First Draft of Report #25:
Merger

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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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. 25, *Merger*, is September 14, 2018 (eight weeks from the date of issue). Oral comments and written comments received after September 14, 2018 will not be reflected in the Second Draft of Report No. 25. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

§ 22A-212 Merger of Related Offenses

(a) PRESUMPTION OF MERGER APPLICABLE TO COMMISSION OF MULTIPLE RELATED OFFENSES. There is a presumption that multiple convictions for two or more offenses arising from the same course of conduct merge whenever:

(1) One offense is established by proof of the same or less than all the facts required to establish the commission of the other offense;

(2) The offenses differ only in that:

(A) One prohibits a less serious harm or wrong to the same person, property, or public interest;

(B) One may be satisfied by a lesser kind of culpability; or

(C) One is defined to prohibit a designated kind of conduct generally, and the other is defined to prohibit a specific instance of such conduct;

(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense;

(4) One offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each;

(5) One offense consists only of an attempt or solicitation toward commission of:

(A) The other offense; or

(B) A different offense that is related to the other offense in the manner described in paragraphs (1)-(4); or

(6) Each offense is a general inchoate offense designed to culminate in the commission of:

(A) The same offense; or

(B) Different offenses that are related to one another in the manner described in paragraphs (1)-(4).

(b) PRESUMPTION OF MERGER INAPPLICABLE WHERE LEGISLATIVE INTENT IS CLEAR. The presumption of merger set forth in subsection (a) is inapplicable whenever the legislature clearly manifests an intent to authorize multiple convictions for different offenses arising from the same course of conduct.

(c) ALTERNATIVE ELEMENTS. The court shall, in applying subsections (a) and (b) to an offense comprised of alternative elements that protect distinct societal interests, limit its analysis to the elements upon which a defendant's conviction is based.

(d) RULE OF PRIORITY. When two or more convictions for different offenses arising from the same course of conduct merge, the offense that remains shall be:

(1) The most serious offense among the offenses in question; or

(2) If the offenses are of equal seriousness, any offense that the court deems appropriate.

(e) FINAL JUDGMENT OF LIABILITY. A person may be found guilty of two or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:

(1) The time for appeal has expired; or

(2) The judgment appealed from has been affirmed.

COMMENTARY

Explanatory Notes. RCC § 212 sets forth a comprehensive framework for addressing issues of sentencing merger that arise when a defendant has been convicted of two or more substantially related criminal offenses arising from the same course of conduct. The framework is comprised of general merger principles, which are intended to preclude the imposition of multiple liability for violation of overlapping criminal statutes that protect the same (or sufficiently similar) societal interests. Barring the aggregation of convictions and liability under these circumstances reflects a basic policy of this Code: proportionate punishment.[1]

The prefatory clause of subsection (a) establishes two important aspects of the general merger principles set forth in RCC § 212. The first aspect is that those principles merely reflect a "presumption" of when multiple liability for commission of substantially related offenses is barred. The question of merger is ultimately one of legislative intent; however, as a matter of practice, the legislature's intent as to merger of specific combinations of substantially related offenses is typically either ambiguous or non-existent. Therefore, subsection (a) provides courts with general default principles for filling in the gaps absent a clear legislative direction to the contrary, see RCC § 212(b).

[1] To be sure, the most direct way of avoiding the problem of disproportionate punishment that arises from overlapping criminal statutes is to avoid enacting such statutes in the first place. However, as a practical matter, drafting offenses that perfectly line up next to one another without any overlap (and avoiding gaps in coverage) is extremely difficult. Therefore, while the offenses in the RCC's Special Part strive to achieve that goal to the extent possible, application of the general merger principles specified in this section remains essential to facilitating the overall proportionality of the RCC.

The second aspect is that the default principles set forth in subsection (a) only address the merger of convictions "arising from the same course of conduct."[2] It is under these circumstances that the imposition of multiple liability most clearly presents problems of proportionality.[3] In contrast, where the defendant's convictions arise from separate conduct, the imposition of multiple liability is less likely to be unfairly duplicative.[4] The principles of merger set forth in subsection (a) are not intended to govern the latter situation.

The first of these principles, RCC § 212(a)(1), supports a presumption of merger where "[o]ne offense is established by proof of the same or less than all the facts required to establish the commission of the other offense." This language effectively codifies the elements test originally set forth by the U.S. Supreme Court in *Blockburger v. United States*.[5] The elements test supports merger whenever the elements of one offense are a subset of the other offense.[6] In practice, two offenses share this kind of elemental relationship whenever it is impossible to commit one offense without also committing the other offense.[7]

Subsection (a)(2) next addresses three particular kinds of variances, which, if constituting the sole distinctions between two or more offenses, support a presumption of merger. The first is where the offenses differ only in that one requires a less serious

[2] Whether or not two offenses "aris[e] from the same course of conduct" is a mixed question of law and fact, which depends upon the factual predicate for both offenses as well as the unit of prosecution that the legislature intended to apply to each. *See, e.g.*, *Hanna v. United States*, 666 A.2d 845, 852–53 (D.C. 1995); *Allen v. United States*, 580 A.2d 653, 657 (D.C. 1990). As a general rule, two offenses arise from the same course of conduct when—at minimum—a single act or omission by the defendant satisfies the requirements of liability for each. However, multiple charges may be based on a series of related acts or omissions yet still arise from the same course of conduct.

[3] For example, it would be disproportionate to impose convictions for both: (1) homicide and assault as it pertains to the death of a single victim perpetrated by a single bullet; (2) possession with intent to distribute PCP and distribution of PCP as it pertains to the sale of the same batch of drugs in a single transaction; or (3) theft and intentional damage of property as it pertains to the immediate destruction of a single piece of stolen property.

[4] For example, it would not be disproportionate to impose convictions for both: (1) homicide and assault as it pertains to a non-fatal shooting on one day and a fatal shooting on another day of the same victim; (2) possession with intent to distribute PCP and distribution of PCP as it pertains to the sale of different batches of drugs in different transactions occurring months apart; or (3) theft and intentional damage of property as it pertains to the destruction of different pieces of property stolen from the same actor years apart.

[5] 284 U.S. 299, 301 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."); *see Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991) (*en banc*) (While the *Blockburger* test, as codified by D.C. Code § 23-112, "uses the phrase 'proof of a fact,' the reference is to what the statutory 'offense' requires in the way of proof, not to the specific 'transaction,'" i.e., "[t]he word 'requires' can refer only to elements, not to whatever facts may be adduced at trial").

[6] Compare, for example, a robbery offense defined as "intentionally causing bodily injury in the course of theft" and an assault offense defined as "intentionally causing bodily injury." The elements of the assault offense are a subset of the elements of the robbery offense.

[7] For example, one way to confirm that the elements of assault are a subset of the elements of robbery, as defined *supra* note 6, is to determine that it is impossible to commit robbery without also committing assault under the relevant statutory definitions.

injury or risk of injury than is necessary to establish commission of the other offense.[8] The second is where the offenses differ only in that one requires a lesser form of culpability than the other.[9] And the third is where the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.[10] Where two offenses satisfy one or more of these principles, then it should be presumed that the legislature intended to preclude multiple liability. [11]

Subsection (a)(3) establishes that a presumption of merger is appropriate where "[o]ne offense requires a finding of fact inconsistent with the requirements for commission of the other offense." This principle applies when the facts required to prove offenses arising from the same course of conduct are "inconsistent with each other as a matter of law."[12] Where the proof necessary to establish one offense necessarily precludes the existence of the proof necessary to establish another offense under any set of facts, it should be presumed that the legislature intended to preclude multiple liability.[13]

Subsection (a)(4) establishes that a presumption of merger is appropriate where "one offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each." This principle applies whenever the gravamen of one offense duplicates that of another offense. This purpose-based evaluation goes beyond mere consideration of whether it is theoretically possible to

[8] An example of two offenses that satisfy this principle are: (1) assault, defined as "intentionally causing bodily injury"; and (2) aggravated assault, defined as "intentionally causing serious bodily injury."

[9] An example of two offenses that satisfy this principle are: (1) murder, defined as "intentionally causing death"; and (2) reckless manslaughter, defined as "recklessly causing death."

[10] An example of two offenses that satisfy this principle are: (1) robbery, defined as "recklessly causing bodily injury in the course of a theft"; and (2) carjacking, defined as "recklessly causing bodily injury in the course of a theft of an automobile."

[11] An example of two offenses that satisfy all three of these principles are: (1) aggravated carjacking defined as "intentionally causing serious bodily injury in the course of a theft of an automobile"; and (2) robbery, defined as "recklessly causing bodily injury in the course of a theft."

[12] *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States*, 407 F.2d 1199, 1223 (1967) (*en banc*)). Compare, for example, a theft offense defined as "taking property of another with intent to permanently deprive" and an unlawful use offense defined as "taking property of another with intent to temporarily deprive. Because a finding that the defendant took property with the intent to *permanently* deprive logically precludes a finding the defendant took property with the intent to *temporarily* deprive, subsection (a)(3) creates a presumption against multiple liability for these two offenses. The same analysis would also create a presumption against multiple liability for a murder offense defined as "intentionally causing the death of another person *absent mitigating circumstances*" and a manslaughter offense defined as "intentionally causing the death of another person *in the presence of mitigating circumstances*."

[13] This presumption against multiple liability based on inconsistent guilty verdicts is to be distinguished from, and is therefore not intended to displace, the legal system's well established "tolerat[ion]" of verdicts of *guilt* and *innocence* that are inconsistent with one another. *Evans v. United States*, 987 A.2d 1138, 1140–41 (D.C. 2010) ("[A] logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict") (quoting *Yeager v. United States*, 557 U.S. 110, 112 (2009) (discussing *Dunn v. United States*, 284 U.S. 390 (1932))); *see, e.g., United States v. Powell*, 469 U.S. 57 (1984). For example, whereas RCC § 212(a)(3) would preclude multiple liability for theft and unlawful use, see *supra* note 12, it would not in any way limit the ability of the fact finder to convict on theft but acquit on unlawful use, notwithstanding the fact that the elements of theft necessarily include the elements of unlawful use.

commit one offense without committing another, see RCC § 212(a)(1). Instead, it requires evaluation of the harm or wrong, culpability, and penalty proscribed by each offense to determine whether a conviction for one offense reasonably accounts for a conviction for another offense.[14]

Subsection (a)(5) addresses merger in two different situations involving multiple convictions for general inchoate offenses and completed offenses. The first is where "[o]ne offense consists only of an attempt or solicitation toward commission of [t]he other offense."[15] The second is where "[o]ne offense consists only of an attempt or solicitation toward commission of . . . "[a] substantive offense that is related to the other offense in the manner described in paragraphs (1)-(4)."[16] In the first situation, RCC § 212(a)(5)(A) creates a general presumption that merger is appropriate for engaging in preparation to commit an offense[17] and the subsequent completion of that offense whenever the convictions involve the same criminal objective.[18] In the second situation, RCC § 212(a)(5)(B) ensures that the outcome is the same although the completed offense is not the target of the general inchoate offense, provided that the completed offense and the target of the general inchoate offense: (1) involve the same criminal objective; and (2) would otherwise be subject to a presumption of merger.[19]

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[14] Compare, for example, the following aggravated theft and carjacking offenses. The aggravated theft offense applies a five year statutory maximum (and no mandatory minimum) to anyone who "takes property of another valued at more than $25,000 dollars with the intent to permanently deprive." The carjacking offense, in contrast, applies a twenty year statutory maximum and a five year mandatory minimum to anyone who "intentionally causes bodily harm to another person in the course of committing theft of a motor vehicle in the immediate possession of another." While the elements of these two offenses are quite similar, they do not satisfy the elements test because, *inter alia*, it is possible to steal a car worth less than $25,000. As a result, it cannot be said that by committing carjacking one necessarily commits aggravated theft. That being said, a consideration of the harm, culpability, and penalty proscribed by each offense—when viewed in light of the fact that a $25,000 vehicle is well within the norm of carjackings—provides the basis for concluding that a carjacking conviction "reasonably accounts" for an aggravated theft conviction when based on the same course of conduct (i.e., the theft of a single automobile from an individual victim).

[15] RCC § 212 (a)(5)(A).

[16] RCC § 212(a)(5)(B).

[17] Note that RCC § 212(a)(5) does not apply to the general inchoate offense of conspiracy, and, therefore, does not create a presumption of merger for conspiracy and the completed offense. *See* RCC § 303(a) (providing bilateral definition of conspiracy).

[18] Where, for example, X fatally shoots V with intent to kill, X has satisfied the requirements of liability for both the *armed murder* of V and the *attempted armed murder* of V. However, there is a presumption against imposing multiple convictions upon X for both offenses. Likewise, if X successfully persuades Y to fatally shoot V, X has satisfied the requirements of liability for both the *armed murder* of V (as an accomplice) and *solicitation of armed murder* of V. However, there is a presumption against imposing multiple convictions upon X for both offenses. Note that the above presumptions would not apply if the charges for either attempt or solicitation to commit armed murder and the (completed) armed murder involved *different victims*.

