed while armed"—the defendant "must, *inter alia*, intend to facilitate the *entire offense*."[215]

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[211] 18 U.S.C.A. § 924(c) ("[A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . .").

[212] *Id.* at 1249 ("In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one). More specifically, as the *Rosemond* court explained, the "defendant's knowledge must be advance knowledge—or otherwise said, knowledge that enables him to make a relevant legal (and indeed, moral) choice." *Id.* For other federal cases, see, for example, *United States v. Lawson*, 872 F.2d 179, 181 (6th Cir. 1989) (where defendant charged with aiding and abetting the receipt and possession of illegal machine guns in violation of 26 U.S.C. § 5861(c), "a strict liability offense," necessary to prove defendant "knew that [principal's] possession of the unregistered guns would be illegal"); *United States v. Jones*, 592 F.2d 1038 (9th Cir. 1979) (defendant, who by driving getaway car of bank robber was an accomplice to crime of bank robbery, was not also an accomplice to the crime of robbery of a bank with a deadly weapon, absent proof defendant "knew that [his accomplice] was armed and intended to use the weapon, and intended to aid him in that respect"); *see also United States v. Ford*, 821 F.3d 63 (1st Cir. 2016) (defendant's conviction for aiding and abetting another's unlawful possession of a firearm because she had "reason to know" facts making such possession criminal, i.e., that person's prior felony conviction, overturned because defendant must be shown to have actually known such facts).

For a good recent collections of post-*Rosemond* case law at the federal level, see Alexander McIsaac, *A Square Peg in A Round Hole: The Illogical and Impractical Application of Rosemond to Strict Liability Sex Crimes*, 50 SUFFOLK U. L. REV. 317, 336 (2017); Allen Thigpen, *Extending* Rosemond, 53 CRIM. LAW BULLETIN 4 (2017).

[213] Note that the *Rosemond* decision is not constitutionally-based, and, therefore, states remain free to determine the relationship between the culpable mental state requirement governing complicity and that applicable to the circumstance(s) of the target offense themselves. *Cf.* DRESSLER, *supra* note 79, at § 29.05 (making similar observation in the context of conspiracy).

[214] *Robinson*, 100 A.3d at 105–06.

[215] *Robinson*, 100 A.3d at 106 and n.17 (citing *Wilson–Bey*, 903 A.2d at 831). For other state cases, see, for example, *State v. Silva-Baltazar*, 886 P.2d 138, 144 (Wash. 1994)("[A]lthough in most crimes involving deadly weapons, the coparticipants are aware that one or more of them is armed, that is no reason to impose strict liability on all coparticipants regardless of each participant's knowledge that another is armed."); *State v. Hammock*, 214 N.J. Super. 320, 322–24, 519 A.2d 364, 365–66 (App. Div. 1986) ("If the jury determines that the defendant shared his partner's purpose to commit the robbery but not his purpose to use a deadly weapon, then the jury may find the defendant guilty of a second-degree robbery, but not a first-degree armed robbery."); *State v. Rodriguez*, 164 N.H. 800, 812 (2013) ("[T]o affirm the defendant's convictions for . . . accomplice to first degree assault, we must be able to conclude that the properly-admitted evidence overwhelmingly established that he had at least a tacit understanding that deadly

There also exists a complementary body of state and federal cases applying a principle of culpable mental state elevation to the circumstance of age in strict liability sex crimes. For example, in *State v. Bowman*, the Court of Appeals of North Carolina—relying on an older precedent from the California Supreme Court—determined that "[a]lthough statutory rape is a strict liability crime, aiding and abetting statutory rape is not."[216] More specifically, the *Bowman* court concluded that the government, when bringing a statutory rape charge against an accomplice, must "present evidence tending to show that the defendant acted with *knowledge* that the [victims] were under the age of sixteen."[217]

Similarly in accordance is the U.S. Court of Appeals for the First Circuit's decision in *United States v. Encarnacion-Ruiz* interpreting the federal statute prohibiting the production of child pornography.[218] More specifically, the *Encarnacion-Ruiz* court held that, although the circumstance of age for the production of child pornography is typically a matter of strict liability, when a charge is brought against an accomplice the government must nevertheless prove that the defendant *knew* the victim was a minor.[219]

The First Circuit supported this outcome, in part, because of the *Rosemond* decision, under which, "to establish the *mens rea* required to aid and abet a crime, the government must prove that the defendant participated with advance knowledge of the elements that constitute the charged offense."[220] But the *Encarnacion-Ruiz* court also looked towards broader policy considerations, underscoring the fact that "the special circumstances which justify the imposition of liability without fault on certain persons

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weapons would be used in the commission of the assault."); *State v. Doucet*, 638 So. 2d 246, 249 (La. Ct. App. 1994) (collecting Louisiana cases that support application of culpable mental state elevation to while armed element of robbery); *see also People v. Childress*, 2015 CO 65M, ¶ 29, 363 P.3d 155, 164, *as modified on denial of reh'g* (Jan. 11, 2016) (complicitor must have "an awareness of those circumstances attending the act or conduct he seeks to further that are necessary for commission of the offense in question."); *compare Silva-Baltazar*, 886 P.2d at 144 (on charge of drug activity within a drug-free zone, awareness activity occurring in such place not required for "any of the participants," including accomplices); *State v. McCalpine*, 190 Conn. 822, 832–33, 463 A.2d 545, 551 (1983) (determining that there is "no requirement that the accessory possess the intent to commit the specific degree of the robbery charged or the intent to possess a deadly weapon"); *State v. Gonzalez*, 15 A.3d 1049, 1053 (Conn. 2011) (government need not prove culpable mental state as to whether principal, in committing homicide, used, carried or threatened to use a firearm; however, court notes available affirmative defense to effectively preclude strict liability).

[216] 188 N.C. App. 635, 650 (N.C. 2008) (citing *People v. Wood*, 56 Cal.App. 431, 205 P. 698 (1922)).

[217] *Id.* at 651. The Court of Appeals of North Carolina understood this outcome to be dictated by the following principle: "[t]he defendant's subjective knowledge that his actions would aid a criminal act is necessary to uphold a conviction based upon the theory of aiding and abetting." *Id.* at 649 ("If the defendant mistakenly undertook his actions based upon the belief that he was assisting a lawful endeavor, he can not be guilty of aiding and abetting a criminal act."). *See also Com. v. Harris*, 74 Mass. App. Ct. 105, 111–15, 904 N.E.2d 478, 484–87 (2009) ("I]f the Commonwealth proceeds on a "nonpresence" theory, avoidance of injustice may in some cases require proof that the joint venturer had more specific knowledge about the victim's age than would be required for conviction of the principal.").

[218] 787 F.3d 581, 589 (1st Cir. 2015).

[219] *Id.*

[220] *Id.* at 649 ("[U]nder *Rosemond*, an aider and abettor of such an offense must have known the victim was a minor when it was still possible to decline to participate in the conduct."); *see id.* ("If an individual charged as an aider and abettor is unaware that the victim was underage, he cannot 'wish[ ] to bring about' such criminal conduct and 'seek . . . . to make it succeed.'") (quoting *Rosemond*, 134 S.Ct. at 1248).

who themselves engage in the proscribed conduct are not likely to exist as to those rendering aid."[221]

Legal commentary on the culpable mental state requirement governing accomplice liability "is particularly sparse and conflicting for crimes requiring proof of some attendant circumstance."[222] Nevertheless, it appears that the majority approach reflected in the scholarly literature supports a principle of culpable mental state elevation.[223]

In accordance with the above analysis of national legal trends, RCC § 210(a) incorporates the following culpability policies applicable to accomplice liability. First, the prefatory clause of RCC § 210(a) establishes that the culpability required for accomplice liability is, at minimum, that required by the target offense. Second, RCC §§ 210(a)(1) and (2) endorse the purpose view of accomplice liability, under which proof that the secondary party consciously desired to bring about conduct planned to culminate in the target offense is a necessary component of accomplice liability. Third, RCC § 210(b) applies a principle of culpable mental state elevation to circumstance elements, under which the accomplice must intend to bring about any circumstance required by the target offense.[224] Fourth, and finally, RCC § 210(c) establishes that where an offense is graded based upon distinctions in culpability as to results, an accomplice may be held liable for any grade for which he or she possesses the required culpability.

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[221] *Id.* at 649. More specifically, as the First Circuit explained, applying a principle of culpable mental state equivocation would mean that:

> Individuals could be convicted of aiding and abetting the production of child pornography even when they had only a fleeting connection to the crime. For example, a set decorator who believes he is working on the production of a legal adult pornographic film could be held liable as an aider and abettor even if he had no knowledge that one of the participants in the film was underage . . . .
>
> Principals, the argument goes, may be convicted [] without proof they had knowledge of [the victim's] age because they confront[ ] the underage victim personally and may reasonably be required to ascertain that victim's age . . . The same justification would not apply to a set decorator or other similarly situated aider and abettor, who may never even see the victim, much less interact with him or her . . . .

Id. at 588–91. *But see id.* at 613 (discussing the "attendant circumstance" exception discussed in LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2).

[222] Kinports, *supra* note 79, at 134.