[19] Where, for example, X fatally shoots V with intent to kill, X has satisfied the requirements of liability for both the *armed murder* of V and the *attempted (unarmed) murder* of V. However, there is a presumption against imposing multiple convictions upon X for both offenses. Likewise, if X successfully persuades Y to fatally shoot V, then X has satisfied the requirements of liability for both the *armed murder* of V (as an accomplice) and *solicitation of (unarmed) murder* of V. However, there is a presumption against imposing multiple convictions upon X for both offenses because armed murder and murder satisfy the general merger principles set forth in paragraphs (1)-(4). Note that the above presumptions would not apply if the charges

Subsection (a)(6) addresses merger in two different situations involving multiple convictions for general inchoate offenses. The first is where the general inchoate offenses are "designed to culminate in commission of [t]he same offense." The second is where the general inchoate offenses "are designed to culminate in commission of "[d]ifferent offenses that are related to one another in the manner described in paragraphs (1)-(4)." In the first situation, RCC § 212(a)(6)(A) creates a general presumption that merger is appropriate for engaging in various forms of preparation to commit the same offense whenever the convictions involve the same criminal objective.[20] In the second situation, RCC § 212(a)(6)(B) ensures that the outcome is the same although the general inchoate offenses are oriented towards completion of different target offenses, provided that those target offenses: (1) involve the same criminal objective; and (2) would otherwise be subject to a presumption of merger.[21]

RCC § 212(b) clarifies that "[t]he presumption of merger set forth in subsection (a) is inapplicable whenever the legislature clearly manifests an intent to authorize multiple convictions for different offenses arising from the same course of conduct." This language explicitly reaffirms what is implied by the prefatory clause of subsection (a), namely, that the relevant merger principles are only defeasible proportionality-based "presumptions" about what the legislature intended. Where the legislature has clearly expressed a prerogative to allow for—or preclude—multiple liability in prosecutions involving commission of substantially related offenses that prerogative must be followed.[22]

Subsection (c) provides a legal framework for applying the principles set forth in subsections (a) and (b) to statutes comprised of alternative elements. In many situations, the fact that an offense can be established in different ways is of no significance to the merger analysis.[23] Where, however, an offense is comprised of alternative elements that speak to distinct societal interests,[24] then the particular basis upon which a conviction for

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for either attempt or solicitation to commit (unarmed) murder and the (completed) armed murder involved *different victims*.

[20] Where, for example, X persuades Y to attempt to kill V with a gun, but Y is subsequently intercepted by police immediately prior to pulling the trigger, X has satisfied the requirements of liability for *attempted armed murder* (as an accomplice to Y), *solicitation of armed murder*, and *conspiracy to commit armed murder*. However, there is a presumption that X may only be subject to liability for one of these three offenses. Note that this presumption would not apply if the charges for attempted armed murder, solicitation of armed murder, and conspiracy to commit armed murder involved *different victims*.

[21] Where, for example, X persuades Y to attempt to kill V with a gun, but Y is subsequently intercepted by police immediately prior to pulling the trigger, X has satisfied the requirements of liability for *attempted armed murder* (as an accomplice to Y), *solicitation of (unarmed) murder*, and *conspiracy to commit aggravated assault*. However, there is a presumption that X may only be subject to liability for one of these three offenses because *armed murder*, *murder*, and *aggravated assault* satisfy the general merger principles set forth in paragraphs (1)-(4). Note that this presumption would not apply if the charges for attempted armed murder, solicitation of murder, and conspiracy to commit aggravated assault involved *different victims*.

[22] Provided, of course, that it respects other constitutional limitations on excessive punishment.

[23] For example, the fact that a theft statute can be satisfied by proof that a person, acting with the intent to permanently deprive, variously "(A) possesses, (B) uses, or (C) exercises control" over the property of another, will typically not be of any import to merger analyses given that these distinctions do not speak to distinct societal interests.

[24] One example of this kind of statute is a child mistreatment offense that reads: "§ 100: Mistreatment of Children. (a) No person shall recklessly: (1) cause bodily injury to a child; or (2) fail to make a reasonable

that offense is based becomes essential to determining whether merger actually serves the interests of proportionality.[25] With that in mind, subsection (c) requires courts to perform the merger analysis proscribed in RCC § 212 by reference to the unit of analysis that most clearly captures the societal interests implicated by a defendant's criminal convictions.[26]

Subsection (d) establishes a rule of priority for determining which of two or more merging convictions should be vacated and which should remain. It is comprised of two different principles. The first dictates that where, among any group of merging offenses, one offense is more serious than the others, the conviction for that more serious offense is the one that should remain.[27] The second proscribes that where, among any group of merging offenses, two or more offenses are of equal seriousness, then the determination

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effort to provide essential food, clothing, shelter, supervision, medical services, or medicine to a child that the person is legally obligated to provide as a parent." The alternative elements in this offense are subsection (a)(1), child mistreatment *by assault*, and (a)(2), and child mistreatment *by parental neglect*. These alternative elements protect distinct societal interests because protecting children from physical harm perpetrated by anyone, (a)(1), appears to be a materially different goal than protecting children from neglect by their parents, (a)(2).

Another example of this kind of statute is a felony murder offense that reads: "§ 200: Felony Murder. (a) No person shall unlawfully kill another person in the course of committing or attempting to commit: (1) Rape; (2) Burglary; (3) Arson; or (4) Robbery. The alternative elements in this offense are subsection (a)(1), felony murder *by rape*, (a)(2), felony murder *by burglary*, (a)(3), felony murder *by arson*, and (a)(4), felony murder *by burglary*. The distinct societal interests protected by these alternative elements is both the actual harm and added risk of death inherent in the commission of these specific offenses.

[25] More specifically, this is because only one of the alternative elements that provide the basis for establishing one offense may speak to the same societal interests protected by another offense.

For example, whether merger is proportionate for a conviction for child mistreatment, as defined *supra* note 24, and a conviction for assault combined with a minor enhancement, when based on the same course of conduct, is proportionate depends upon the basis of the child mistreatment conviction. If that basis is child mistreatment *by assault* then merger would be proportionate because the gravamen of child mistreatment *by assault* duplicates that of the enhanced assault offense. If, in contrast, the basis is child mistreatment *by parental neglect* then merger would not be proportionate because enhanced assault and child mistreatment by parental neglect address distinct societal interests.

Likewise, whether merger is proportionate for a conviction for felony murder, as defined *supra* note 24, and a conviction for one of the four offenses enumerated in that statute, when based on the same course of conduct, depends upon the basis of the felony murder conviction. Where an enumerated offense is serving as the basis for aggravation (e.g., convictions for felony murder-rape and rape committed against a single victim), then merger would further the interests of proportionality—whereas it would not if the enumerated offense is not serving as the basis for aggravation (e.g., convictions for felony murder-rape and burglary committed against a single victim).

[26] For example, the relevant questions in determining whether child mistreatment merges with enhanced assault, see *supra* note 24, is: (1) whether "§ 100(a)(1), child mistreatment-assault" merges with enhanced assault; and (2) whether § 100(a)(2), child mistreatment-neglect" merges with enhanced assault. It is not whether "§ 100(a), child mistreatment" merges with enhanced assault. Likewise, the question of whether felony murder merges with an enumerated offense, see *supra* note 24, must be approached on a similar theory-specific basis (e.g., does "§ 200(a)(1), felony murder-rape" merge with rape, not whether "§ 200, felony murder" merges with rape).

[27] The most serious offense will typically be the offense that is subject to the highest offense classification; however, if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense is "most serious" for purposes of subsection (d).

of which among those more serious offenses should remain is submitted to the court's discretion.

Subsection (e) clarifies two important procedural aspects of the merger analysis set forth in RCC § 212. First, RCC § 212 should not be construed as in any way constraining the number of offenses over which the fact finder may deliberate. Rather, the trier of fact may find the defendant guilty of any number of offenses that merge under RCC § 212 for which the requirements of liability have been met.[28] Second, RCC § 212 only places limitations on the entry of a final judgment of liability—i.e., a conviction that exists after the expiration of appellate rights or affirmance on appeal—for merging offenses. This clarification is intended to provide D.C. Superior Court judges with sufficient leeway to continue their current practice of entering judgment on all counts for which the defendant has been convicted, thereby leaving merger issues to the D.C. Court of Appeals for resolution on direct review, should they so choose.[29]

The principles of merger set forth in RCC § 212 are intended to present questions of law regarding the manner in which the statutory elements of criminal offenses relate to one another. Therefore, the determination of whether those principles preclude multiple liability for two or more substantially related offenses should generally be conducted without regard to the underlying facts of a case.[30] Further, once a court determines that RCC § 212 requires merger of two or more offenses, that determination should be treated as binding on all future cases involving the same offenses.[31]

The principles of merger set forth in RCC § 212 should not be construed as having legal import for the resolution of issues that go beyond determining when the legislature has authorized the imposition of multiple liability for substantially related offenses prosecuted in a single proceeding. This prohibition includes, but is not limited to, determining: (1) when successive prosecutions for substantially related offenses may be brought; (2) when a jury may be instructed on an offense that was not specifically charged in the indictment; and (3) when an appellate court may direct the entry of judgment on an offense over which the jury never deliberated.

Relation to Current District Law. RCC § 212 codifies, clarifies, changes, and fills in gaps reflected in District law governing merger.

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[28] Provided, of course, that the defendant actually satisfies the requirements of liability for those offenses.

[29] At the same time, this provision would not preclude D.C. Superior Court judges from changing their current practice, and instead conducting merger analyses at initial sentencing, either. In the event that one or more convictions is dismissed by the trial court pursuant to RCC § 212, that dismissal shall not be considered an acquittal on the merits, such that a vacated conviction may be re-instated in appropriate circumstances (e.g., where the remaining offense is overturned on appeal for reasons that do not effect the vacated offense).

[30] Note that where the merger analysis involves one or more offenses comprised of alternative elements of a nature described in subsection (c), then a limited factual inquiry will be necessary to determine the particular basis upon which a conviction for that offense is based (e.g., was the defendant convicted of felony murder-*rape* or felony murder-*burglary*).

[31] Provided, of course, that they arise from the same course of conduct. This same principle of *stare decisis* applies where one of the offenses under consideration is comprised of alternative elements of a nature described in subsection (c). While a limited factual analysis may be necessary to determine the particular subsection of an alternative element statute upon which a criminal conviction rests, see *supra* note 30, a court's holding concerning the relationship between an offense committed pursuant to that subsection and another offense would still be binding on all future cases involving those same provisions.

The District's current approach to merger is, as a matter of substantive policy, piecemeal, frequently ambiguous, and unduly narrow. The D.C. Court of Appeals (DCCA), construing D.C. Code § 23-112,[32] employs the elements test as the primary basis for determining whether to impose multiple liability for substantially related offenses arising from the same course of conduct. The court's application of the elements test to address this issue is at times inconsistent, and, in many situations where there is no clear legislative intent, may have the unintended effect of authorizing the imposition of disproportionate punishment. Subsections (a)-(d) of RCC § 212 replace this judicially developed approach with a comprehensive set of substantive merger policies. Many of these policies are based on current District law, and, therefore, are primarily intended to clarify the mechanics of merger analysis for the purpose of enhancing the consistency and efficiency of District law. However, a few of these policies broaden the District's current approach to merger for purposes of enhancing the proportionality of the D.C. Code.

As a matter of judicial administration, the District's law of merger is currently treated as the sole province of appellate, rather than trial, courts. D.C. Superior Court judges, based on explicit instructions from the DCCA, appear to systematically ignore merger issues at sentencing, leaving them for appellate resolution. This approach brings with it both efficiency gains as well as potential liberty costs. The RCC merger provisions do not resolve this tension. Subsection (e) enables the substantive policies set forth in subsections (a)-(d) to be implemented in a manner consistent with the District's current approach of not addressing merger issues at initial sentencing, without precluding future administrative changes should District courts deem them to be appropriate.

RCC § 212(a)-(d): Relation to Current District Law on Substantive Merger Policy. Subsections (a), (b), (c), and (d) comprise a clear and comprehensive body of substantive merger policies that are in some ways consistent with and in others ways broader than the District's current approach.

It is well established under District law that the Double Jeopardy Clause of the U.S. Constitution prohibits the imposition of multiple punishments when—but only when—doing so would conflict with legislative intent.[33] As a result, the DCCA views "legislative intent [as the] key in determining whether offenses merge, as 'the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.'"[34] And, in the

[32] D.C. Code § 23-112 ("A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.").

[33] *E.g., Byrd v. United States*, 598 A.2d 386, 388 (D.C. 1991) (*en banc*) ("The role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.") (quoting *Albernaz v. United States*, 450 U.S. 333, 334 (1981)); *Robinson v. United States*, 608 A.2d 115, 115 (D.C. 1992); *Lennon v. United States*, 736 A.2d 208, 209 (D.C. 1999). Beyond this limitation on multiple punishments, the DCCA recognizes that the same double jeopardy guarantee has been said to "protect[] against a second prosecution for the same offense after acquittal," as well as a "second prosecution for the same offense after conviction." *Byrd*, 598 A.2d at 387 n.4 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

[34] *Young v. United States*, 143 A.3d 751, 760 (D.C. 2016) (quoting *Graure v. United States*, 18 A.3d 743, 765 n.31 (D.C. 2011)). Because the Double Jeopardy Clause of the Fifth Amendment prohibits "multiple

District, "the *Blockburger* rule, albeit in less than felicitous language, has been codified as an express declaration of legislative intent" as to merger under D.C. Code § 23-112.[35]

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punishments for the same offense," *Lennon v. United States*, 736 A.2d 208, 209 (D.C. 1999), it "compels merger of duplicative convictions for the same offense, so as to leave only a single sentence for that single offense." *McCoy v. United States*, 890 A.2d 204, 216 (D.C. 2006).

[35] *Byrd*, 598 A.2d at 386 (internal quotations and citation omitted); *see Blockburger v. United States*, 284 U.S. 299, 301 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). The relevant statute, D.C. Code § 23-112, establishes that:

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

In *Whalen v. United States*, the U.S. Supreme Court had the occasion to interpret this statute, observing that:

> The legislative history rather clearly confirms that Congress intended the federal courts to adhere strictly to the *Blockburger* test when construing the penal provisions of the District of Columbia Code. The House Committee Report expressly disapproved several decisions of the United States Court of Appeals for the District of Columbia Circuit that had not allowed consecutive sentences notwithstanding the fact that the offenses were different under the *Blockburger* test. *See* H.R. Rep. No. 91–907, p. 114 (1970). The Report restated the general principle that "whether or not consecutive sentences may be imposed depends on the intent of Congress." *Ibid*. But "[s]ince Congress in enacting legislation rarely specifies its intent on this matter, the courts have long adhered to the rule that Congress did intend to permit consecutive sentences . . . when each offense "'requires proof of a fact which the other does not,'" *ibid*., citing *Blockburger v. United States, supra*, and *Gore v. United States, supra*. The Committee Report observed that the United States Court of Appeals had "retreated from this settled principle of law" by requiring specific evidence of congressional intent to allow cumulative punishments, H.R. Rep. No.91–907, at 114, and the Report concluded as follows:
>
> > "To obviate the need for the courts to search for legislative intent, section 23–112 clearly states the rule for sentencing on offenses arising from the same transaction. For example, a person convicted of entering a house with intent to steal and stealing therefrom shall be sentenced consecutively on the crimes of burglary and larceny unless the judge provides to the contrary."
>
> We think that the only correct way to read § 23–112, in the light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule for construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed "shall, unless the court expressly provides otherwise, run consecutively." And where the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress.

445 U.S. 684, 692–93 (1980).

The *Blockburger* rule, as applied to multiple convictions for different offenses prosecuted in a single proceeding, supports a rebuttable presumption of legislative intent[36] as to merger when (but only when) two basic requirements are met: (1) the convictions arise from the same act or course of conduct[37]; and (2) the underlying offenses upon which the convictions are based entail proof of the same facts.[38] The DCCA has expounded upon the contours of each of these requirements through a robust and well-developed body of case law.

Whether, for purposes of the first requirement, multiple convictions arise from separate acts or transaction depends upon an analysis of three factors. The first factor is the appropriate unit of prosecution, which is "generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence."[39] The second factor is the duration of the conduct in question; the analysis here focuses on whether there was an "appreciable length of time 'between the acts [alleged to] constitute the [multiple] offenses.'"[40] The third factor asks whether "a subsequent criminal act is '[] not the result of the original impulse, but a fresh one.'"[41] Judicial evaluation of the first factor is purely a matter of law; the inquiry focuses on legislative intent as discerned from the traditional sources of statutory meaning.[42] Judicial evaluation of the latter two factors, in contrast, requires application of "a fact-based approach,"[43] which revolves around whether the defendant reached a "fork-in-the-road."[44]

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[36] Because the *Blockburger* rule merely creates a presumption of legislative intent, the results it yields can always be overcome by 'a clearly contrary legislative intent' manifested by the D.C. Council. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002).

[37] *Hanna v. United States*, 666 A.2d 845, 853 (D.C. 1995); *Allen v. United States*, 580 A.2d 653, 657 (D.C. 1990)); *Villines v. United States*, 320 A.2d 313, 314 (D.C. 1974); *Logan v. United States*, 460 A.2d 34, 36 (D.C. 1983).

[38] *Alfaro v. United States*, 859 A.2d 149, 155 (D.C. 2004) (quoting *Blockburger*, 284 U.S. at 301).

[39] *Brown v. State*, 535 A.2d 485, 489 (Md. 1988); *see, e.g., Briscoe v. United States*, 528 A.2d 1243, 1245 (D.C. 1987) ("[W]e must determine whether the Council of the District of Columbia intended to permit multiple punishments for possession of the same drug at the same time and at approximately the same place."). Sometimes, however, the unit of prosecution centers around the kind of interest protected by the statute. For example, in *Vines v. United States*, the defendant damaged two cars in a single course of conduct, and was later convicted of two counts of MDP. 70 A.3d 1170, 1176-77 (D.C. 2013), *as amended* (Sept. 19, 2013). On appeal, the defendant argued that this was inappropriate because the MDP statute contemplated the destruction of "property" in a more general sense; thus, because there was only one property-destroying act, there should only be one conviction. *Id.* A majority of the panel rejected this argument, looking to the legislative intent underlying the statute and finding that "the definition contemplates that an injury to each new victim will constitute a separate offense." *Id.*

[40] *Hanna*, 666 A.2d at 853 (quoting *Blockburger*, 284 U.S. at 303).

[41] *Hanna*, 666 A.2d at 853. *See, e.g., Maddox v. United States*, 745 A.2d 284, 294 (D.C. 2000) (Therefore, whether [appellant]'s convictions of armed robbery and assault with a deadly weapon merge, depends on "whether there was any evidence that [appellant] reached a 'fork in the road,' leading to a 'fresh impulse' which resulted in a separate offense."); *Bullock v. United States*, 709 A.2d 87, 91 (D.C. 1998) (defendant properly convicted both of distribution of drugs and subsequent possession with intent to distribute where defendant reached "fork in the road" but remained on scene as result of "renewed criminal impulse").

[42] *See, e.g., Briscoe*, 528 A.2d at 1245.

[43] *Morris v. United States*, 622 A.2d 1116, 1130 (D.C.1993); *Gray v. United States*, 544 A.2d 1255, 1257–59 (D.C. 1988); *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002); *Spain v. United States*, 665 A.2d 658, 661 (D.C. 1995); *Cullen v. United States*, 886 A.2d 870, 873 (D.C. 2005).

[44] *Hanna*, 666 A.2d at 853 ("If at the scene of the crime the defendant can be said to have realized that he [or she] has come to a fork in the road, and nevertheless decides to invade a different interest, then his [or

The second requirement, which is the crux of the *Blockburger* rule, incorporates what is often referred to as the elements test.[45] The central question presented by the elements test is whether, "where the same act or transaction constitutes a violation of two different statutory provisions, 'each provision require[] proof of a fact which the other does not[?]'"[46] If, based on consideration of the statutory elements of two offenses for which the defendant has been convicted, this question can be answered in the negative, then the operative assumption is that the legislature intended to preclude the imposition of multiple liability and punishments, such that one of the convictions must be vacated.[47] Where, in contrast, an affirmative answer can be rendered—i.e., because element analysis indicates that both offenses of conviction require proof of at least one distinct fact—then it is presumed that the legislature intended to authorize multiple liability and punishments.[48] Judicial application of the elements test is generally understood by the DCCA to entail a pure legal analysis, which is to be conducted without regard to the underlying facts of a case. [49]

This wholly legal approach to the elements test is to be contrasted with the "fact-based analysis in determining whether multiple punishments [are] permissible" frequently applied by the DCCA prior to its *en banc* decision in *Byrd v. United States*.[50]

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her] successive intentions make him [or her] subject to cumulative punishment, and he [or she] must be treated as accepting that risk, whether in fact he [or she] knows of it or not.") (quoting *Owens v. United States*, 497 A.2d 1086, 1095 (D.C. 1985)).

[45] *Alfaro*, 859 A.2d at 155.

[46] *Robinson v. United States*, 608 A.2d 115, 115 (D.C. 1992) (quoting *Blockburger*, 284 U.S. at 304).

[47] *See, e.g., Briscoe*, 528 A.2d at 1245.

[48] *Hanna*, 666 A.2d at 854; *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002).

[49] *See, e.g., Spain v. United States*, 665 A.2d 658, 662 (D.C. 1995) ("Whether two charged offenses merge into one is not for the jury to decide; rather, it is a question of law for the court.") (citing *Hagins v. United States*, 639 A.2d 612, 617 (D.C. 1994)); *Hanna*, 666 A.2d at 859 ("[W]hen more than one offense is founded on the same conduct the merger analysis must focus exclusively on the elements of the various offenses and not on the facts introduced to prove those elements."); *Alfaro*, 859 A.2d at 155 ("In applying the *Blockburger* test, the focus is on the statutorily-specified elements of each offense and not the specific facts of a given case.").

[50] 598 A.2d 386, 390 (D.C. 1991); *see, e.g., Arnold v. United States*, 467 A.2d 136, 138-39 (D.C. 1983) (holding that a defendant could not be punished both for grand larceny and unauthorized use of a motor vehicle, and "observing that with respect to the specific factual situation in that case, the conviction for unauthorized use included proof of no fact not also adduced on the larceny charge"); *Worthy v. United States*, 509 A.2d 1157 (D.C. 1986) (applying the same fact-based analysis to convictions for unauthorized use of a vehicle and receiving stolen property, deeming Arnold "dispositive").

The District's pre-*Byrd* application of the "doctrine of merger and lesser included offenses" was based upon the U.S. Court of Appeals for the D.C. Circuit's decision in *United States v. Whitaker*, which the DCCA in *Hall v. United States* summarized as follows:

> In *Whitaker* the court held that unlawful entry was a lesser included offense of burglary for the purpose of allowing the defendant to request a jury instruction on unlawful entry, despite the fact that unlawful entry need not have necessarily been established as an element of burglary under the D.C. Code or under the indictment of that case. The *Whitaker* court reasoned that because unauthorized entry was an element of the vast majority of burglaries it should be considered a lesser included offense where the facts of the particular case indicate that it was a lesser included offense. The court added, however, that its novel analysis of lesser included offenses was given with the caveat that there must also be an inherent relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the

Under this broader approach to merger, the DCCA would look beyond "abstract consideration of the statutes involved or the wording of the indictment,"[51] and instead look to the proof presented at trial to assess whether there exists a "significant difference in the nature of [the defendant's conduct]."[52] In *Byrd*, however, the *en banc* court opted to abandon this fact-sensitive analysis, reasoning that prior DCCA cases "erred in concluding that since the facts as actually presented by the government to prove one charge were necessarily used by the government to prove the second charge, the two charges constituted the 'same offense.'"[53] Under *Blockburger*, as the *Byrd* court concludes, "the focus should have been on the statutory elements of the two distinct charges," that is, "whether each statutory provision required proof of an element that the other did not."[54]

Although the general applicability of the elements test is clear in principle, District courts frequently struggle to determine when the standard is satisfied as a matter of course.[55] To help clarify matters, the DCCA frequently relies on the concept of a "lesser included offense" (LIO) to guide its analysis.[56] The general rule applied by District courts is that two offenses merge when (but only when) one of two offenses is an LIO of the other.[57] One offense is an LIO of another, in turn, if "the elements of the lesser offense are a subset of the elements of the charged offense."[58] Practically speaking, this means that Offense X is only an LIO of Offense Y if it is literally impossible to commit Offense Y without necessarily also committing Offense X under any set of facts.[59] Where application of this comparative analysis leads to the conclusion that one of two convictions is an LIO of the other, then "the trial court has but one course, to vacate the lesser-included offense," thereby imposing liability and punishment for the greater, more serious offense.[60]

> general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.

343 A.2d 35, 39 (D.C. 1975) (discussing 447 F.2d 314, 319 (D.C. Cir. 1971)).

[51] *Hall*, 343 A.2d at 39.

[52] *Arnold*, 467 A.2d at 139 ("In this case there appears to be no significant difference in the nature of appellant's use of the vehicle with regard to the unauthorized use conviction, which might have distinguished it from his use and possession of the vehicle with regard to grand larceny. Unauthorized use required no proof beyond that required for conviction of grand larceny.").

[53] 598 A.2d at 390.

[54] *Id.*

[55] *See, e.g., Rose v. United States*, 49 A.3d 1252 (D.C. 2012); *Alfaro v. United States*, 859 A.2d 149 (D.C. 2004); *Mungo v. United States*, 772 A.2d 240 (D.C. 2001); *see also Byrd*, 598 A.2d at 390 ("We recognize that legitimate questions may arise at times with respect to the manner in which the *Blockburger* test is to be applied in a given case.").

[56] *See, e.g., Alfaro*, 859 A.2d at 155; *Lee v. United States*, 668 A.2d 822, 825 (D.C. 1995).

[57] *See, e.g., Alfaro*, 859 A.2d at 155; *Lee*, 668 A.2d at 825.

[58] *Alfaro*, 859 A.2d at 155 (quoting *Schmuck v. United States*, 489 U.S. 705, 716 (1989)); *Mungo*, 772 A.2d at 245 (D.C. 2001) ("the statutory elements of the lesser offense are contained within those of the greater charged offense").

[59] *Alfaro*, 859 A.2d at 155 ("[T]o constitute a lesser-included offense, 'the lesser [offense] must be such that it is impossible to commit the greater without first having committed the lesser.'") (quoting *Schmuck*, 489 U.S. at 719).