[223] *Compare, e.g.*, Alexander & Kessler, *supra* note 164, at 1161 (collecting authorities in support, and arguing for a principle of culpable mental state elevation under which "[r]ecklessness is the universal solvent for circumstantial mens rea"); Kinports, *supra* note 79, at 134 (arguing for application of purpose requirement to circumstance elements); LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2 (supporting principal of culpable mental state elevation as to circumstance elements at least where the offense is one of strict liability); *with* Robinson & Grall, *supra* note 118, at 742 (supporting principle of culpable mental state equivalency as to circumstances); DRESSLER, *supra* note 79, at § 30.6 (same). Note that scholarly support for a principal of culpable mental state equivalency as to circumstances may presuppose acceptance of a general recklessness default applicable to the circumstance elements of the completed offense.

[224] *See* Commentary on RCC § 302(a): National Legal Trends (solicitation); Commentary on RCC § 303(a): National Legal Trends (conspiracy).

RCC § 210(d): Relation to National Legal Trends on Derivative Liability. Accomplice liability provides a basis for holding one person liable for the crimes committed by another.[225] As such, it does not constitute a freestanding form of criminal liability; rather, accomplice liability is derivative in nature.[226] Practically speaking, this means that holding someone liable as an accomplice actually requires proof that a crime was, in fact, committed by someone.[227] Determining what this derivative aspect of complicity specifically entails with respect to an accomplice can be difficult, however, given the various ways in which the principal's legal situation might be resolved.[228]

The most basic set of issues arise where the government prosecutes an accomplice in a situation where the principal has not been convicted of the charged offense. Under these circumstances, one can generally ask: should the fact that the principal has not been convicted preclude conviction of the accomplice? In answering this question, one might further differentiate between the varying reasons for which the principal has not been convicted. For example, the government may have declined to move forward with the prosecution—either because the principal died, fled from the jurisdiction, or had an immunity from prosecution. Alternatively, the government may have attempted to prosecute the principal, but ultimately lost at trial—by an acquittal in either the same proceeding in which the accomplice was being prosecuted or in a separate proceeding.

Yet another set of issues arise where the principal has been convicted of an offense, but that offense is of a different grade than that for which the government is seeking to hold the accomplice liable. For example, an accomplice might be charged with assisting a homicide with the mental state necessary for manslaughter (i.e., heat of passion or recklessness), in a case where the principal has been convicted of acting with the mental state necessary for murder (i.e., intent/absence of mitigating circumstances). Alternatively, the converse is also possible: an accomplice might be charged with assisting a homicide with the mental state necessary for first-degree murder (i.e., intent/absence of mitigating circumstances), in a case where the principal has been convicted (or only can be convicted) of acting with the mental state necessary for manslaughter (i.e., heat of passion or recklessness). In this kind of situation, the question that arises is whether the accomplice may be convicted of a grade of an offense that is either *less serious* (the first scenario) or *more serious* (the second scenario) than that committed by the principal?

The early common law approach to the above issues was relatively restrictive: "[A]n accessory could not be convicted of the crime in which he assisted until the principal was convicted and, with the limited exception of criminal homicide, could not be convicted of a more serious offense or degree of offense than that of which the principal was convicted."[229] More recently, though, "[n]early all states have abrogated these rigid common law rules."[230] For example, it is now generally accepted that "[a]n

[225] DRESSLER, *supra* note 79, at § 30.06; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. *See, e.g.*, *McKnight v. State*, 658 N.E.2d 559, 561 (Ind. 1995).
[226] DRESSLER, *supra* note 79, at § 30.06; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2
[227] DRESSLER, *supra* note 79, at § 30.06; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. *See, e.g.*, *People v. Vaughn*, 465 N.W.2d 365, 369 (Mich. Ct. App. 1990).
[228] The next two paragraphs draw on issues raised in DRESSLER, *supra* note 79, at § 30.06.
[229] *Id.*
[230] *Id.* For case law addressing whether the availability of a justification defense on behalf of the principal extends to an accomplice, see *United States v. Lopez*, 662 F.Supp. 1083 (N.D. Cal. 1987) (liability as an

aider and abettor may be convicted of an offense even though the principal has not been convicted,"[231] or even where the principal has been acquitted.[232] Likewise, it is also generally accepted that an "aider and abettor may be convicted of a lesser or greater offense than the principal."[233]

Abrogation of the early common law approach to implementing the derivative nature of accomplice liability is not a new phenomenon; many jurisdictions adopted these kinds of more expansive policies prior to completion of the Model Penal Code.[234] Nevertheless, it is the Model Penal Code approach to codifying them that provides the contemporary basis for their expression in modern criminal codes.[235] The relevant provision, Model Penal Code § 2.06(7), establishes that:

> An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

The above language encapsulates a cluster of policies. Most fundamentally, it establishes the basic principle of derivative liability, namely, that accomplice liability requires proof that the offense for which the defendant is being held liable was, in fact,

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aider and abettor requires proof of a "criminal act," for that reason a justification defense of a principal, because it is available where there is no wrongful act under the circumstances, precludes accomplice liability on the part of one who aids the justified conduct); *State v. Montanez*, 894 A.2d 928 (Conn. 2006) (alleged accomplice entitled to a jury instruction on the principal's use of self-defense because when an act is justified by self-defense, a third party has the right to assist the principal in his lawful conduct); *U.S. v. Smith*, 478 F.2d 976 (D.C. Cir. 1973) (where principal charged in murder case was improperly deprived of evidence corroborating his claim of self-defense through actions of the government and his conviction therefore was reversed, conviction of second defendant as aider and abettor also reversed because if principal has been acquitted on grounds of self-defense, no crime to aid and abet would have been committed).

[231] *Mayfield v. United States*, 659 A.2d 1249, 1256 (D.C. 1995); *People v. Paige*, 131 Mich.App. 34 (1983) (conviction of principal is not a prerequisite to conviction of aider and abettor, relying on *People v. Mangiapane*, 219 Mich. 62, 188 N.W. 401 (1922)); *Murchison v. United States*, 486 A.2d 77, 81 (D.C. 1984) ("[N]o prerequisite that the principal perpetrator of the offense also be convicted").

[232] *Standefer v. United States*, 447 U.S. 10, 14–20 (1980) (conviction of principal is not a prerequisite to an aiding and abetting conviction, even where principal is acquitted in a separate trial); *United States v. McCall*, 460 F.2d 952, 958 (D.C. Cir. 1972) (acquittal of principal in separate trial does not preclude conviction of aider and abettor); *Singletary v. State*, 509 S.W.2d 572 (Tex. Crim. App. 1974) (acquittal of principal for murder did not require reversal of accomplice's conviction).

[233] *Branch v. United States*, 382 A.2d 1033, 1035 (D.C. 1978) (aider and abettor convicted of lesser offense); *State v. McAllister*, 366 So.2d 1340 (La. 1978) (aider and abettor can be convicted of first degree murder despite the fact that perpetrator was convicted of manslaughter); *State v. Wilder*, 25 Wash. App. 568 (1980) (aider and abettor may be convicted of first degree murder when the principal was only convicted of second degree murder); *Williams v. State*, 383 So.2d 547, 554 (Ala. Crim. App. 1979); *Pendry v. State*, 367 A.2d 627, 630 (Del. 1976); *Potts v. State*, 430 So.2d 900, 902–03 (Fla. 1982); *State v. Lopez*, 484 So.2d 217, 225 (La. Ct. App. 1986); *Handy v. State*, 326 A.2d 189, 196 (Md. 1974); *People v. Paige*, 345 N.W.2d 639, 641 (Mich. 1984); *State v. Cassell*, 211 S.E.2d 208, 210–12 (N.C. 1975); *State v. Tremblay*, 479 P.2d 507–511 (Or. 1971); *Commonwealth v. Strong*, 399 A.2d 88, 90 (Pa. 1979); *State v. Haines*, 192 S.E.2d 879, 881–82 (W. Va. 1972).

[234] *See generally* Model Penal Code § 2.06(7) cmt. at 327-28.