[60] *Mooney v. United States*, 938 A.2d 710, 724 (D.C. 2007) ("[W]here the illegality of multiple punishments results from convictions of a greater and a lesser-included offense, the double jeopardy bar is

An illustrative example of two crimes that share this kind of element-based, LIO relationship are the District's offenses of second degree murder[61] and murder of a police officer (MPO).[62] Both offenses require a malicious killing; however, MPO, but not second degree murder, requires that the victim be a police officer.[63] Therefore, it *cannot* be said that each offense "requires proof of a fact which the other does not."[64] Rather, MPO requires proof of the same facts as second degree murder, plus at least one additional fact, namely, that the victim be a police officer.[65] As a result, it impossible to commit MPO without also committing second degree murder. It therefore follows that second degree murder is an LIO of MPO. Under the elements test, then, multiple convictions for both offenses, if based on the same course of conduct/committed against a single victim, would merge at sentencing, thereby leaving a single conviction for only the greater offense, MPO.

Many (if not most) of the substantially overlapping offenses contained in the D.C. Code do not share this kind of element-based, LIO relationship, and, therefore, are not subject to a presumption of merger under the *Blockburger* rule. A comparison of the District's carjacking and robbery statutes is illustrative.

The District's robbery statute applies a fifteen year statutory maximum to any person who, "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value."[66] Similarly, the District's carjacking statute applies a twenty one year statutory maximum (and seven year mandatory minimum) to any person who "by force or violence, whether against resistance or by sudden or stealthy

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fully addressed, and the illegal sentence corrected, by merging the lesser into the greater offense so that only the latter remains . . . ."); *Franklin v. United States*, 392 A.2d 516, 519 n.3 (D.C. 1978) ("[W]here an appellant has been convicted of both the crime and a lesser included offense, the appropriate appellate remedy is vacation of the lesser included offense.") (citing *Franey v. United States*, 382 A.2d 1019, 1021 (D.C. 1978)); *see, e.g., In re T.M.*, 155 A.3d 400, 408 (D.C. 2017) ("Appellant's conviction for felony assault . . . merges with her conviction for AAWA because felony assault is a lesser-included offense of AAWA.").

It's worth noting that for a significant amount of time "it was generally thought that the prohibition against multiple punishments applied only to *consecutive* sentencing." *Byrd*, 598 A.2d at 393. This view changed, however, in *Doepel v. United States*, where the DCCA recognized that "even a concurrent sentence is an element of punishment because of potential collateral consequences" and accordingly forbade concurrent sentences for both felony murder and the underlying felony. 434 A.2d 449, 459 (D.C. 1981). And "[t]his interpretation of the result that follows from a *Blockburger* analysis of multiple punishments was, four years later, confirmed by the Supreme Court in *Ball v. United States.*" *Byrd*, 598 A.2d at 393 (citing *Ball v. United States*, 470 U.S. 856 (1985) (because a separate conviction, even with a concurrent sentence, could have collateral consequences, the imposition of concurrent sentences "cannot be squared with Congress' intention")).

[61] D.C. Code § 22-2103 ("Whoever with malice aforethought . . . kills another, is guilty of murder in the second degree.")

[62] D.C. Code § 22-2106 ("Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee . . . .").

[63] *Compare* D.C. Code § 22-2103 *with* D.C. Code § 22-2106.

[64] *Blockburger*, 284 U.S. at 304.

[65] Note also that MPO requires proof that the malice was "deliberate and premeditated." D.C. Code § 22-2106.

[66] D.C. Code § 22-2801.

seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle . . . ."[67]

Comparing the elements of carjacking and robbery in *Pixley v. United States*, the DCCA ultimately concluded that the *Blockburger* rule supports the imposition of multiple liability and punishment for both offenses when based on the same course of conduct.[68] Central to the court's analysis is the theoretical possibility of satisfying the elements of carjacking without also satisfying the elements of robbery. True, "*most* carjackings" are likely to constitute robberies; however, this is not always the case.[69] For example, it is possible to commit carjacking without also committing a robbery since robbery requires proof that the property have been *carried away*.[70] And, of course, it is possible to commit robbery without also committing carjacking since carjacking requires proof that the property at issue be a *motor vehicle*.[71] Accordingly, the DCCA concluded, the District's carjacking and robbery offenses do not merge under the elements test.[72]

The merger analysis reflected in both the *Pixley* decision and in many other areas of District law is consistent with the DCCA's frequent assertion that the elements test is to be conducted without regard to the government's theory of prosecution or the specific facts of a case.[73] However, a close reading of DCCA case law post-*Byrd* reveals the periodic application of a broader, theory-specific/fact-sensitive approach to the elements test.

Illustrative is the District law pertaining to merger of robbery and assault. The DCCA has repeatedly held that convictions for robbery and assault merge.[74] However, this conclusion is contrary to the results generated by a strict application of the elements test, which indicates that each "requires proof of a fact which the other does not."[75] For

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[67] D.C. Code § 22-2803(a)(1).

[68] *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997).

[69] *Id.* at 440 (quoting LETTER TO THE CHAIRPERSON OF THE COMMITTEE ON THE JUDICIARY FROM THEN-CORPORATION COUNSEL JOHN PAYTON (November 17, 1992), at 1 (emphasis added)).

[70] *Id.* ("[W]hile robbery requires a carrying away or asportation, carjacking by its terms does not; as the government points out, it can be committed by putting a gun to the head of the person in possession and ordering the person out of the car.").

[71] *Pixley*, 692 A.2d at 440 ("Plainly carjacking requires proof of an element that robbery does not: the taking of a person's motor vehicle.").

[72] *Id.* The *Pixley* court also observed the inclusion of the culpable mental state of recklessness and an alternative attempts element in the carjacking statute to provide additional reasons weighing against merger. *See id.*

[73] *See, e.g.*, cases cited *supra* note 49 and accompanying text.

[74] *Simms v. United States*, 634 A.2d 442, 447 (D.C. 1993); *In re Z.B.*, 131 A.3d 351, 355 (D.C. 2016) ("[I]t is not possible to commit robbery without also committing assault, and assault accordingly merges as a lesser-included offense."); *Beaner v. United States*, 845 A.2d 525, 540–41 (D.C. 2004) ("ADW is a lesser included offense of armed robbery when the assault is committed in order to effectuate the robbery."); *In re T.H.B.*, 670 A.2d 895, 899 (D.C. 1996) (assault with intent to rob LIO of robbery). *But see Matter of D.B.H.*, 549 A.2d 351, 353 (D.C. 1988) ("[W]hether or not simple assault is a lesser-included offense of a charged robbery in general, it cannot be considered, for purposes of providing sufficient notice to the accused, a lesser-included offense of the robbery charged here."). For pre-*Byrd* case law, see, for example, *Rogers v. United States*, 566 A.2d 69, 71 n.3 (D.C. 1989) (assault LIO of robbery); *Norris v. United States*, 585 A.2d 1372, 1375 (D.C. 1991) (assault with a dangerous weapon LIO of armed robbery); *Harling v. United States*, 460 A.2d 571, 574 (D.C. 1983).

[75] *Pearsall v. United States*, 812 A.2d 953, 961 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975)).

example, the District's assault offense requires "the unlawful use of force causing injury to another or the attempt to cause injury with the present ability to do so," without regard to whether a theft was involved.[76] In contrast, the District's robbery offense requires the theft of property in the victim's immediate actual possession, without regard to whether an assault was involved (i.e., a taking by "stealthy seizure" or "snatching" will suffice).[77] It is, therefore, theoretically possible to commit one of these offenses without necessarily committing the other.[78]

How, then, has the DCCA determined that the District's robbery and assault offenses are subject to merger? The legal basis for this conclusion is not clearly articulated in the case law. However, it seems to rest upon a theory-specific construction of *robbery by assault* (i.e., a taking "against resistance" rather than a taking by "sudden or stealthy seizure or snatching"), under which a fact-based consideration of how the robbery was committed effectively limits the scope of the elements being compared under *Blockburger*.[79]

This same theory-specific, fact-based approach also appears to be at the heart of District law governing merger of felony murder and the underlying offense. An abstract elemental analysis of felony murder and any particular offense that serves as the source of aggravation—e.g., rape, burglary, arson, etc.—weighs against merger given that each offense "requires proof of a fact which the other does not."[80] For example, felony murder requires proof of a killing, which is not required by any specific enumerated felony. In contrast, each of these specific enumerated felonies requires proof of facts that are not necessary to prove felony murder, since proof of the commission of a different enumerated felony may always suffice.[81] As a result, it is always theoretically possible to commit felony murder without necessarily committing the offense that actually serves as the basis for the aggravation of the homicide in any particular case.

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[76] *Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001).

[77] D.C. Code § 22-2801. Although the phrase "stealthy seizure or snatching" was included to address pickpockets, both the DCCA and U.S. Court of Appeals for the D.C. Circuit have interpreted such language to encompass *any situation* involving the "actual physical taking of the property from the person of another, even though [it is] without his knowledge and consent, and though the property [is] unattached to his person." *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994) (quoting *Turner v. United States*, 16 F.2d 535, 536 (D.C. Cir. 1926)). In practical effect, this means that a defendant can be convicted of robbery in the District "when the only force used is that necessary to [move property from Point A to Point B]." *United States v. Mathis*, 963 F.2d 399, 410 (D.C. Cir. 1992). Indeed, the DCCA has been particularly candid on this point, "consistently and for many years" holding that "any taking" of property in the immediate actual possession of another "is a robbery—not simply larceny." *Leak v. United States*, 757 A.2d 739, 742 (D.C. 2000).

[78] Indeed, the reported cases contain numerous examples of instances of where this has, in fact, occurred *See* cases cited *supra* note 77.

[79] That is, an approach that analyzes the elements of *robbery by assault*, which necessarily include the elements of assault. This has been described as a "pleadings," rather than "statutory," approach. *See* Model Penal Code § 1.07 cmt. at 130 ("[U]nder the statutory approach, the offense of battery would not be an included offense in a charge of robbery because an element of battery, the use of force, is not a necessary element of robbery; the threat of force suffices to establish robbery. Battery would, however, be included in a charge of robbery under the pleadings approach if the pleading alleged the use of force.").

[80] *Pearsall v. United States*, 812 A.2d 953, 961 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975)).

[81] *See infra* notes 202-11 and accompanying text for a more extended discussion.

In the face of this abstract elemental analysis, the DCCA (as well as the U.S. Supreme Court interpreting District law[82]) has repeatedly held that "the underlying felony will merge with [] felony murder."[83] Yet, as with the case law pertaining to merger of assault and robbery, the rationale for this outcome is not explicitly provided by the DCCA. Here again, though, the conclusion only seems supportable if one accounts for the government's theory of liability—as reflected in the charging document and/or facts proven at trial—to ensure that the underlying felony upon which merger is sought is, in fact, the basis for aggravation of homicide.[84]

It's also worth noting that, in rare situations, the DCCA requires merger of overlapping offenses under circumstances that do not seem supportable under any construction of the elements test. Illustrative is the District law pertaining to merger of assault and attempt offenses. The DCCA has held that assault with a dangerous weapon is an LIO of, and therefore merges under *Blockburger* with, the while armed versions of both attempted robbery and attempted aggravated assault.[85] However, neither an abstract elemental analysis of the relevant statutes, nor a more context-sensitive evaluation of those elements in light of the government's theory of prosecution, would seem to support this conclusion. The lesser offense of assault with a dangerous weapon requires proof of a fact—an attempted battery, *plus the present ability* to commit, a battery[86]—that neither of the greater offenses of attempted robbery and attempted aggravated assault while armed require proof of. Therefore, the DCCA's decision to merge a conviction for assault with a dangerous weapon into both of these substantially overlapping offenses,

[82] *Whalen v. United States*, 445 U.S. 684 (1980). The defendant in *Whalen* was "convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape." *Id.* at 685. Thereafter, the defendant appealed the convictions (and consecutive sentences) to the DCCA, arguing that "his sentence for the offense of rape must be vacated because that offense merged for purposes of punishment with the felony-murder offense, just as, for example, simple assault is ordinarily held to merge into the offense of assault with a dangerous weapon." *Id.* at 686. However, the DCCA "disagreed, finding that 'the societal interests which Congress sought to protect by enactment [of the two statutes] are separate and distinct,' and that 'nothing in th[e] legislation . . . suggest[s] that Congress intended' the two offenses to merge." *Id.* at 687 (quoting *Whalen v. United States*, 379 A.2d 1152, 1159 (D.C. 1977)). The U.S. Supreme Court subsequently granted the case "to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law." *Id.* at 687. The *Whalen* court ultimately answered this question in the affirmative, holding that "the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case." *Id.*; *see also Doepel v. United States*, 434 A.2d 449, 459 (D.C. 1981) (recognizing that "even a concurrent sentence is an element of punishment because of potential collateral consequences" and accordingly precluding concurrent sentences for both felony murder and the underlying felony).

[83] *Newman v. United States*, 705 A.2d 246, 265 n.19 (D.C. 1997); *see, e.g.*, *Mooney*, 938 A.2d at 721 n.11 ("Where two different persons are robbed, as here, [] the underlying felony conviction (armed robbery) merges into the felony murder conviction related to the same victim") (citing *Green v. United States*, 718 A.2d 1042, 1063 (D.C. 1998)); *Spencer v. United States*, 132 A.3d 1163, 1173–74 (D.C. 2016); *Baker v. United States*, 867 A.2d 988, 1010 (D.C. 2005); *Bonhart v. United States*, 691 A.2d 160, 164 (D.C. 1997).

[84] *See infra* notes 202-11 and accompanying text for a more extended discussion.