[235] *Id.*

committed.[236] Beyond that, this provision also establishes four specific policies concerning the "relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense."[237] First, it is immaterial that the "person claimed to have committed the offense has not been prosecuted or convicted."[238] Second, it is immaterial that the "person claimed to have committed the offense . . . has been convicted of a different offense or degree of offense."[239] Third, it is immaterial that the "person claimed to have committed the offense . . . has an immunity to prosecution."[240] And fourth, it is immaterial that the "person claimed to have committed the offense . . . has been acquitted."[241]

The above policies, as the accompanying Model Penal Code commentary explains, were understood by the drafters to accord with what were then "modern developments,"[242] i.e., previously existing "legislation that deprives the distinction between principals and accessories of its common law procedural significance."[243] And they were also believed to "follow the consistent principle" reflected throughout Mode Penal Code § 2.06, namely, "that it is only the conduct of the main actor that is attributed to the accomplice, with the degree of liability turning on the accomplice's own culpability."[244]

Since completion of the Model Penal Code, legislative adoption of a general provision based on § 2.06(7) has become a standard feature of comprehensive code reform efforts.[245] This is reflected in the following trends. First, nearly all reform codes incorporate a provision declaring that an accomplice may be convicted even if the principal has not been prosecuted[246] or convicted.[247] Second, a strong majority of reform

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[236] Model Penal Code § 2.06(7) ("An accomplice may be convicted on proof of the commission of the offense and of his complicity therein . . . .").
[237] Model Penal Code § 2.06(7): Explanatory Note.
[238] Model Penal Code § 2.06(7).
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] Model Penal Code § 2.06(7): Explanatory Note.
[243] Model Penal Code § 2.06(7) cmt. at 327-28.
[244] *Id.*
[245] *Id.* (noting that a "great majority of recently enacted codes and proposals" incorporate "a provision comparable to subsection (7)").
[246] Ala. Code § 13A-2-25; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Colo. Rev. Stat. Ann. § 18-1-605; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Haw. Rev. Stat. § 702-225; Ill. Comp. Stat. Ann. ch. 720, § 5/5-3; Ind. Code Ann. § 35-41-2-4; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.Y. Penal Law § 20.05; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.160; Pa. Cons. Stat.Ann. tit. 18, § 306; S.D. Cod. Laws § 22-3-5.1; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201.
[247] Ala. Code § 13A-2-25; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Colo. Rev. Stat. Ann. § 18-1-605; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Haw. Rev. Stat. § 702-225; Ill. Comp. Stat. Ann. ch. 720, § 5/5-3; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.046; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.Y. Penal Law § 20.05; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Or. Rev. Stat. § 161.160; Pa. Cons. Stat.Ann. tit. 18, § 306;

codes incorporate a provision declaring that an accomplice may be convicted even if the principal has been acquitted,[248] or has been convicted of a different offense or degree of offense.[249] And third, a simple majority of reform codes incorporate a provision declaring that an accomplice may be convicted even if the principal has immunity to prosecution or conviction.[250]

Consistent with national legal trends, the RCC incorporates a general provision that is broadly consistent with the Model Penal Code approach to addressing the derivative nature of accomplice liability. The relevant provision, RCC § 210(d), does so by codifying two basic principles. The first is that accomplice liability entails "proof of the commission of the offense" that was, in fact, committed by another person.[251] The second is that, assuming the government can meet this standard of proof, the legal disposition of the principal actor's situation—for example, non-prosecution, the absence of a conviction, or an acquittal—is generally immaterial to that of the accomplice.[252]

RCC § 210(a), (b), (c), & (d): Relation to National Trends on Codification. There is wide variance between jurisdictions insofar as the codification of a general definition of accomplice liability is concerned.[253] Generally speaking, though, the Model Penal Code's general provision, § 2.06,[254] provides the basis for most contemporary reform

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Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Va. Code Ann. § 18.2-21; Wash. Rev. Code § 9A.08.020; Wis. Stat. Ann. § 939.05; Wyo. Stat. § 6-1-201.

[248] Ala. Code § 13A-2-25; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Ill. Comp. Stat. Ann. ch. 720, § 5/5-3; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Md. Code Ann. Crim. Proc. § 4-204; Mo. Ann. Stat. § 562.046; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.Y. Penal Law § 20.05; Pa. Cons. Stat.Ann. tit. 18, § 306; S.D. Cod. Laws § 22-3-5.1; Tenn. Code Ann. § 39-11-407; Wash. Rev. Code § 9A.08.020.

[249] Ala. Code § 13A-2-25; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Colo. Rev. Stat. Ann. § 18-1-605; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Haw. Rev. Stat. § 702-225; Iowa Code Ann. § 703.1; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Md. Code Ann. Crim. Proc. § 4-204; Mo. Ann. Stat. § 562.046; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.160; Pa. Cons. Stat.Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Wash. Rev. Code § 9A.08.020; Wis. Stat. Ann. § 939.05.

[250] Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Haw. Rev. Stat. § 702-225; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mo. Ann. Stat. § 562.046; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.Y. Penal Law § 20.05; N.D. Cent. Code § 12.1-03-01; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Wash. Rev. Code § 9A.08.020.

[251] RCC § 210(d) ("An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein . . . .).

[252] RCC § 210(d) (rendering immaterial the fact that "the other person claimed to have committed the offense: (1) Has not been prosecuted or convicted; or (2) Has been convicted of a different offense or degree of an offense; or (3) Has been acquitted.").

[253] Decker, *supra* note 186, at 239 (noting that "inconsistency between the plain language of states' accomplice liability legislation and its respective interpretation in the state courts").

[254] The relevant subsections, Model Penal Code §§ 2.06(3), (4), and (7), read:

(3) A person is an accomplice of another person in the commission of an offense if:

efforts. The general definition of accomplice liability incorporated into RCC § 210 incorporates aspects of the Model Penal Code approach to drafting while, at the same time, utilizing a few techniques, which depart from it. These departures are consistent with the interests of clarity, consistency, and accessibility.

The most noteworthy drafting decision reflected in the Model Penal Code's general definition of accomplice liability is the manner in which the culpable mental state requirement is codified. Notwithstanding the Model Penal Code drafters' general commitment to element analysis, the culpability language utilized in § 2.06(3) reflects offense analysis, and, therefore, leaves the culpable mental state requirements applicable to accomplice liability ambiguous.[255]

Illustrative is the prefatory clause of Model Penal Code § 2.06(3), which entails proof that the defendant act "with the purpose of promoting or facilitating" the commission of the offense that is the object of the defendant's assistance or encouragement. Viewed from the perspective of element analysis, the import of this language is less than clear. On the one hand, the purpose requirement is framed in terms of commission of the *target offense*. On the other hand, all (target) offenses are comprised of different elements (namely, conduct, results, and circumstances).[256] Based solely on consideration of Model Penal Code § 2.06(3), then, it is unclear to which of the elements of the target offense this purpose requirement should be understood to apply.[257]

It is only through commentary that the drafters of the Model Penal Code clarify their intent for the general purpose requirement set forth in § 2.06(3) to apply, at minimum, to the "bringing about of conduct that the Code has declared to be criminal.[258] This implicit adoption of the true purpose approach to conduct is thereafter accompanied

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> (a) with the purpose of promoting or facilitating the commission of the offense, he
>
> (i) solicits such other person to commit it, or
>
> (ii) aids or agrees or attempts to aid such other person in planning or committing it, or
>
> (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or
>
> (b) his conduct is expressly declared by law to establish his complicity . . . .
>
> (4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense . . . .
>
> (7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

[255] *See* Robinson & Grall, *supra* note 118, at 733-34.

[256] *See also id.* at 758 ("One could be even more precise by distinguishing the accomplice's culpability as to his conduct, generally not an issue, from his culpability as to whether his conduct will assist the perpetrator in committing the offense, the primary issue here.").

[257] *See id.*

[258] Model Penal Code § 2.06 cmt. at 310.

by a further textual clarification that the purpose requirement *does not* apply to results. More specifically, Model Penal Code § 2.06(4) establishes that result elements are subject to a principle of culpable mental state equivalency, under which:

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.[259]

Importantly, Model Penal Code § 2.06 does not incorporate an analogous provision addressing the culpability required for circumstances.[260] Instead, the drafters of the Model Penal Code opted for "deliberate ambiguity as to whether the purpose requirement extends to circumstance elements of the contemplated offense or whether . . . the policy of the substantive offense on this point should control."[261] Through such silence the drafters intended to delegate the issue "to resolution by the courts."[262] This is the same approach reflecting in the Model Penal Code's general solicitation[263] and conspiracy provisions,[264] both of which also "deliberately le[ave] open" the "matter" of whether the circumstances of the target offense are subject to a principle of culpable mental state elevation or equivalency,[265] with the goal of "affording courts sufficient flexibility for satisfactory decision as such cases may arise."[266]

While consistent with the Model Penal Code's solicitation and conspiracy provisions, this grant of policy discretion to the courts is no less problematic. The codification virtues of clarity, consistency, and fair notice all point towards providing comprehensive legislative guidance concerning the culpable mental state requirement accomplice liability,[267] "rather than the type of ad hoc, fact-specific, case-by-case development that would result from an attempt to solve [related policy issues through] continued reliance on common law."[268] Comprehensive legislation of this nature also serves the interests of due process: "[c]riminal statutes are," after all, "constitutionally required to be clear in their designation of the elements of crimes, including mental elements."[269]

With this in mind, the RCC approach to codifying the culpable mental state of accomplice liability strives to provide the clarity lacking from the Model Penal Code,

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[259] Model Penal Code § 2.06(4).
[260] Robinson & Grall, *supra* note 118, at 739.
[261] Model Penal Code § 2.06 cmt. at 311 n.37.
[262] *Id.*
[263] Model Penal Code § 5.02(1).
[264] Model Penal Code § 5.03(1).
[265] Model Penal Code § 5.02(1) cmt. at 371 n.23.
[266] Model Penal Code § 5.03(1) cmt. at 113.
[267] *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 332-366 (2005).
[268] *Com. v. Barsell*, 424 Mass. 737, 741 (1997); *see also* Robinson & Grall, *supra* note 118, at 754 ("The ambiguous language of the conspiracy provision coupled with the ambivalent language of the commentary indicates a need for clarification."). For discussion of the problems this delegation has created, see Mueller, *supra* note 202, at 2179.
[269] Wesson, *supra* note 207, at 209.

while at the same time avoiding unnecessary complexity to the extent feasible. This is accomplished in three steps.

To start, the prefatory clause of RCC § 210(a) establishes that the culpability requirement applicable to accomplice liability necessarily incorporates "the culpability required by [the target] offense." This language is modeled on the prefatory clauses employed in various modern accomplice liability statutes.[270] It effectively communicates that accomplice liability requires, at minimum, proof of the culpable mental states (if any) governing the results and circumstances of the target offense.[271]

Next, RCC § 210(a)(1) and (2) clearly and directly articulate that accomplice liability's distinctive purpose requirement governs the conduct which constitutes the object of the assistance or encouragement. More specifically, RCC § 210(a)(1) states that the defendant must "[p]urposely assist[] another person with the planning or commission of conduct constituting that offense." Likewise, RCC § 210(a)(2) states that the defendant must "[p]urposely encourage[] another person to engage in conduct constituting that offense." This language is modeled on the approach in a few modern accomplice liability provisions, which clarify that proof of a conscious desire as to the conduct constituting the target offense is necessary where the government's theory of liability is based on *assistance*.[272] Notably, however, these statutes are silent on the relationship between the actor's state of mind and the conduct elements of the target where the government's theory of liability is based on *encouragement*.[273] The latter approach is unnecessarily ambiguous—whereas the drafting technique employed in the RCC allows for a more succinct general statement of the culpable mental state requirement governing accomplice liability.

Thereafter, RCC § 210(b) provides explicit statutory detail concerning the relationship between an accomplice's state of mind and the circumstances of the target offense. More specifically, RCC § 210(b) establishes that: "Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist." This language incorporates a principle of culpable mental state elevation governing circumstances applicable whenever the target offense is comprised of a circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). For these offenses, proof of intent on behalf of the accomplice is required as to the requisite circumstance elements.

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[270] *See* Conn. Gen. Stat. Ann. § 53a-8 ("acting with the mental state required for commission of an offense . . ."); N.Y. Penal Law § 20.00 ("acting with the mental culpability required for the commission thereof"); Kan. Stat. Ann. § 21-5210(a) ("acting with the mental culpability required for the commission thereof").

[271] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 201(d) (culpability requirement defined). This clause also addresses broader aspects of culpability such as, for example, premeditation, deliberation, or the absence of any mitigating circumstances, which the target offense might likewise require. Being an accomplice to such an offense would, pursuant to the prefatory clause of § 210(a), require proof of the same.

[272] *See* Conn. Gen. Stat. Ann. § 53a-8 ("solicits, requests, commands, importunes or *intentionally aids* another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender"); N.Y. Penal Law § 20.00 ("solicits, requests, commands, importunes, or *intentionally aids* such person to engage in such conduct"); Kan. Stat. Ann. § 21-5210(a) ("advises, hires, counsels or procures the other to commit the crime or *intentionally aids* the other in committing the conduct constituting the crime.").

[273] *See* sources cited *id.*

Finally, RCC § 210(c) provides additional clarity concerning the disposition of cases involving the commission of an offense that is divided into degrees based upon distinctions in culpability as to results, where an accomplice and the principal act with different states of mind.

The Model Penal Code approach to addressing this issue is *apparently* reflected § 2.06(4), under which "an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."[274] The drafters intended for this language to be read as attributing the relevant criminal conduct "to both participants, with the liability of each measured by his own degree of culpability toward the result."[275] However, the envisioned legal proposition (i.e., that an accomplice may be convicted of a different grade of an offense than that which is committed by the principal where there are variations in culpable mental state[276]) is far from clear based upon the text of § 2.06(4).[277]

With that in mind, and in the interests and clarity and consistency, the RCC incorporates a clearer and more direct approach to communicating this principle of individualized liability. More specifically, RCC § 210(c) states that: "An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability." This language is premised upon the modern accomplice liability statutes employed in a handful of reform jurisdictions.[278] It explicitly addresses by statute an important culpability issue upon which the Model Penal Code is ambiguous (and ultimately relies upon commentary to clarify).

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the culpable mental state requirement governing accomplice liability, which avoids the flaws and ambiguities reflected in Model Penal Code § 2.06(3)-(4).[279]

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[274] Model Penal Code § 2.06(4).

[275] *Id.*; *see also* Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1386 (1998) ("A fair interpretation of the relationship between subsections (3) and (4) is that once the state can establish that the secondary actor had the purpose to promote or facilitate the commission of one particular offense, as required under subsection (3), that actor will also be liable for additional, unplanned, result-oriented crimes the principal commits as long as that actor possesses the mens rea required by the crime for that result.").

[276] Model Penal Code § 2.06 cmt. at 311.

[277] For a critique along these lines, see Rogers, *supra* note 275, at 1375; *see also State v. Etzweiler*, 480 A.2d 870, 875 (N.H. 1984) (providing similar critique).

[278] *See, e.g.*, Del. Code Ann. tit. 11, § 274 ("When, pursuant to § 271 of this title, 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance.").

[279] One other revision worth noting is that RCC § 210(d) omits reference to "immunity to prosecution or conviction" under Model Penal Code § 2.06(7) in the interests of brevity and simplicity. Any actor who has an immunity to prosecution or conviction necessarily "has not been prosecuted or convicted" under RCC § 210(d)(1) and, therefore, is covered by this broader language. As a result, the immunity clause is superfluous. *See generally supra* note 250 and accompanying text (observing that the immunity clause is less frequently codified than all other clauses contained in Model Penal Code § 2.06(7)).

§ 22A-211 LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON

(a) USING ANOTHER PERSON TO COMMIT AN OFFENSE. A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense.

(b) INNOCENT OR IRRESPONSIBLE PERSON DEFINED. An "innocent or irresponsible person" within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense:

(1) Lacks the culpable mental state requirement for that offense; or

(2) Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.

COMMENTARY

Explanatory Notes. Subsections (a) and (b) codify the innocent instrumentality rule applicable under the Revised Criminal Code (RCC). Collectively, these provisions provide a comprehensive statement of the conduct requirement and culpable mental state requirement necessary to support criminal liability for causing another person to commit a crime.

The innocent instrumentality rule provides a causal mechanism for holding one party, P, criminally liable for the acts of another party, X, under circumstances where X is innocent or irresponsible, and, therefore, cannot him or herself be held criminally liable.[1] Where, as in these situations, P has effectively used X as a means of achieving a criminal objective, it is appropriate to view X's conduct as an extension of P's for analytical purposes. RCC § 211 authorizes this form of imputation upon proof of three basic requirements.

First, the intermediary must qualify as "an innocent or irresponsible person," RCC § 211(a). This phrase, as further clarified in subsection (b), envisions two different types of actors. Pursuant to subsection (b)(1), there are those who, having engaged in conduct that satisfies the objective elements of an offense, lack the culpable mental state requirement for that offense.[2] Pursuant to subsection (b)(2), there are those who, having engaged in conduct that satisfies the objective elements of an offense, meet the requirements for an excuse defense,[3] such as insanity,[4] immaturity,[5] duress,[6] or a reasonable mistake as to justification.[7]

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[1] Ordinarily, one party cannot be held criminally liable for the conduct of a second party unless the second party actually commits a crime. *See* RCC § 210 (accomplice liability applicable when, but only when, the government can establish that the defendant purposely assisted or encouraged another person w*ith the commission of a crime*).

[2] This would apply, for example, in the situation of a bank manager who carries out a theft by asking an employee to retrieve funds, based on the lie that the company's CEO has authorized the withdrawal.

[3] Which is to say, a defense that negates an actor's blameworthiness.

The second requirement is one of a causal nexus,[8] namely, the relationship between the defendant's conduct and that of the intermediary must be sufficiently close to satisfy the principles of factual[9] and legal[10] causation set forth in RCC § 204. In this context, factual causation entails proof that the defendant did something to manipulate or otherwise use the innocent or irresponsible person, so that it may be said that but for the defendant's actions, the intermediary would not have engaged in the prohibited conduct.[11] Even where this empirical prerequisite is met, however, the principle of legal causation precludes liability if the nexus between the defendant's conduct and that of the intermediary is too remote or attenuated to fairly allow for a conviction.[12]

The third requirement is that the defendant must act with the "the culpability required by [the target] offense," RCC § 211(a).[13] This requirement entails proof that the defendant caused an innocent or irresponsible person to engage in conduct constituting an offense with the state of mind—purpose, knowledge, intent, recklessness, negligence, or none at all (i.e., strict liability)—applicable to each of the objective elements that comprise the offense.[14] In practice, this means that a defendant *may* be held criminally

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[4] This would apply, for example, in the situation of a hit man who induces a mentally ill individual to carry out an assassination on his behalf.

[5] This would apply, for example, in the situation of a gang member who carries out a retaliatory murder by asking his young child to shoot the rival.

[6] This would apply, for example, in the situation of a sexual predator who forces one victim to perform sexual acts upon another victim at gunpoint.

[7] This would apply, for example, in the situation of a person who orchestrates the death of an enemy by police through a fraudulent 911 call indicating that the target is armed, dangerous, and prepared to shoot any member of law enforcement upon arrival. And it would also apply where an aggressor provokes his victim to mistakenly fire in reasonable self-defense at an innocent bystander, thereby resulting in the death of the bystander.