[85] *See, e.g., Morris v. United States*, 622 A.2d 1116, 1129 (D.C. 1993) (holding, post-*Byrd*, that convictions for attempted armed robbery and assault with a dangerous weapon against the same victim as a part of the same criminal incident merge); *Frye v. United States*, 926 A.2d 1085, 1098 (D.C. 2005) (same for attempted aggravated assault while armed and assault with a dangerous weapon).

[86] *Mungo*, 772 A.2d at 245; *see, e.g., Joiner-Die v. United States*, 899 A.2d 762, 765 (D.C. 2006).

while both intuitive and seemingly just, does not appear to be consistent with the results generated by a *Blockburger* analysis.[87]

Even accounting for the DCCA's periodic *de facto* application of a broader approach to the elements test, there is little question that the overall scope of merger under District law is exceedingly narrow. Indeed, relatively minor variances between what are otherwise very similar offenses routinely provide District courts with the basis for rejecting claims of merger.[88] This is problematic given that the breadth of liability inherent in such an approach has the potential to be highly disproportionate.

The disproportionality problem is comprised of two different dimensions. The first relates to the disproportionate accumulation of convictions, namely, application of the elements test supports the imposition of multiple convictions for conduct that intuitively reflects a single crime. Second, but relatedly, this accumulation of convictions authorizes the imposition of a disproportionate sentence by effectively aggregating the statutory maxima of all non-merging offenses.

To illustrate both dimensions, consider again the DCCA's holding in *Pixley v. United States* that the District's carjacking and robbery offenses do not merge under the elements test.[89] In practical effect, this means that any person who participates in a successful carjacking in the District can always be convicted of both robbery and carjacking—notwithstanding the fact that, from a communicative perspective, a single

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[87] In holding that assault with a dangerous weapon merges with attempted aggravated assault while armed, the *Frye* court deemed it "doubtful" that the dangerous proximity test applicable to criminal attempts under District law, as applied to the offense of aggravated assault, could be established by proof of "action short of some assaultive conduct." *Frye*, 926 A.2d at 1099 ("Short of some assaultive conduct or some other specific effort to inflict harm on the victim, it is difficult to discern any overt act which would cross the threshold from mere preparation to an actual attempt for [aggravated assault]."). However, it appears to be well established in both case law and commentary that the dangerous proximity test can indeed be satisfied prior to reaching the present ability requirement of assault. As the Maryland Court of Appeals has observed:

> Because the overt act necessary for an attempt is frequently an assault, the two crimes have a significant overlap. But the overlap is not complete, because an overt act can qualify as an attempt and yet not rise to the level of an assault. For example, an attempted poisoning would qualify as attempted murder, but it would not be an assault, especially if the poison did not come in contact with the victim. *See Bittle v. State*, 78 Md. 526, 28 A. 405 (1894). An aborted attempt to bomb an airplane would not be an assault, but it would be attempted murder. *See People v. Grant*, 105 Cal.App.2d 347, 233 P.2d 660 (1951). [] A person who fires a shot at an empty bed where he mistakenly believes the victim is sleeping has committed attempted murder, but not an assault. *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902).

Hardy v. State, 301 Md. 124, 129, 482 A.2d 474, 477 (1984); *see, e.g.*, R. PERKINS, *Criminal Law* 578 (2d ed. 1969) ("The law of assault crystallizing at a much earlier day than the law of criminal attempt in general, is much more literal in its requirement of 'dangerous proximity to success' (actual or apparent) than is the law in regard to an attempt to commit an offense other than battery.")

[88] *See, e.g.*, *Pixley*, 692 A.2d at 440; *Allen v. United States*, 697 A.2d 1, 2 (D.C. 1997) (rejecting claim of merger for UUV and carjacking, notwithstanding the fact that it would take "an improbable scenario" to commit a carjacking without also committing UUV); *In re Z.B.*, 131 A.3d 351, 355 (D.C. 2016) (holding that a conviction for robbery does not merge with threats because "it *is* possible to commit a robbery without committing verbal threats—that is, through the use of violence or conduct that puts one in fear").

[89] *Pixley*, 692 A.2d at 440.

conviction for carjacking would seem to suffice.[90] And it also means that any person who participates in a successful, unarmed carjacking in the District is subject to thirty-six years of incarceration (regardless of whether any force is actually applied[91]), which is three-and-a-half times the ten year statutory maximum facing someone who commits a "life-threatening or disabling" aggravated assault.[92]

The kinds of disproportionality inherent in the elements test stem from placing a singular focus on whether offenses require proof of different facts. This is problematic from the perspective of proportionate punishment because two substantially overlapping offenses may require proof of slightly different facts, yet the gravamen of one offense—based upon the harm, culpability, and penalty it proscribes—may still duplicate that of the other.

Here again, a comparison of the District's robbery and carjacking offenses is illustrative. It is certainly true that a person can commit carjacking without necessarily committing robbery. Not only is asportation an essential element of robbery but not carjacking, but carjacking can be proven without regard to the defendant's extremely intoxicated state, which is not true of robbery.[93] These moral distinctions, while narrow, are meaningful: all else being equal, for example, a sober theft of property from a person is more blameworthy than a failed attempt at taking property while in an inebriated state. That said, the existence of these distinctions does not undercut a more general recognition that carjacking speaks to the same combined threat to personal security and property rights addressed by robbery.[94] The central difference is that carjacking affords additional protections—in the form of substantially increased minimum and maximum penalties—where the theft of property implicates an automobile.[95] (This conclusion is further

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[90] Which is to say, that a carjacking conviction by itself would seem to express the nature of what has occurred where a single victim is robbed of his or her automobile. This is, of course, a subjective assertion; however, it seems relatively clear that the most common-sense interpretation of the phrase "X was convicted of both robbery and carjacking" is that X engaged in two separate criminal acts.

[91] Under District law, it appears that a non-violent theft of an automobile located near the owner constitutes carjacking. *Young v. United States*, 111 A.3d 13, 14 (D.C. 2015); *see* cases cited *supra* note 77 (discussing alternative element of "stealthy seizure" in the context of robbery).

[92] D.C. Code § 22-404.01(b) ("Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both."); *Swinton v. United States*, 902 A.2d 772, 775 (D.C. 2006) (observing that "[t]he injuries in [aggravated assault] cases usually [are] life-threatening or disabling. The victims typically require[] urgent and continuing medical treatment (and, often, surgery), carr[y] visible and long-lasting (if not permanent) scars, and suffer[] other consequential damage, such as significant impairment of their faculties. In short, these cases [are] horrific.").

[93] *See, e.g.*, *Pixley*, 692 A.2d at 440.

[94] *See* COMMITTEE REPORT OF THE COMMITTEE ON THE JUDICIARY ON BILL 10-16, *Carjacking Prevention Amendment Act of 1993*, at 2 (Feb. 25, 1993) (hereinafter "Committee Report") ("Background and Need" section of the legislative history notes that "[f]or the victim, carjacking is an especially traumatic experience"); *id.* at 3 (noting that the bill was passed a month after "[t]he issue of carjacking began to receive media and national attention as a result of the September, 1992 carjacking which ended with the murder of Pamela Basu, who died while being dragged in her car.")

[95] For example, the "Background and Need" section of the Committee Report notes that:

> [C]arjacking takes from its victims their mobility. Where a vehicle is used for employment or transportation to employment, a carjacker has stolen the victim's means of earning a living. Additionally, in a city of renters, their automobile probably

bolstered by a recognition that the elements of an offense only set the floor of liability, while the statutory maximum is geared towards addressing more culpable/harmful variations of the same basic conduct—a characterization that seems to easily fit *sober* and *successful* carjackings.[96]) With that in mind, and assuming that the District's robbery and carjacking statutes are individually proportionate, then imposing multiple convictions and punishments for both offenses—where the gravamen of one duplicates that of the other—necessarily leads to the disproportionate duplication of liability and punishment.

It's important to highlight that the disproportionalities inherent in the application of the elements test go well beyond the *double* counting of similar harms, implicating *triple* counting and beyond. Consider, for example, the actual extent of liability and punishment confronting an actor who commits an unarmed carjacking in the District based on the following facts:

Unarmed Carjacking. X confronts Y while Y is sitting in her new Mercedes Benz at a gas station. X threatens to inflict physical harm upon Y unless she hands over her keys and immediately exits the vehicle. Y complies with the threat. X thereafter drives away in the vehicle without inflicting any physical harm on Y.

In this scenario, Defendant X has not only satisfied the requirements of liability for carjacking and robbery, but also, at least three other District offenses: (1) unauthorized use of a vehicle (UUV), which subjects a person who uses the motor vehicle of another without permission to a five year statutory maximum[97]; (2) felony threats, which subjects a person who makes verbal threats to do bodily harm to a twenty year statutory maximum; and (3) felony theft, which subjects a person who steals property worth more than $1,000 to a ten year statutory maximum.[98]

None of these offenses appear to be subject to a presumption of merger under the elements test. For example, the DCCA has explicitly determined that UUV does not merge with carjacking because UUV, but not carjacking, requires the actual *use* of the vehicle.[99] DCCA case law likewise suggests that felony threats would not merge with carjacking because "it is possible to commit a robbery without committing verbal threats—that is, through the use of violence or conduct that puts one in fear."[100] And DCCA case law also indicates that felony theft would not merge with carjacking because for felony theft, but not carjacking, the value of the property stolen must be greater than

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represents the most valuable piece of property owned by victims. Even if properly insured, the cost of replacement may be too much to bear.

Id. at 3.

[96] Indeed, *sober* and *successful* carjackings are presumably the norm rather than the exception.

[97] D.C. Code § 22-3215(b) ("A person commits the offense of unauthorized use of a motor vehicle under this subsection if, without the consent of the owner, the person takes, uses, or operates a motor vehicle, or causes a motor vehicle to be taken, used, or operated, for his or her own profit, use, or purpose.").

[98] D.C. Code § 22-3212(a) ("Any person convicted of theft in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both, if the value of the property obtained or used is $1,000 or more.").

[99] *Allen*, 697 A.2d at 2.

[100] *In re Z.B.*, 131 A.3d at 353 (comparing robbery and misdemeanor threats, which has essentially the same elements as felony threats).

$1,000.[101] (One could imagine, for example, a carjacking implicating a vehicle worth less than $1,000). Under the elements test, then, it appears that Defendant X could be could be convicted of, and cumulatively sentenced for, all five offenses, with an accompanying aggregate statutory maxima of seventy-one years.

Now consider the further accumulation of convictions and aggregation of sentencing exposure that occurs under the elements test when a weapon is introduced into the fact pattern:

Armed Carjacking. X confronts Y while Y is sitting in her new Mercedes Benz at a gas station. X brandishes a firearm and threatens to shoot Y unless she hands over her keys and immediately exits the vehicle. Y complies with the threat. X thereafter drives away in the vehicle without inflicting any physical harm on Y.

In this scenario, Defendant X has satisfied the requirements of liability for at least seven different offenses: (1) armed carjacking, an aggravated form of carjacking that is subject to a forty year statutory maximum alongside a fifteen year mandatory minimum[102]; (2) robbery while armed, a combination offense subject to a forty five year statutory maximum alongside a five to ten year mandatory minimum[103]; (3) felony theft (ten year statutory maximum); (4) felony threats (twenty year statutory maximum); (5) UUV (five year statutory maximum); (6) possession of a firearm during a crime of violence (PFCOV), which is subject to a fifteen year statutory maximum alongside a five year mandatory minimum[104]; and (7) carrying a pistol without a license (CPWL), which is subject to a five year statutory maximum.[105]

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[101] *See Foreman v. United States*, 988 A.2d 505, 506 n.1 (D.C. 2010) (parties agreeing that felony theft is not a lesser-included offense of armed robbery).

[102] D.C. Code § 22-2803(b)(1) ("A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles), commits or attempts to commit the offense of carjacking."); *id.* at (b)(2) ("A person convicted of armed carjacking shall be fined not more than the amount set forth in § 22-3571.01 and be imprisoned for a mandatory-minimum term of not less than 15 years and a maximum term of not more than 40 years, or both.").

[103] The applicable enhancement statute, D.C. Code § 22–4502, provides, in relevant part:

> (a) Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm . . . .
>
> (1) May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses . . . [and] shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years; [or]
>
> (2) [] shall, if convicted of [a] second offense while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 10 years . . . .

[104] D.C. Code § 22-4504(b) ("No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person

None of these offenses appear to be subject to a presumption of merger under the elements test. The first five offenses—armed carjacking, robbery while armed, felony theft, felony threats, and UUV—would not merge for the same reasons previously mentioned above in the context of an unarmed carjacking.[106] Nor, however, would the PFCOV and CPWL convictions appear to be subject to merger under the elements test either. For example, PFCOV does not merge with either armed carjacking or robbery while armed because, as the DCCA has explained, "proof of possession does not necessarily prove armed with/readily available, and proof of a dangerous weapon does not necessarily prove a firearm or imitation thereof."[107] And CPWL does not merge with either of these offenses because, as the DCCA has explained, CPWL "presupposes an operable and unlicensed pistol outside one's own premises or place of business, but not proof that the pistol was used in a robbery or, for that matter, in any other crime."[108] Finally, the DCCA has determined that PFCOV does not merge with CPWL because, whereas "[t]he lack of a license is an element of CPWL, but not of PFCOV," the "commission of a crime of violence or a dangerous crime while in possession of a firearm or imitation firearm is an element of PFCOV, but not of CPWL."[109] Pursuant to the elements test, therefore, it appears that Defendant X could be convicted of, and cumulatively sentenced for, all seven offenses, with an accompanying aggregate statutory maxima of over one hundred and thirty years alongside at least twenty five years of aggregated mandatory minima.[110]

It's important to point out that the breadth of liability inherent in the District's approach to merger, while illustrated in the context of a carjacking, is by no means limited to this particular context. Rather, application of the elements test to just about any area of District law is likely to reflect it. To take just one more example, consider the intersection between the elements test and general inchoate liability. Although the inchoate offenses of attempt, solicitation, and conspiracy are similarly targeted at preventing the consummation of criminal offenses, none appear to be subject to a presumption of merger under the elements test.