[8] *See generally* 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.").

[9] *See generally* RCC § 204(b) ("Factual cause" means . . . The result would not have occurred but for the person's conduct; or . . . In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.").

[10] *See generally* RCC § 204(c) ("Legal cause" means the result was a reasonably foreseeable consequence of the person's conduct. A consequence is reasonably foreseeable if its occurrence is not too remote, accidental, or otherwise dependent upon an intervening force or act to have a just bearing on the person's liability.").

[11] For example, where P gives X, an irresponsible agent known to have a penchant for mad driving, the keys to P's car, P is the factual cause of any injuries X subsequently inflicts on the road. If, however, P merely helps X back out of the driveway while X is driving his own car, P would not be a factual cause of any injuries X subsequently inflicts on the road (provided, of course, that P's assistance is not a necessary condition to X's drive).

[12] For example, if a parent leaves a loaded firearm in his toddler's outdoor play area, and the parent's own toddler find its, and subsequently uses it to injure a playmate at the parent's house, that parent is the legal cause of the subsequent harm caused by the toddler. If, in contrast, the parent leaves the loaded firearm in his toddler's outdoor play area, and a tornado thereafter moves the weapon to the back of a cargo truck which subsequently moves the weapon to a different toddler's backyard on the other side of the city, the parent would not be the legal cause of any harm caused by that other toddler.

[13] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 201(d) (culpability requirement defined).

[14] For example, if rape requires proof of *intentionally* engaging in sexual intercourse, with *negligence* as to the absence of consent, P may be held liable for coercing X to rape V if (but only if) it can be proven that: (1) P *intentionally* caused X to engage in sexual intercourse with V; and (2) P did so *failing to perceive a substantial risk* that V was not consenting to the episode.

liable for a crime of recklessness or negligence under RCC § 211, provided that he or she caused the conduct of an innocent or irresponsible person with the requisite non-intentional culpable mental state.[15] Under no circumstances, however, should RCC § 211 be construed to allow for a conviction upon proof of a lesser form of culpability than that required by the target offense.[16]

Relation to Current District Law. Subsections (a) and (b) codify, clarify, and fill in gaps reflected in District law relevant to the innocent instrumentality doctrine.

There is little District authority on the innocent instrumentality doctrine. Nevertheless, that which does exist supports the "universally acknowledged principle" that "one is no less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent."[17]

More than a century ago, District courts recognized that criminal liability may attach for an offense committed indirectly, including through unwitting agents, such as, for example, "where one procures poison to be administered by an innocent agent to a third person."[18] And this also remains true today: while there exists ongoing disagreement at the DCCA over whether it is ever appropriate to hold one person criminally responsible for causing a *culpable* actor to engage in prohibited conduct (separate and apart from aider and abettor liability),[19] there seems to be agreement that a

[15] For example, if homicide rises to the level of manslaughter when it is recklessly committed, P may be convicted for leaving his car keys out around X, an irresponsible agent known to have a penchant for mad driving, if X subsequently finds them and kills V on the road, provided the following can be proven: (1) P *consciously disregarded a substantial risk* that his keys, if found by X, would lead X to operate the vehicle in a deadly manner; and (2) P's carelessness constitutes a gross deviation from the standard of care that a reasonable person in his situation would observe.

[16] For example, if obtaining property by false pretenses is a crime only if the false pretenses are made purposely, P does not commit it by negligently causing X to make statements that are false. Instead, P must do so purposely.

[17] Model Penal Code § 2.06 cmt. at 300.

[18] *United States v. Guiteau*, 1882 WL 118, at *16 (D.C. Jan. 10, 1882). Similarly, as the U.S. Court of Appeals for the D.C. Circuit observed in *Maxey v. United States*:

> It is the known and familiar principle of criminal jurisprudence, that he who commands or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots employed to administer poison. The proof of the command or procurement may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency." *United States* v. *Gooding*, 12 Wheat. 460, 469, 6 L. ed. 693, 696. *See also* 1 Bishop, Crim. Law, secs. 649, 651, 652; *People* v. *Adams*, 3 Denio, 190, 207, 45 Am. Dec. 468; *Seifert* v. *State*, 160 Ind. 464, 467, 98 Am. St. Rep. 340, 67 N. E. 100. Those authorities fully sustain the general principle of law declared by the court, that one may be convicted as a principal, though acting in the commission of the crime through an innocent agent.

30 App. D.C. 63, 74–75 (D.C. Cir. 1907).

[19] This is reflected in the litigation over the gun battle theory of liability. *See generally Fleming v. United States*, 148 A.3d 1175, (D.C. 2016), *reh'g en banc granted, opinion vacated*, 164 A.3d 72 (D.C. 2017). *Compare Roy v. United States*, 871 A.2d 498, 502 (D.C. 2005) (upholding jury instruction that permitted the jury to find that the defendant, by engaging in a gun battle in a public space, was responsible for causing the death of an innocent bystander killed by a stray bullet even if it was not the defendant who fired

causal theory of criminal liability is appropriate where "A uses B as an innocent instrumentality."[20]

Illustrative is the DCCA's decision in *Blaize v. United States*.[21] At issue in *Blaize* was the defendant's conviction for voluntary manslaughter, which was based on the following facts: D fires shots at V, sending V running; the noise of the shots also startles X, an illegally parked driver; in response to the shots, X speeds away at a rate of approximately 90 mph; X thereafter hits and kills V.[22] On appeal, the DCCA upheld the conviction applying a causal analysis, premised on the proposition that because "[X's] attempt[] to flee quickly, and without careful attention to pedestrian safety, w[as] entirely predictable," there was no problem with holding D responsible for the death of V although the immediate cause was X's conduct.[23]

This sparse case law is accompanied by a Redbook jury instruction entitled "willfully causing an act to be done."[24] Premised on the federal statute, 18 U.S.C. § 2(b), that instruction reads:

> You may find [name of defendant] guilty of the crime charged in the indictment without finding that s/he personally committed each of the acts constituting the offense or was personally present at the commission of the offense. A defendant is responsible for an act which s/he willfully causes to be done if the act would be criminal if performed by him/her directly or by another. To "cause" an act to be done means to bring it about. You may convict [name of defendant] of the offense charged if you find that the government has proved beyond a reasonable doubt each element of the offense and that [name of defendant] willfully caused such an act to be done, with the intent to commit the crime.[25]

This instruction is thereafter accompanied by a brief commentary collecting federal cases, which support the proposition that "an individual can be criminally culpable for causing an intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime."[26]

RCC § 211 is substantively consistent with the above District authorities, while, at the same time, providing a clearer and more comprehensive approach for applying the innocent instrumentality rule. Subsection (a) establishes that one person may be held criminally liable for the acts of an innocent or irresponsible person provided that: (1) the

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the fatal round, provided that the death was reasonably foreseeable) *with Fleming*, 148 A.3d at 1177 ("[E]ven assuming arming oneself with a gun and firing it could satisfy the direct causation requirement, the volitional, felonious act of someone else then shooting and killing the decedent is an 'intervening cause' that breaks this chain of criminal causation.") (Easterly, J., dissenting).

[20] *Fleming*, 148 A.3d at 1189 n.14 (Easterly, J., dissenting).

[21] *Blaize v. United States*, 21 A.3d 78, 80 (D.C. 2011).

[22] *Blaize*, 21 A.3d at 80-81.

[23] *Id.* at 83.

[24] D.C. Crim. Jur. Instr. 3.102.

[25] *Id.*

[26] *See Fraley v. U.S.*, 858 F.2d 230, 233 (5th Cir. 1988); *U.S. v. Cook*, 745 F.2d 1311 (10th Cir. 1984); *U.S. v. Rucker*, 586 F.2d 899, 905 (2d Cir. 1978); *U.S. v. Deaton*, 563 F.2d 777, 778 (5th Cir. 1977); *U.S. v. Ordner*, 554 F.2d 24, 29 (2d Cir. 1977); *U.S. v. Rapoport*, 545 F.2d 802, 805-06 (2d Cir. 1976); *U.S. v. Lester*, 363 F.2d 68 (6th Cir. 1966).

principal actor causes the innocent or irresponsible person to engage in conduct constituting an offense; and (2) the principal actor does so with the culpability requirement applicable to that offense. Thereafter, subsection (b) clarifies the primary bases for viewing a human intermediary as "innocent or irresponsible," namely, (1) lacking the culpable mental state requirement for an offense; or (2) acting under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to justification.

Relation to National Legal Trends. There are two primary means by which one person can be held accountable for the conduct of another. The first, and most common, is that of accomplice liability; it applies where one party intentionally assists or encourages the commission of an offense committed by another party.[27] There is, however, one important limitation confronting accomplice liability, namely, the requirement that the other party *actually commit an offense*.[28]

Consider the following illustration: a drug dealer asks his sister—who is unaware of her brother's means of employment—to pick up a package for him at the post office. He credibly tells his sister that the package is filled with cooking spices; however, it is actually filled with heroin. If the sister is subsequently arrested by the police in transit from the post office, the drug dealer cannot be deemed an accomplice to the possession of narcotics by the sister since the sister cannot herself be convicted of that offense.[29] Although she has engaged in conduct that satisfies the *objective elements* of an offense, the sister nevertheless does not act with the required *culpable mental state*, i.e., knowledge (or even negligence) as to the nature of the substance in her possession.[30]

Under these circumstances, the drug dealer can, however, be held criminally responsible for possession as a principal under a different theory of liability: the "innocent instrumentality rule."[31] This rule posits that, where the defendant manipulates an innocent person to commit what would be a crime if the innocent person were not legally excused or justified, the innocent person's conduct may be imputed to the defendant.[32]

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[27] *See generally* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. §§ 13.2 (3d ed. Westlaw 2018); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.04 (6th ed. 2012).

[28] *See generally* LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 27, at § 30.04.

[29] *See generally* LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 27, at § 30.04.

[30] *See generally* LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 27, at § 30.04.

[31] *See, e.g.*, DRESSLER, *supra* note 27, at § 30.03 ("The term 'accomplice' does not include one who coerces or manipulates an innocent person to commit an offense. Such an actor is considered the perpetrator of the offense, the 'principal in the first degree' in traditional common law parlance, based on the 'innocent instrumentality' doctrine."); LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1; *Morrisey v. State*, 620 A.2d 207 (Del. 1993); *State v. Williams*, 916 A.2d 294 (Md. 2007).

[32] For an illustrative example of the distinct role that each of these two theories of liability play, consider the difference between aiding and abetting a theft (via solicitation) and using another person to commit a theft, drawn from DRESSLER, *supra* note 27, at § 28.01.

If D1 suggests to X1 that the latter steal V1's television set, and X1 thereafter does as requested, X1 is the perpetrator of the offense and D1 is an accomplice to the theft based upon the solicitation. In contrast, suppose that D2 fraudulently says to X2: "My television set is at V2's house. He asked me to pick it up. Would you do me a favor and get it for me?" If X2 does as requested, D2 is not guilty of solicitation to commit larceny, and therefore would not be X2's accomplice, because D2 is not requesting X2 to engage in conduct that would constitute a crime by X2. Instead, D2 is attempting to perpetrate the offense himself, by using X2 as his dupe. Which is to say: X2 is D2's "innocent instrumentality" because, if X2 believes

The innocent instrumentality rule is based on, but also departs from, normal principles of causation. The rule treats an actor who uses an innocent person as the means of committing a crime as having caused that person's act in the same way he would be seen to cause a physical event (e.g., firing a gun to injure another person).[33] This kind of treatment constitutes a departure from the standard approach to causation doctrine, under which other people's conduct are not typically viewed "as caused happenings, but as the product of the actor's self-determined choices, so that it is the actor who is the cause of what he does, not [the individual] who set the stage for his action."[34] Where, however, one party, P, induces another party, X, to engage in generally prohibited conduct that is either excusable or justifiable, the analysis materially changes. This is because, "[f]or purposes of causation doctrine, excusable and justifiable actions are not seen as completely freely chosen."[35] Under such circumstances, the law regards P as a principal and X as a tool—an innocent agent—that P uses to commit the crime.[36]

The innocent instrumentality rule is a well-established common law doctrine.[37] Historically, American legal authorities have long viewed the act of an innocent agent induced by another to commit a crime to be "as much the act of the procurer as if he were present and did the act himself."[38] And this is still true today: the idea that "one is no

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D2's representations and takes V2's property, X2 is not guilty of larceny since he lacks the specific intent to steal.

[33] Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 369-70 (1985).

[34] *Id.*; *see* JOHN KAPLAN ET AL., CRIMINAL LAW 261 (6th ed. 2008) ("Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions."). Note that where an animal is employed, no such issues arise:

> For example, suppose that D trains his dog to pick up his neighbor's newspaper every morning from the front lawn and bring it to D, who keeps the newspaper as his own. D is guilty of petty larceny—he is the principal in the first degree of the theft. Because the dog is not a human being and, therefore, does not have the capacity to form a culpable mental state, the animal is D's innocent instrumentality. We no more treat the dog as the perpetrator of the theft than we would say that a gun is the "perpetrator" of a murder and that the person pulling the trigger is the gun's "accomplice."

DRESSLER, *supra* note 27, at § 28.01.

[35] Kadish, *supra* note 33, at 369–70. *See* H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 326 (2d ed. 1985) ("The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.").

[36] Kadish, *supra* note 33, at 369–70.

[37] Commentary on Ky. Rev. Stat. Ann. § 502.010 ("That an individual may incur criminal liability by procuring a prohibited harm through an act of an innocent or irresponsible agent is a principle of long standing."); *see, e.g.*, LAFAVE, *supra* note 27, at § 13.1 *Gallimore v. Com.*, 436 S.E.2d 421, 427 (Va. 1993); *State v. Thomas*, 619 S.W.2d 513, 514 (Tenn. 1981); Gabriel Hallevy, *The Criminal Liability of Artificial Intelligence Entities-from Science Fiction to Legal Social Control*, 4 AKRON INTELL. PROP. J. 171, 179 (2010).

[38] J. Turner, 1 RUSSELL ON CRIME 129 (12th ed. 1964); *see United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966) *cert. denied* 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967) ("This doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as Regina v. Saunders, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per alium facit per se*, at least as early as the 14th century") (citing *United States v. Gooding*, 25 U.S. (12

less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent" remains a "universally acknowledged principle" reflected across an array of contemporary common law authorities.[39]

The innocent instrumentality rule, as construed by these authorities, is generally comprised of three main requirements.[40] The first, and most fundamental, is that a human intermediary, in order to be deemed an instrumentality, must have *non-culpably* engaged in criminal conduct.[41] There are a variety of circumstances that will support this essential finding of blamelessness.[42]

The most common fact patterns involve an intermediary who has been induced by the principal to engage in criminal conduct by misleading or incomplete information. Where the principal's deceptive practices preclude the intermediary from acting with the culpable mental state requirement applicable to an offense, the intermediary is treated as an instrumentality whose conduct may be imputed to the principal.[43]

Even where an intermediary acts with the culpable mental state requirement applicable to an offense (e.g., intentionally commits an offense's objective elements), the innocent instrumentality rule may still apply if the conditions for an excuse defense are met. For example, where P induces X, a child, to intentionally engage in criminal conduct, P is nevertheless accountable for such conduct if X possesses an immaturity defense.[44] Similarly, where P coerces X by threat of physical violence to intentionally engage in criminal conduct, P is nevertheless accountable for such conduct if P possesses a duress defense.[45] And where P induces X, a mentally ill individual, to intentionally

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Wheat.) 460, 6 L.Ed. 693 (1827)); *see also* F.B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930).

[39] Model Penal Code § 2.06 cmt. at 300.

[40] LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1.

[41] Note that the innocent instrumentality rule can be applied to impute some, but not all, of the objective elements of an offense. *See Morrisey v. State*, 620 A.2d 207, 210 (Del. 1993) ("Consequently, in this case, although the innocent persons who Morrisey forced to engage in sexual intercourse were unarmed, the aggravating element of displaying what appeared to be a deadly weapon was provided by Morrisey's own conduct.").

[42] Kadish, *supra* note 33, at 369–70 ("The doctrine of causation through an innocent agent has been widely applied in a great variety of situations.").

[43] *See, e.g.*, *United States v. Bryan*, 483 F.2d 88 (3d Cir. 1973) (innocent party induced to ship whiskey); *Boushea v. United States*, 173 F.2d 131 (8th Cir. 1949) (innocent party induced to submit false claim); *People v. Mutchler*, 140 N.E. 820 (Ill. 1923) (fraudulent check cashed by innocent agent); *State v. Bourgeois*, 148 So.3d 561 (La. 2013); State v. Runkles, 605 A.2d 111 (Md. 1992); *McAlevy v. Commonwealth*, 620 S.E.2d 758 (Va. 2005); *Jones v. State*, 256 P.3d 527 (Wyo. 2011).

[44] LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1 ("[I]f A, with intent to bring about B's death, causes C (a child) to take B's life, A is guilty of intent-to-kill murder."); *see, e.g., State v. Bobenhouse*, 166 Wash.2d 881 (2009) (defendant forced his two minor children to have sex with one another); *Maxey v. United States*, 30 App.D.C. 63 (D.C. Cir. 1907) (child given funds and directed to obtain abortion); *Commonwealth v. Hill*, 11 Mass. 136 (1841) (child used to pass counterfeit check).