For example, the DCCA in *Robinson v. United States* specifically rejected the defendant's claim that conspiracy to commit robbery and attempted robbery merge, observing that:

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may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence.")

[105] D.C. Code § 22-4504(a)(1) ("A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both . . . .").

[106] *See supra* notes 99-101 and accompanying text.

[107] *Thomas v. United States*, 602 A.2d 647, 655 (D.C. 1992); *Stevenson v. United States*, 760 A.2d 1034, 1035 (D.C. 2000) ("convictions for PFCV do not merge into the predicate armed offenses").

[108] *Rouse v. United States*, 402 A.2d 1218, 1221 (D.C. 1979).

[109] *Ray v. United States*, 620 A.2d 860, 865 (D.C. 1993)

[110] *See, e.g., Hanna*, 666 A.2d at 859 ("This court has expressly ruled [that the while armed enhancement and PFCOV "do not merge and, therefore, that a defendant subject to a mandatory minimum sentence as a result of a conviction under [PFCOV] may also be subject to the [while armed] enhancement provisions [in the D.C. Code] . . . At resentencing, therefore, appellants are subject to the mandatory minimum sentences required by [both].") (citing *Thomas*, 602 A.2d at 654).

> There are obvious differences between the two offenses, and each requires proof of a fact which the other does not. Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.[] To establish a conspiracy, the government must prove an unlawful agreement among two or more persons. No such proof is required for attempted robbery. To establish attempted robbery, the government must prove that the defendant committed an overt act which was done with the intent to commit the crime and which, but for the intervention of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime. [] No such proof is required for conspiracy, for the "overt act" requirement as to that crime is far less exacting; a preparatory act, innocent in itself, may be sufficient.[111]

Likewise, although the DCCA has never explicitly addressed the issue, the same *Blockburger*-based rationale would similarly seem to support the imposition of multiple convictions and punishments for both solicitation and attempt, as well as solicitation and conspiracy, to commit a single crime of violence.[112] If true, however, this would mean that a person could—pursuant to the elements test—be convicted of, and sentenced for, attempt, conspiracy, and solicitation to commit the same crime of violence.[113]

Beyond authorizing the imposition of three felony convictions for an effort to accomplish a single criminal objective, the resulting aggregation of punishments could potentially impose a significantly greater level of sentencing exposure upon an actor who *fails to accomplish a criminal objective* than one who *successfully completes it*. A comparative analysis of the two following scenarios under District law is illustrative:

Scenario 1. X1 intentionally crushes Y's jaw with a sucker punch to the face. X1's goal is to inflict a horrific but non-fatal injury. X1 is successful; Y's injury requires urgent and continuing medical treatment, and results in visible and long-lasting scars.[114]

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[111] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992); *see, e.g., McCullough v. United States*, 827 A.2d 48, 59 (D.C. 2003)

[112] The phrase "crime of violence," in turn, is defined in D.C. Code § 23-1331(4) to encompass the following offenses:

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

[113] *Robinson*, 608 A.2d at 116.

[114] *See Swinton*, 902 A.2d at 775 (observing that "[t]he injuries in [aggravated assault] cases usually [are] life-threatening or disabling. The victims typically require[] urgent and continuing medical treatment (and,

Scenario 2. X2 offers Z $1,000 to sucker punch Y in the face. X2's goal is to inflict a horrific but non-fatal injury. Z initially agrees, but, after making substantial preparations, later renounces, informing the police of the plan. X2 subsequently decides to carry out the plan himself. However, as X2 approaches Y, the police intercede, thereby preventing X2 from injuring Y.

In scenario 1, X1 has committed aggravated assault, and is therefore subject to ten years of potential punishment. In scenario 2, X2 came close, but ultimately failed, to commit aggravated assault. He does, however, satisfy the requirements of liability for attempted aggravated assault, and is therefore subject to five years of potential punishment for that general inchoate offense.[115] In addition, X2 has also satisfied the requirements of liability for two other general inchoate offenses: (1) solicitation of aggravated assault, which is subject to ten years of potential punishment[116]; and (2) conspiracy to commit aggravated assault, which is subject to ten years of potential punishment.[117] Assuming, pursuant to the elements test, that convictions for these general inchoate offenses do not merge, then X2 would be facing a maximum sentence of twenty-five years for his unsuccessful effort at harming Y. This outcome, when viewed in light of the ten years of potential incarceration confronting X1 for successfully causing the same injury to Y, seems highly disproportionate.

Prior to concluding the proportionality analysis in this section, one important caveat bears notice: the fact that the elements test authorizes the disproportionate aggregation of statutory maxima does not mean that the sentences actually imposed by D.C. Superior Court judges in any particular case will reflect this disproportionality. This is because, while the District's trial judges must determine a sentence for every offense of conviction, they typically have discretion to have those sentences run at the same time, thereby effectively neutralizing the imprisonment terms of all but the most severe sentence—a practice generally referred to as concurrent sentencing.

There are two different sources of legal authority relevant to understanding the scope of concurrent sentencing in the District. The first is the D.C. Code. A handful of District statutes *affirmatively require* the sentences arising from multiple convictions for two or more substantially overlapping offenses to run concurrently. The most notable example of this kind of legislative provision is D.C. Code § 22-3203, which statutorily requires judges to impose concurrent sentences for certain combinations of overlapping property offenses. More specifically, this provision states that:

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often, surgery), carr[y] visible and long-lasting (if not permanent) scars, and suffer[] other consequential damage, such as significant impairment of their faculties. In short, these cases [are] horrific.").

[115] D.C. Code § 22-404.01(c) ("Any person convicted of attempted aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 5 years, or both.").

[116] D.C. Code § 22-2107(b) ("Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.").

[117] D.C. Code § 22-1805a(2) ("If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be . . . imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.").

> A person may be convicted of any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct; provided, that no person shall be consecutively sentenced for any such combination or combinations that arise from the same act or course of conduct.[118]

The D.C. Code likewise contains a few additional provisions that impose a comparable requirement of concurrent sentencing on a narrower, offense-specific basis. For example, the District's enticing a child statute establishes the following:

> No person shall be consecutively sentenced for enticing a child or minor to engage in a sexual act or sexual contact . . . and engaging in that sexual act or sexual contact with that child or minor, provided, that the enticement occurred closely associated in time with the sexual act or sexual contact.[119]

The second relevant source of legal authority are the Voluntary D.C. Sentencing Guidelines (DCSG), which direct Superior Court judges to run such overlapping convictions concurrently in a variety of situations. The relevant provision, Rule 6.2, offers the following non-binding[120] guidance:

> 6.2 Concurrent Sentences
>
> The following sentences must be imposed concurrently:
>
> For offenses that are not crimes of violence: multiple offenses in a single event, such as passing several bad checks . . . .

The above language—when viewed in light of the relevant DCSG definitions of "crimes of violence"[121] and "event"[122]—indicates that multiple convictions for all non-

[118] D.C. Code § 22-3203. This provision accordingly dictates that a person who violates two or more of the enumerated property offenses—theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property—during a single course of conduct *must* be sentenced concurrently. *See, e.g., Youssef v. United States*, 27 A.3d 1202, 1206 (D.C. 2011).

[119] D.C. Code § 22-3010.

[120] The DCSG are completely voluntary. *See, e.g.,* D.C. Code § 3–105(c) (sentencing guidelines promulgated by the D.C. Sentencing Commission "shall not create any legally enforceable rights in any party"); *Speaks v. United States*, 959 A.2d 712, 718 (D.C. 2008).

[121] The DCSG clarify that "[t]he term "crime of violence" under the Guidelines is . . . identical to the crime of violence definition provided in D.C. Code § 23-1331(4)." DCSG R. 7.4. That statutory provision, in turn, denotes the following list of offenses:

> (4) The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force,

violent offenses arising from the same course of conduct are to be sentenced concurrently. This appears to be true, moreover, without regard to whether there exists *any overlap* between the offenses of conviction in the first place. So, for example, a judge sentencing a defendant convicted of theft and carrying a dangerous weapon (CDW) based on the same course of conduct would, under this rule, impose concurrent sentences for each offense—notwithstanding the fact that CDW and theft are completely different offenses.[123] All the more so, then, Rule 6.2 appears to direct judges to impose concurrent sentences on a defendant who is convicted of multiple non-violent offenses that actually overlap.[124]

The District's concurrent sentencing policies, when viewed collectively, seem to *modestly* mitigate *some* of the proportionality problems inherent in the elements test. At the same time, however, the relevant safeguards these policies appear to provide are limited in key ways.

> coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4).

[122] DCSG R. 7.10 provides the following definition of "event":

> [O]ffenses are part of a single event if they were committed at the same time and place or have the same nucleus of facts. Offenses are part of multiple events if they were committed at different times and places or have a different nucleus of facts. When an offense(s) crosses jurisdictional lines (e.g. from Maryland into the District), it may result in multiple cases. However, this should not change the analysis regarding whether the offense(s) constitutes a single or multiple events.

[123] This practice may lead to disproportionate leniency in certain situations. *See, e.g.*, Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 605 (2004) (noting that the problem with a system in which courts "impose concurrent sentences for multiple offenses of conviction [when such offenses do not overlap]" is that it "has the obvious and pervasive flaw of trivializing, to the point of complete irrelevance, every offense other than the most serious one. A sensible liability scheme should require, or at least allow, some additional punishment for each such harm—although perhaps incrementally reduced punishment instead of the equally crude alternative of full consecutive sentences for each offense.").

[124] The DCSG provides the following relevant example:

> The defendant sold heroin and cocaine to an undercover narcotics officer as part of a "buy – bust" operation. The defendant was not apprehended at the time of the transaction and a warrant was issued for her arrest. The defendant was arrested three days later. A search of the defendant's person at the time of her arrest uncovered liquid PCP. The defendant was convicted of distribution of heroin, distribution of cocaine, and possession of liquid PCP. The sentences imposed for distribution of heroin and distribution of cocaine should run concurrently because they are non-violent crimes that arose from the same event. The court has the discretion to impose a sentence for possession of liquid PCP that runs either concurrently or consecutively to the sentences imposed for the distribution of heroin and distribution of cocaine convictions because they are not part of the same event.

DCSG R. 6.3.

First, various provisions in the D.C. Code affirmatively encourage judges to run the sentences for substantially overlapping offenses back-to-back (hereinafter, "consecutive sentencing"). In some instances, the encouragement is "soft." For example, the DCCA has construed D.C. Code § 23-112 to embody a general "preference . . . that consecutive sentences be imposed when an individual is convicted of two or more offenses, even if the convictions arise out of the same act or transaction."[125] In other instances, however, the D.C. Code legally compels consecutive sentencing. For example, the District's UUV statute establishes that any person who commits the offense "during the course of or to facilitate a crime of violence, *shall be*," *inter alia*, "imprisoned for not more than 10 years, or both, *consecutive to the penalty imposed for the crime of violence*."[126]

Second, the relatively few number of offenses subject to a statutorily mandated rule of concurrent sentencing means that the circumstances in which an accused has a *legally enforceable right to concurrent sentencing* for substantially overlapping offenses are quite rare.

Third, the concurrent sentencing policies reflected in the DCSG are—their non-binding nature aside[127]—limited in important ways. Most significant is the fact that they only address the sentencing of multiple non-violent offenses arising from the same course of conduct.[128] In contrast, the DCSG are completely silent on how to deal with comparable convictions for violent offenses.[129] Further, the relevant DCSG rule applicable to the sentencing of multiple non-violent offenses arising from the same course of conduct it itself subject to a "departure principle," under which judges may "deviat[e]" from the "consecutive and concurrent sentencing rules" if they believe that "adhering to them would result in a manifest injustice."[130]

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[125] *Jones v. United States*, 401 A.2d 473, 475 (D.C. 1979); *see, e.g., Banks v. United States*, 307 A.2d 767, 769 (D.C. 1973) ("Congress has clearly stated its intent [in the general sentencing statute with respect to consecutive sentences]."); *Bragdon v. United States*, 717 A.2d 878, 880 (D.C. 1998) (same). In practice, the statutory preference articulated in D.C. Code § 23-112 has little legal effect; for the most part, it merely makes consecutive sentencing the *default* in the absence of judicial specification. That is, where the sentencing court forgets to specify in a multi-conviction case how the various sentences are supposed to run. At the same time, there's also a local rule of criminal procedure, which more explicitly mandates this outcome as well. *See* D.C. Super. Ct. R. Crim. P. 32 ("Unless the Court pronouncing a sentence otherwise provides, a sentence imposed on a defendant for conviction of an offense shall run consecutively to any other sentence imposed on such defendant for conviction of an offense.").

[126] D.C. Code § 22-3215(2)(A).

[127] That is, because the DCSG are completely voluntary, an accused sentenced consecutively for committing two or more substantially overlapping offenses in contravention to Rule 6.2 effectively has no legal recourse. *See, e.g.*, sources cited *supra* note 120.

[128] In practical effect, this means that a District judge faced with sentencing an offender like Defendant X in the carjacking hypothetical discussed earlier receives no guidance from the DCSG regarding the critical determination of whether that offenders sentences ought to run concurrently or consecutively.

[129] To be sure, there is a provision in the DCSG that addresses the overarching topic of sentencing an offender convicted of multiple violent offenses. However, that provision, Rule 6.1, appears to ignore the issue of how to sentence an offender who has committed multiple violent offenses in a single course of conduct, which implicates one victim. *See id.* at R. 6.1 ("The following sentences must be imposed consecutively: For multiple crimes of violence: multiple victims in multiple events; multiple victims in one event; and one victim in multiple events for offenses sentenced on the same day . . .").

[130] *See* DCSG R. 6.3 ("The court has discretion to sentence everything else either consecutively or concurrently . . . The departure principles permit deviating from these consecutive and concurrent sentencing rules if adhering to them would result in a manifest injustice . . . ."). Presumably, then, a judge

Fourth, and perhaps most fundamentally, concurrent sentencing policies only address one kind of disproportionality arising from multiple convictions for substantially related offenses: the aggregation of sentencing exposure. They do nothing, in contrast, to address the second relevant kind of disproportionality: the accumulation of criminal convictions. The disproportionate accumulation of criminal convictions is a distinct problem given that a criminal conviction is—sentence length aside—a form of punishment.[131] This is a function of "the extra stigma imposed upon one's reputation" by the imposition of multiple criminal convictions.[132] And it is also a function of the collateral consequences associated with those convictions, which may include "the harsher treatment that may be accorded the defendant under the habitual offender statutes of some States; the possible impeachment by prior convictions, if the defendant ever becomes a witness in future cases; and, in some jurisdictions, less favorable parole opportunities."[133]

When viewed as a whole, then, the District's law of merger poses two different sets of problems. First, it suffers from a marked lack of clarity and consistency, as reflected in the DCCA's disparate and conflicting application of the elements test. Second, and perhaps more significant, application of the elements test—under any construction—creates the possibility of a disproportionate multiplication of criminal convictions and punishment. With those problems in mind, RCC § 212 incorporates a comprehensive legislative framework for addressing merger issues that is both clearer and broader than the District's current approach, and which is oriented towards improving the consistency and proportionality of District law.[134]

The centerpiece of this framework is RCC § 212(a), which incorporates a cluster of principles to guide the judicial inquiry into legislative intent as to merger where substantially related offenses are based on the same course of conduct. The first, and most narrow, of these principles is the elements test. More specifically, subsection (a)(1) codifies the elements test by establishing that merger is appropriate where "[o]ne offense

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could impose consecutive sentences for the commission of multiple non-violent, substantially overlapping offenses without violating the DCSG at all—so long as the imposition would avoid a "manifest injustice." *Id.* And of course, this decision would not be subject to any legal review.

[131] *Com. v. Jones*, 382 Mass. 387, 396 (1981).

[132] *O'Clair v. United States*, 470 F.2d 1199, 1203 (1st Cir. 1972).

[133] *Jones*, 382 Mass. at 396 (citing, e.g., *Benton v. Maryland*, 395 U.S. 784, 790-791 & n.5 (1969); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 299-300 n.161 (1965); Note, *Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970)). To be sure, some of these collateral consequences can be dealt with in other ways. Illustrative is the current version of D.C. Code § 22-3203, which also establishes that for the relevant offenses subject to concurrent sentencing, "[c]onvictions arising out of the same act or course of conduct shall be considered as one conviction for purposes of any application of repeat offender sentencing provisions." D.C. Code § 22-3203. Still, this kind of roundabout solution is far from perfect. For example, it only applies to local repeat offender sentencing provisions, and thus presumably would not govern the calculation of an offender's criminal history score in another jurisdiction.

[134] To be sure, the most direct way of dealing with the proportionality problems that arise from offense overlap under current District law is to revise individual offenses in a manner that reflects their appropriate breadth, and to eliminate unnecessary offenses that merely duplicate preexisting coverage. CCRC work has endeavored to move in this direction. As a practical matter, however, drafting offenses that perfectly line up next to one another without any overlap (and avoiding gaps in coverage) is unachievable.

is established by proof of the same or less than all the facts required to establish the commission of the other offense."[135]

Thereafter, subsection (a)(2) addresses three particular kinds of variances, which, when constituting the sole distinctions between substantially related offenses, should support a presumption of merger. The first is where the offenses differ only in that one requires a less serious injury or risk of injury than is necessary to establish commission of the other offense (e.g., assault and aggravated assault). The second is where the offenses differ only in that one requires a lesser form of culpability than the other (e.g., murder and manslaughter). And the third is where the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct (e.g., murder and murder of a police officer).

Next, subsection (a)(3) establishes a presumption of legislative intent as to merger where "[o]ne offense requires a finding of fact inconsistent with the requirements for commission of the other offense." This limitation on multiple liability is intended to apply to convictions for two or more substantially related offenses that are "inconsistent with each other as a matter of law,"[136] that is, where the proof necessary to establish one offense necessarily precludes the existence of the proof necessary to establish another offense under any set of facts when based on the same course of conduct (e.g., intent to steal-theft and intent to use-theft).[137]

Although the District's law of merger is not a paradigm of clarity, it nevertheless appears that each of the above five principles is supported by District case law.[138] However, the next merger principle in RCC § 212 clearly goes beyond it.

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[135] *See Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991) (*en banc*) (While the *Blockburger* test, as codified by D.C. Code § 23-112, "uses the phrase 'proof of a fact,' the reference is to what the statutory 'offense' requires in the way of proof, not to the specific 'transaction,'" i.e., "[t]he word 'requires' can refer only to elements, not to whatever facts may be adduced at trial").

[136] *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States*, 407 F.2d 1199, 1223 (1967) (*en banc*).

[137] This presumption against multiple liability based on inconsistent guilty verdicts is to be distinguished from, and is therefore not intended to displace, the legal system's well established "tolerat[ion]" of verdicts of *guilt* and *innocence* that are inconsistent with one another. *Evans v. United States*, 987 A.2d 1138, 1140–41 (D.C. 2010) ("[A] logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict") (quoting *Yeager v. United States*, 557 U.S. 110, 112 (2009) (discussing *Dunn v. United States*, 284 U.S. 390 (1932))); *see, e.g., United States v. Powell*, 469 U.S. 57 (1984).

[138] For District case law in support of the elements test as codified RCC § 212(a)(1), see, for example, cases cited *supra* notes 45-49 and accompanying text.

For District case law in support of the lesser harm principle as codified in RCC § 212(a)(2)(A), see, for example, *In re T.M.*, 155 A.3d 400, 408 (D.C. 2017) ("Appellant's conviction for felony assault . . . merges with her conviction for AAWA because felony assault is a lesser-included offense of AAWA."); *Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014) ("[Felony assault] is a lesser-included offense of aggravated assault.") (quoting *Collins v. United States*, 73 A.3d 974, 985 (D.C. 2013)).

For District case law in support of the lesser culpability principle as codified in RCC § 212(a)(2)(B), see, for example, *Washington v. United States*, 884 A.2d 1080, 1085 (D.C. 2005) (involuntary manslaughter LIO of premeditated murder); *In re T.H.B.*, 670 A.2d 895 (D.C. 1996) (simple assault merges with assault with intent to commit robbery); *Teneyck v. United States*, 112 A.3d 906, 913 (D.C. 2015) (same).

For District case law in support of the specificity principle as codified in RCC § 212(a)(2)(C), see, for example, *Waller v. United States*, 389 A.2d 801, 808 (D.C. 1978) (assault merges with assault with a dangerous weapon).

More specifically, RCC § 212(a)(4) establishes a presumption of legislative intent as to merger where "[c]onviction for one offense [reasonably] accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each." This principle, which is the broadest in subsection (a), requires merger of convictions for two or more substantially related offenses when the gravamen of one offense duplicates that of another. The pertinent evaluation goes beyond consideration of whether it is theoretically possible to commit one offense without committing another. Instead, it asks the court to consider the relevant offenses' purposes, accounting for the harm or wrong, culpability, and penalty proscribed by each.

The final two principles incorporated into RCC § 212(a) address merger of general inchoate offenses. The first principle, codified in subsection (a)(5), establishes a presumption of legislative intent as to merger where "[o]ne offense consists only of an attempt or solicitation toward commission of [t]he other offense," or, alternatively, "[a] substantive offense that is related to the other offense in the manner described in paragraphs (1)-(4)." The first portion of this provision generally precludes multiple convictions for an attempt or solicitation and the completed offense (e.g. attempt or solicitation to commit murder and murder). The second portion of this principle extends the same treatment to an attempt or solicitation and a completed offense that varies from the target of the attempt or solicitation in a manner that reflects the other, more general merger principles enumerated in subsection (a) (e.g., attempt or solicitation to commit murder and aggravated assault). This principle appears to at least generally reflect current District law.[139]

Note that the District considers these three principles to be an extension of the elements test, whereas in at least some jurisdictions they are considered to be an addition to/expansion of the elements test. *See, e.g.*, Commentary on Haw. Rev. Stat. Ann. § 701-109(c); *Fraser v. State*, 523 S.W.3d 320, 333 (Tex. App. 2017).

For District case law consistent with RCC § 212(a)(3), see, for example, *Davis v. United States*, 37 App. D.C. 126, 133 (D.C. Cir. 1911) (precluding multiple convictions for logically inconsistent offenses of obtaining money by false pretenses and embezzlement of the same money in a case where "the trial court pertinently suggested, that the 'verdict under the embezzlement counts negatives one essential fact in the crime of procuring money by false pretenses, namely, the devesting of the title originally'"); *Fulton v. United States*, 45 App. D.C. 27, 41–42 (D.C. Cir. 1916) (reaffirming the principle set forth in *Davis*, namely, that multiple convictions are inappropriate for "counts charging distinct and inconsistent offenses," and holding that guilty verdicts on two embezzlement counts alleging ownership of the same property in different persons could not stand); *United States v. Daigle*, 149 F. Supp. 409, 414 (D.D.C), *aff'd*, 248 F.2d 608 (D.C. Cir. 1957) ("[W]here a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand."); *see also Byrd*, 598 A.2d at 397 (observing that "theft and RSP [] are closely related to one another, but mutually inconsistent," and that therefore, "unlike a lesser included offense where the lesser offense is committed at the same time as the greater offense, a defendant cannot commit theft and RSP at the same time.") (Belson, J., concurring in part and dissenting in part); *compare Edmonds v. United States*, 609 A.2d 1131, 1132 (D.C. 1992) ("Even if we assume that the verdicts on these two counts were inconsistent, it has long been recognized that inconsistent verdicts are permissible.").

[139] For District case law in support of RCC § 212(a)(5)(A) as it pertains to criminal attempts, see, for example, *In re T.M.*, 155 A.3d 400, 408 (D.C. 2017) (holding that convictions for attempt and completed offense merge); *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990) ("Every completed criminal offense necessarily includes an attempt to commit that offense.").

Note that these cases support merger notwithstanding the fact that the offenses of attempt and the completed offense do not always satisfy the elements test. Consider that for a criminal attempt, the government must prove that the accused acted with the intent to cause any result required by the target

The second principle, codified in subsection (a)(6), establishes a presumption of legislative intent as to merger where "[e]ach offense is a general inchoate offense designed to culminate in the commission of [t]he same offense"; or, alternatively, "[d]ifferent offenses that are related to one another in the manner described in paragraphs (1)-(4)." The first portion of this provision generally precludes multiple convictions for attempt, solicitation, and conspiracy to commit the same offense. The second portion of this principle extends the same treatment to multiple convictions for attempt, solicitation, and conspiracy to commit distinct target offenses, provided that the variance between those target offenses reflects the other, more general merger principles enumerated in subsection (a). This principle appears to be contrary to current District law at least insofar as merger of attempt and conspiracy is concerned.[140]

Subsection (b) establishes when the principles in subsection (a) are inapplicable, namely, "whenever the legislature clearly manifests an intent to authorize multiple convictions for different offenses." This explicitly codifies what is otherwise well established in the District: that legislative intent is the touchstone of judicial merger analysis.[141]

Subsection (c) provides a legal framework for applying the principles set forth in §§ (a) and (b) to statutes comprised of alternative elements. It requires judges to conduct the merger inquiry with reference to the unit of analysis most likely to facilitate proportionality in sentencing. This provision reflects the approach inherent in some areas of District law.[142]

Subsection (d) establishes a rule of priority for guiding judicial selection of merging offenses. Under this rule, where two or more offenses are subject to merger, the conviction that ultimately survives—whether at trial or on appeal—should be [t]he most serious offense among the offenses in question."[143] However, "[i]f the offenses are of

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offense, regardless of whether a lower culpable mental state, such as recklessness or negligence, will suffice to establish the target offense. *See Jones v. United States*, 124 A.3d 127, 132–34 (D.C. 2015); *see also Williams v. United States*, 130 A.3d 343, 347 (D.C. 2016) (discussing *Jones*). Practically speaking, this means that, where the target of an attempt is a crime of recklessness or negligence, it is not necessarily true that one who commits the target offense necessarily also commits an attempt. *Compare* D.C. SUPER. CT. R. CRIM. P. 31(c) ("A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.").