[45] DRESSLER, *supra* note 27, at § 30.06 ("If D coerces X to commit a theft by threatening X's life, X will be acquitted of larceny on the basis of duress. Today, and according to common law principles, D may be convicted of larceny. X was D's innocent instrumentality."); *see, e.g., Parnell v. State*, 912 S.W.2d 422 (Ark. 1996) (defendant was guilty of rape where he forced his adopted children to have sexual relations, even though the son would have a duress defense to a rape charge); *State v. Thomas*, 619 S.W.2d 513 (Tenn. 1981) (defendant was guilty of criminal sexual conduct where he forced wife at gunpoint to perform sexual acts on her husband); *Morrisey v. State*, 620 A.2d 207 (Del. 1993).

engage in in criminal conduct, P is nevertheless accountable for such conduct if X possesses an insanity defense.[46]

One other important situation in which the innocent instrumentality rule applies is where the intermediary makes a reasonable mistake as to a justification, i.e., mistakenly causes harm in a situation where the justifying conditions were culpably created by the principal. Illustrative situations include: (1) where P orchestrates the fatal shooting of his enemy, V, by a police officer, X, based on a fraudulent 911 call indicating that V is standing outside his home armed, dangerous, and prepared to shoot any member of law enforcement upon arrival[47]; and (2) where P, a robber, provokes his victim, X, to mistakenly kill an innocent bystander, V, in reasonable self-defense.[48] Under these circumstances, the innocent instrumentality rule provides the basis for imputing X's lethal yet mistakenly justified conduct to P based upon his or her having culpably created the conditions that gave rise to it.[49]

Once it has been determined that an intermediary who engages in statutorily prohibited conduct qualifies as an instrumentality, the next issue to be addressed is whether a sufficient causal nexus between the defendant's conduct and that of the intermediary exists.[50] The innocent instrumentality rule is subject to a causation requirement comprised of the same basic principles of factual causation and legal causation applicable throughout the criminal law. In this context, factual causation entails an empirical evaluation of whether the P was the logical, but-for cause of X's conduct, i.e., the question is whether "P did something to manipulate or otherwise use X, so that it may be said that, but for P's conduct, X would not have engaged in the conduct for which P is being held accountable."[51] Legal causation, in contrast, imports a normative evaluation of whether the chain of events following P's attempt at inducing X

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[46] *Jones v. State*, 19 So. 2d 81, 83 (Ala. Ct. App. 1944) ("One may or could use an insane person as the agent of destruction . . . just as guiltily as with a person of sound mind."); *see, e.g., Johnson v. State*, 38 So. 182 (Ala. 1904) (incompetent person incited to kill); *People v. Monks*, 24 P.2d 508 (Cal. 1933) (incompetent person induced to draw check against insufficient funds).

[47] On similar facts, the Supreme Court of Virginia in *Bailey v. Commonwealth* rejected the defendant's contention that he could not be convicted of manslaughter because the actual perpetrators of the offense, the police, were innocent of any wrongdoing. 329 S.E.2d 37 (Va. 1985). The court explained that the defendant, who orchestrated a scenario that resulted in the victim's being shot by the police, could be convicted because, as one who employed an innocent agent, he was guilty as a principal in the first degree. *Id.* at 40.

[48] Model Penal Code § 2.06 cmt. at 303; *see also Taylor v. Superior Court*, 477 P.2d 131 (Cal. 1970) (court would not hold the defendant directly liable under the felony-murder rule for the justifiable killing of a co-felon by the owner of the store the defendant and his co-felons were robbing; the court was willing, however, to permit an imputation of liability under a theory of vicarious liability focusing upon a co-felon's earlier conduct, initiating the gun battle, that caused the justifying circumstances).

[49] *See* PAUL H. ROBINSON, 2 CRIM. L. DEF. § 123 (Westlaw 2018).

[50] *See, e.g.*, Commentary on Ky. Rev. Stat. Ann. § 502.010 ("His act or omission to act must be shown to have caused the conduct of the innocent or irresponsible person which resulted in the crime."); DRESSLER, *supra* note 27, at § 30.09.

[51] DRESSLER, *supra* note 27, at § 30.09; *see, e.g., United States v. Kegler*, 724 F.2d 190, 200 (D.C. Cir. 1983) ("'Cause' means 'bringing about'") *United States v. Keats*, 937 F.2d 58, 64 (2d Cir. 1991) ("physical consequence"); *United States v. Levine*, 457 F.2d 1186, 1188 (10th Cir. 1972) ("procures or brings about"). Sometimes this is framed in terms of whether the defendant is the "cause in fact." *United States v. Nelson*, Nos. 98-1231, 98-1437, 2002 WL 14171, at *35 (2d Cir. Jan. 7, 2002) ("cause in fact" (emphasis omitted) (quoting *United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992)); *United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir. 1970) ("cause-in-fact").

to engage in criminal conduct were "reasonably foreseeable,"[52] or not too "attenuated,"[53] to justify holding the defendant liable under the circumstances.[54]

The third, and final, requirement is that the defendant must have committed the *actus reus* of the innocent instrumentality rule "with whatever *mens rea* or mental state is needed for the crime."[55] More specifically, the government must prove that the defendant caused an innocent or irresponsible person to engage in conduct constituting an offense with the state of mind—purpose, knowledge, intent, recklessness, negligence, or none at all (i.e., strict liability)—applicable to each of the objective elements that comprise the offense. So, for example, in a jurisdiction where rape requires proof of *intentionally* engaging in sexual intercourse, with *negligence* as to the absence of consent, P may be held liable for coercing X to rape V if (but only if) it can be proven that: (1) P *intentionally* caused X to engage in sexual intercourse with V; and (2) P did so *failing to perceive a substantial risk* that V was not consenting to the episode.[56]

This general principle of culpable mental state equivalency has three main implications. First, the innocent instrumentality rule does not require proof of intent; rather, "a defendant may be held liable for causing the acts of an innocent agent even if he does so recklessly or negligently, so long as no greater *mens rea* is required for the underlying offense."[57] For example, P may be held liable for reckless manslaughter if he *recklessly* leaves his car keys with X, an irresponsible agent known to have a penchant for mad driving, if X subsequently kills V on the road, provided that P *consciously*

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[52] *Pereira v. United States*, 347 U.S. 1 (1954) (reasonably foreseeable consequences are "caused" for purposes of innocent instrumentality rule); *see United States v. Alexander*, 135 F.3d 470, 474-75 (7th Cir. 1998) (observing that the *Pereira* decision is the foundation upon which an entire line of cases holds that a defendant "causes" a third party to mail or wire transmission for purposes of mail fraud when the defendant acts with the knowledge that use of the mails or wire facilities will occur in the ordinary course of business or where such use can reasonably be foreseen).

[53] *United States v. Hsia*, 176 F.3d 517, 522–23 (D.C. Cir. 1999).

[54] Note that there is clearly a spectrum of cases along which the strength of the causal relation varies with the actor's degree of control over the other person or, in other words, with the other person's degree of independent action. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 631–32 (1984). *See Fritz v. State*, 130 N.W.2d 279 (Wis. 1964) (X persuaded Y, who had a history of mental illness, to kill X's husband, where such persuasive powers derived from emotional manipulation of Y); *United States v. Nelson*, 277 F.3d 164, 213 (2d Cir. 2002) (causal link was between X's speech at the scene of the accident which led to the rioting and violence and the eventual attack by Y on victim).

[55] *See, e.g.*, Commentary on Ky. Rev. Stat. Ann. § 502.010 (under the innocent instrumentality rule a defendant must be "shown to have acted with a culpable mental state sufficient for commission of the offense charged," which "is established if it is shown that a defendant intended to accomplish the resulting criminal objective through a non-culpable agent"); DRESSLER, *supra* note 27, at § 30.09; *cf.* Joshua Dressler, *Reforming Complicity Law: Trivial Assistance As A Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 448 (2008) ("[S]uppose that S, unaware that P is insane, provides a gun to P at the latter's request so that P can murder V. If P is later acquitted on insanity grounds, the law should not treat S as the perpetrator of the crime through "innocent instrumentality" P. P was not manipulated by S; he was not S's instrument.").

[56] *See Morrisey v. State*, 620 A.2d 207, 210 (Del. 1993).

[57] Kadish, *supra* note 33, at 410; *see* Commentary on Ala. Code § 13A-2-22 (observing that innocent instrumentality rule may "impose a broader liability on a defendant than" accomplice liability, such that, "when an innocent or irresponsible person's conduct is caused by a mental state such as recklessness or criminal negligence, the defendant is held accountable for the behavior of the acting party to the extent that the defendant's mental state would permit").

disregarded a substantial risk that such a fatal outcome could transpire, and such disregard was a gross deviation from a reasonable standard of care.[58]

Second, and conversely, the innocent instrumentality rule precludes holding an actor criminally liable for causing an innocent or irresponsible person to engage in statutorily prohibited conduct absent proof of a culpable mental state that is *at least as demanding* as that governing the target offense. For example, if "obtaining property by false pretenses is a crime only if the false pretenses are made purposely, one does not commit it by negligently causing an innocent agent to make statements that are false; one must do so purposely."[59]

Third, and relatedly, where an offense is divided into degrees based upon distinctions in culpability as to results, the principal's "liability shall extend only as far as his mental state will permit."[60] For example, where a defendant recklessly "cause[s] a child to kill intentionally, the child's intent to kill is not imputed to him; he may be guilty of manslaughter for his recklessness but he is accountable for nothing more."[61]

The contemporary basis for codifying the innocent instrumentality rule is the Model Penal Code's general complicity provision, § 2.06.[62] At "the time of the drafting of the Model Penal Code," criminal codes rarely incorporated a "legislative formulation" of the rule, and even those that did were ambiguous about its basic contours.[63] The drafters of the Model Penal Code sought to fill this gap by offering a clear statutory approach. What they ultimately produced states that: "A person is legally accountable for

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[58] Commentary on Ky. Rev. Stat. Ann. § 502.010 ("For example, if a defendant permits an incompetent or immature person to drive his vehicle, with an awareness of the risk involved, he may be convicted of manslaughter in the second degree [] for a homicide caused by the incompetent or immature person."); *see, e.g.*, *Berness v. State*, 38 Ala. App. 1, 5, 83 So. 2d 607, 611 (Ala. Ct. App. 1953), aff'd, 263 Ala. 641, 83 So. 2d 613 (1955) (owner in control of car liable for manslaughter for knowingly permitting intoxicated person to drive in such manner that death results). Note that federal courts have upheld convictions based on proof of what amounts to negligence. *See, e.g.*, *Pereira*, 347 U.S. at 8-9 (1954). *But see United States v. Berlin*, 472 F.2d 13, 14 (9th Cir. 1973) ("Section 2(b) does, as appellants contend, have overtones of agency, and, in our judgment, the *willful causation to which it refers must be purposeful rather than be based simply upon reasonable foreseeability*.") (emphasis added).

[59] Model Penal Code § 2.06 cmt. at 303; *see* LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1.

[60] Commentary on Ala. Code § 13A-2-22; *see* LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1.

[61] Model Penal Code § 2.06 cmt. at 302-03.

[62] LAFAVE, *supra* note 27, at 2 SUBST. CRIM. L. § 13.1.

[63] Model Penal Code § 2.06 cmt. at 301 ("In a few states, statutory treatment of the subject provided for the liability of a person who counsels, advises, or encourages a child or lunatic to commit a crime . . . [But it] is paradoxical to speak of counseling or encouraging irresponsible persons to commit a crime, since by hypothesis their conduct is not criminal, and this is even clearer in the case of innocent, responsible agents.") (citing Cal. Penal Code § 31).

One prominent early example is Section 2(b) of Title 18 of the United States Code. Section 2(b), enacted in 1948 as part of a consolidation and reorganization of federal criminal statutes, was amended in 1981 to read: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." The federal courts have held this statute "adopts the general principal of causation in criminal law that an individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is achieved through the actions of . . . intermediaries." *United States v. Concepcion*, 983 F.2d 369, 383–84 (2d Cir. 1992) (internal quotation marks omitted). For an overview of the confusing and conflicting case law surrounding the meaning of "willfully" in the federal statute, see Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1448–49 (2002).

the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct."[64]

This formulation is composed of two main components. With respect to considerations of *actus reus*, the language utilized by the drafters clarifies that the innocent instrumentality rule "applies only if P causes X"—an innocent or irresponsible person—"to engage in the conduct in question."[65] And, with respect to considerations of *mens rea*, such language delineates that an actor may only be held "accountable for the behavior of an innocent or irresponsible person when he has caused it with the purpose, knowledge, recklessness, or negligence that the law requires for commission of the crime with which he has been charged."[66]

Since completion of the Model Penal Code, the drafters' recommended approach to codifying the innocent instrumentality rule has gone on to become quite influential. For example, the commentary accompanying the Code highlights that, as of 1980, "most of the recent revisions" had either incorporated or proposed a comparable provision.[67] And this remains true today: nineteen of the twenty-nine jurisdictions that have undertaken comprehensive criminal code reform efforts codify the innocent instrumentality rule in a manner that corresponds with Model Penal Code § 2.06(2)(a).[68]

While the Model Penal Code approach to codification has had a broad influence on modern criminal codes, legislatures in reform jurisdictions also routinely modify it. Many of these revisions are minor or organizational; however, some are substantive.[69] Most significant are those reform jurisdictions that incorporate a definition of an "innocent or irresponsible person" (the importance of which is discussed below).[70]

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[64] Model Penal Code § 2.06(2)(a).

[65] DRESSLER, *supra* note 27, at § 30.09; *see* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 733 (1983) ("The objective elements for causing crime by an innocent are relatively straightforward. The defendant need not satisfy the objective elements of the substantive offense; the point of the provision is to hold him legally accountable when he engages in conduct that causes an innocent or irresponsible person to satisfy the objective requirements.").

[66] Model Penal Code § 2.06 cmt. at 302.

[67] Model Penal Code § 2.06 cmt. at 303 n.15.

[68] *See* Ala. Code § 13A-2-22; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-303; Ark. Code Ann. § 5-2-402; Colo. Rev. Stat. Ann. § 18-1-602; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-221; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ky. Rev. Stat. Ann. § 502.010; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Ohio Rev. Code Ann. § 2923.03; Pa. Cons. Stat. Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-401; Tex. Penal Code Ann. § 7.02; Wash. Rev. Code § 9A.08.020; *see also* John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 255–56 (2008) (noting relevant legislative trends).

[69] For an overview of legislative trends, see Model Penal Code § 2.06 cmt. at 303 n.15.

[70] Illustrative is the Kentucky Criminal Code, which clarifies that the phrase:

> [I]ncludes anyone who is not guilty of the offense in question, despite his participation, because of:
>
> (a) Criminal irresponsibility or other legal incapacity or exemption; or
>
> (b) Unawareness of the criminal nature of the conduct in question or the defendant's criminal purpose; or

Revisions aside, there is little question that Model Penal Code § 2.06(2)(a) broadly reflects the modern legislative approach to the issue, which has also generally been embraced by the scholarly commentary.[71]

Consistent with the above legal authorities, the RCC incorporates a broadly applicable general provision codifying the innocent instrumentality rule. The RCC's recognition of a broadly applicable doctrine for imputing the conduct of an innocent or irresponsible agent based upon causal principles accords with Model Penal Code § 2.06(2)(a). At the same time, the manner in which the RCC codifies the relevant policies in a manner that departs from the Model Penal Code approach in two notable ways.

First, RCC § 211 remedies a key ambiguity in Model Penal Code § 2.06(2)(a), which vaguely states that the defendant must cause an innocent or irresponsible person to "engage in *such* conduct."[72] As a textual matter, this language does not expressly require that the conduct that the defendant causes the intermediary to engage in actually be the conduct constituting the offense, "that is, the conduct under the circumstances and causing the results proscribed by the offense definition."[73] That being said, there is little doubt "that the drafters intended to require this" construction.[74] With that in mind, and in furtherance of the interests of clarity and consistency, RCC § 211 explicitly states that the defendant must cause "an innocent or irresponsible person to *engage in conduct constituting an offense*."[75]

Second, RCC § 211(b) fills an important gap in Model Penal Code § 2.06(2)(a), which fails to define an "innocent or irresponsible person." Absent a statutory definition of this phrase, the text of Model Penal Code § 2.06(2)(a) "gives no hint as to what kinds of defenses offered by the perpetrator will render him 'innocent or irresponsible.'"[76]

To be sure, the commentary accompanying the Model Penal Code offers illustrative examples, such as those who lack the necessary intent, the mentally ill, children, and one who mistakenly kills an innocent bystander while responding to a

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> (c) Any other factor precluding the mental state sufficient for the commission of the offense in question.

Ky. Rev. Stat. Ann. § 502.010; *see, e.g.,* Ala. § 13A-2-22(2)(b) ("[I]ncludes any person who is not guilty of the offense in question, despite his behavior, because of: (1) Criminal irresponsibility or other legal incapacity or exemption; (2) Unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose; or (3) Any other factor precluding the mental state sufficient for the commission of the offense in question."); Colo. Rev. Stat. Ann. § 18-1-602 ("[I]ncludes any person who is not guilty of the offense in question, despite his behavior, because of duress, legal incapacity or exemption, or unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose, or any other factor precluding the mental state sufficient for the commission of the offense in question.").

[71] *See, e.g.,* Robinson & Grall, *supra* note 65, at 733; Kadish, *supra* note 33, at 384–85.

[72] Model Penal Code § 2.06(2)(a) ("A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct . . . .").

[73] *See* Robinson and Grall, *supra* note 65, at 733.

[74] *See id.* (discussing those aspects of the Model Penal Code commentary that support this view).

[75] *See, e.g.,* Alaska Stat. Ann. § 11.16.110 (3) ("[A]cting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct").

[76] ROBINSON, *supra* note 49, at 1 CRIM. L. DEF. § 82.

defendant's attack.[77] Viewed collectively, these illustrations indicate that the absence of an offense's culpable mental state requirement or the presence of an excuse defense provide the basis for viewing someone as innocent or irresponsible.[78] Commentary aside, the failure to expressly communicate this point through the Code's text remains a significant oversight given its importance to application of the rule.[79]

With that in mind, and in furtherance of the interests of clarity and consistency, RCC § 211(b) explicitly defines an "innocent or irresponsible person" to include "a person who, having engaged in conduct constituting an offense" either "[l]acks the culpable mental state requirement for that offense," or, alternatively, "[a]cts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to justification."

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the innocent instrumentality rule, which avoids the flaws and ambiguities reflected in Model Penal Code § 2.06(2)(a).

[77] Model Penal Code § 2.06 cmt. at 301-04.
[78] ROBINSON, *supra* note 49, at 1 CRIM. L. DEF. § 82.
[79] *See id.*