No District case law on general solicitation liability exists. *See* Commentary on D.C. Crim. Jur. Instr. § 4.500 (observing, with respect to the District's general solicitation offense, that there does not appear to be a single reported decision "involving this statute"). However, it seems at least plausible that the DCCA would apply a similar approach to dealing with merger of solicitation and the completed offense.

For District case law allowing multiple convictions for conspiracy and the completed offense, see, for example, *McCullough v. United States*, 827 A.2d 48, 59 (D.C. 2003) (citing *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992)).

For District case law in support of RCC § 212(a)(5)(B) as it pertains to criminal attempts, see, for example, *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005) (finding that attempted aggravated assault while armed merges with assault with a dangerous weapon).

[140] *See supra* notes 111-14 and accompanying text (discussing merger of conspiracy and attempt under District law).

[141] *See* cases cited *supra* notes 33-49 and accompanying text.

[142] *See* cases cited *supra* notes 74-84 and accompanying text.

[143] RCC § 212(d)(1).

equal seriousness," then "any offense that the court deems appropriate" may remain.[144] This rule of priority is consistent with current District law.[145]

When viewed collectively, subsections (a)-(d) comprise a clear and comprehensive body of substantive merger policies that would broaden the District's current approach to merger in furtherance of the overall proportionality of District law. It's important to note, however, that this expansion would not change the essential nature of the merger inquiry currently facing District courts. This is because, although some of the merger principles enumerated in these provisions go beyond the scope of the elements test as enumerated by the DCCA (and codified in RCC § 212(a)(1)), these principles all share one core similarity: they present questions of law regarding the manner in which the statutory elements of criminal offenses relate to one another. Therefore, the determination of whether those principles preclude multiple liability for two or more substantially related offenses can—as is currently the case in the District[146]—be conducted without regard to the underlying facts of a case.[147]

RCC § 212(e): Relation to Current State of Judicial Administration of Merger Policy. RCC § 212(e) would neither require nor preclude changes to current District law pertaining to judicial administration of merger policy.

In the District, the law of merger is generally deemed to be the province of the appellate courts, with little role for trial judges to play in safeguarding "the double jeopardy bar on multiple punishments for the same offense."[148] This is reflected in the fact that D.C. Superior Court judges appear to systematically ignore all merger issues at sentencing, thereby leaving them for appellate resolution by the DCCA in the first instance. More specifically, the standard procedure followed by the District's trial judges seems to be as follows: (1) sentence the defendant on all counts of conviction without regard to whether any of those counts are likely to merge; and (2) determine whether those counts should run consecutively or concurrently.[149]

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[144] RCC § 212(d)(2).

[145] *See* cases cited *supra* note 60 and accompanying text.

[146] Note that where the merger analysis involves one or more offenses comprised of alternative elements of a nature described in RCC § 212(c), then a limited factual inquiry will be necessary to determine the particular basis of a conviction (i.e., was the defendant convicted of felony murder-*rape* or felony murder-*burglary*). However, this also appears to reflect current District practice in at least some areas of law. *See* cases cited *supra* notes 74-84 and accompanying text.

[147] Therefore, the merger analysis under RCC § 212 is not a return to the fact-based approach disclaimed in *Byrd*, but rather, an expansion of the current law-based approach.

[148] *Mooney v. United States*, 938 A.2d 710, 724 (D.C. 2007).

[149] Here's one example from *Hanna v. United States*:

> After a hearing on January 28, 1992, appellants were sentenced to prison on February 3, 1992 for the first incident as follows: (1) three counts of armed kidnapping (D, E, I), eight to twenty-four years for each count; (2) two counts of first degree burglary while armed (F, G), four to twelve years for each count; (3) two counts of assault with a dangerous weapon (H, J), three to nine years for each count; (4) one count of armed robbery (K), three to nine years; and (5) one count of possession of a firearm during a crime of violence (L), a mandatory minimum sentence of five to fifteen years. Sentences on the two burglary counts (F, G) were concurrent with each other but consecutive to all the other counts. Sentences for the seven crimes of violence counts D, E, H, I, J, K, L

This sentencing regime appears to have its roots in the DCCA's decision in *Garris v. United States*, where the court explained that:

> Initially permitting convictions on both counts serves the useful purpose of allowing this court to determine whether there is error concerning one of the counts that does not affect the other . . . If so, then no merger problem even arises as only one conviction stands. If not, a remand to the trial court with instructions to vacate one conviction cures the double jeopardy problem without risk to society that an error free count was dismissed . . . .
>
> The policy sought to be vindicated [by sentencing merger] is better served, in cases of appeal on issues other than validity of the sentence alone, by waiting for completion of the appeal process before vacating judgment on one of multiple counts. No legitimate interest of the defendant is served by requiring a trial court to guess which of multiple convictions will survive on appeal. Indeed, if the count chosen is reversed on grounds independent of the validity of the one vacated, a substitution would have to be made [] and a new appeal thereunder must be permitted if error independent of the reversed conviction is to be raised.[150]

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were concurrent with each other. The overall sentence for the first incident was 12 to 36 years.

Appellants received prison sentences for the second incident as follows: (1) two counts of first degree burglary while armed (M, N), four to twelve years for each count; (2) five counts of assault with a dangerous weapon (O, P, Q, R, S), three to nine years for each count; (3) one count of armed robbery (T), three to nine years; (4) one count of possession of a firearm during a crime of violence (U), a mandatory minimum sentence of five to fifteen years; (5) one count of carrying a pistol without a license (V), one year; and (6) one count of possession of a prohibited weapon (W), one year. Sentences on the two burglary counts (M, N) were concurrent with each other but consecutive to all other counts; sentences for the seven crimes of violence counts O, P, Q, R, S, T, U were concurrent with each other; and the sentences for carrying a pistol without a license and for possession of a prohibited weapon were concurrent with all other counts. The overall sentence for the second incident was nine to 27 years.

Appellants' sentences for the two incidents, therefore, totaled 21 to 63 years of imprisonment. In sentencing appellants on all counts, the trial court acted consistently with this court's suggestion that sentence should initially be imposed on all counts to allow this court to review merger issues and to remand to the trial court for resentencing as necessary.

Hanna v. United States, 666 A.2d 845, 859 (D.C. 1995).

[150] *Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985). Nearly two decades earlier, the D.C. Circuit observed in *Fuller v. United States* that:

> There are sound reasons for permitting the jury to render verdicts as to separate offenses even where consecutive sentences are not permitted. For example, in the murder situation, a prosecutor should be permitted to proceed on both first degree murder theories. Perhaps the jury will believe one and not the other, and perhaps the jury will believe both. We see no reason for a rule of law that would require the prosecutor to

In subsequent years, the DCCA has "reiterate[d] the suggestion . . . made in *Garris*," namely, that:

> [W]hen a jury has returned guilty verdicts on two counts which merge, the trial court need not guess which [] conviction will survive on appeal and enter an acquittal on the other count. [Rather, the trial court should simply leave the issues to be resolved by the DCCA]. This policy will avoid situations [] in which it becomes necessary to remand for substitution of convictions, from which the defendant may take a second appeal.[151]

When, pursuant to this regime, the DCCA is presented with merger issues on appeal, they are subject to a *de novo* standard of review[152] in which context the court "is limited to assuring that the sentencing court d[id] not exceed its legislative mandate by imposing multiple punishments for the same offense."[153] If, in the course of conducting this review, the DCCA concludes that two or more convictions should merge—or, alternatively, where the government concedes that two or more convictions should merge[154]—then the appellate court will remand the convictions "to the trial court for the limited purpose of merger and resentencing."[155] Importantly, however, "when

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> elect between the offenses before the case is sent to the jury. Nor do we see why the jury must elect. Permitting a guilty verdict on each count—if warranted by the facts—may serve the useful purpose of avoiding retrials by permitting an appellate court, or a trial court on further reflection, to uphold a conviction where there is error concerning one of the counts that does not infect the other. Moreover, that course precludes a range of double jeopardy contentions.
>
> There is no general reason why the jury should not be permitted to render a verdict on each theory, so long as the offenses are not in conflict and no aspect of the case gives reasonable indication that the jury might be confused or led astray.

407 F.2d 1199, 1224–25 (D.C. Cir. 1967).

[151] *Warrick v. United States*, 528 A.2d 438, 443 n.6 (D.C. 1987) (internal quotations and alterations omitted).

[152] *Roy v. United States*, 871 A.2d 498, 510 (D.C. 2005) ("We review issues of merger *de novo*, to determine whether there has been a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.") (quoting *Nixon v. United States*, 730 A.2d 145, 151–52 (D.C. 1999)); *Robinson v. United States*, 50 A.3d 508, 532 (D.C. 2012).

[153] *James v. United States*, 718 A.2d 1083, 1086–87 (D.C. 1998).

[154] *Collins v. United States*, 73 A.3d 974, 985 (D.C. 2013) ("The government concedes that appellant's conviction for ASBI of Brown merges with his conviction for aggravated assault of Brown because ASBI is a lesser-included offense.").

[155] *Newman v. United States*, 705 A.2d 246, 265 (D.C. 1997) (citing *Whalen v. United States*, 445 U.S. 684 (1980)). Insofar as correction of illegal sentences is concerned, the District's rules of criminal procedure provide:

> Rule 35. Correction or reduction of sentence or collateral; setting aside forfeiture.
>
> (a) *Correction of sentence.* The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

resentencing to respect the double jeopardy bar on multiple punishments for the same offense where the defendant has been convicted of a greater and lesser-included offense, the trial court has but one course, to vacate the lesser-included offense."[156] And, when a defendant's sentences for the merged counts "are concurrent and congruent," it is well-established that "[r]esentencing is not required."[157]

The current state of judicial administration regarding merger issues in the District is notable. The approach to merger proscribed by the DCCA in *Garris* and its progeny is one that, in effect, seems to require and/or encourage trial judges to disregard clear or potential constitutional violations at initial sentencing, in favor of initial appellate resolution.

> (b) *Reduction of sentence.* A motion to reduce a sentence may be made not later than 120 days after the sentence is imposed or probation is revoked, or not later than 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or not later than 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The Court shall determine the motion within a reasonable time. After notice to the parties and an opportunity to be heard, the Court may reduce a sentence without motion, not later than 120 days after the sentence is imposed or probation is revoked, or not later than 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or not later than 120 days after entry of any order or judgment of the Supreme Court, denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this paragraph.

Super. Ct. Crim R. 35(a) & (b).

[156] *Mooney v. United States*, 938 A.2d 710, 724 (D.C. 2007); *see Franklin v. United States*, 392 A.2d 516, 519 n.3 (D.C. 1978) ("[W]here an appellant has been convicted of both the crime and a lesser included offense, the appropriate appellate remedy is vacation of the lesser included offense.") (citing *Franey v. United States*, 382 A.2d 1019, 1021 (D.C. 1978)).

[157] *Collins*, 73 A.3d at 985; *see, e.g.*, *United States v. Battle*, 613 F.3d 258, 266 (D.C. Cir. 2010) ("Because the court sentenced [appellant] to the same, concurrent terms of imprisonment for [both] convictions, resentencing is unnecessary."); *Medley v. United States*, 104 A.3d 115, 133 (D.C. 2014).

One key procedural question on remand is whether the defendant has a right to allocute. For example, "a defendant is constitutionally 'guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure.'" *Kimes v. United States*, 569 A.2d 104, 108 (D.C. 1989) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)). This includes the right to be present upon the imposition of sentence—"a fundamental [right] which implicates the due process clause." *Warrick*, 551 A.2d at 1334 (citing *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam)). Additionally, Superior Court Rule of Criminal Procedure 32(c)(1) provides that at the time of sentencing, the defendant shall have the right to allocute, that is, to present any information in mitigation of punishment, and to make a statement on his or her "own behalf." Super. Ct. Crim R. 32(c)(1). However, Superior Court Rule of Criminal Procedure 43 provides that a defendant is not required to be present "[w]hen the proceeding involves a reduction or correction of sentence under Rule 35." Super. Ct. Crim R. 43(c)(4). Rule 35, in turn, states that the Superior Court "may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein . . . . " Super. Ct. Crim. R. 35(a). Typically, therefore, the defendant's presence is only required after an appeal that remands for sentencing based upon a count that was not originally sentenced. *Mooney*, 938 A.2d at 724.

The unintuitive-ness of such an approach is well captured by the DCCA's decision *Mooney v. United States*.[158] On the one hand, the *Mooney* court recognized that the merger-based remands to trial courts produced by this regime involve a mandate to "correct the *illegality* of a sentence that violates double jeopardy's bar on the imposition of multiple punishments for the same offense."[159] But, on the other hand, the *Mooney* court also recognized that the "illegality" of a sentence in this context "does not imply trial court error as [DCCA case law has] established that the trial court should enter convictions on all guilty verdicts returned by the jury, subject to review by this court on appeal on 'issues other than the validity of the sentence alone.'"[160]

As a matter of policy, the current judicial approach favoring initial review of merger issues at the appellate level has mixed support. There surely are, as the *Garris* decision highlights, important judicial efficiency benefits under the current system, which helps to avoid cases from being sent back and forth between Superior Court and the Court of Appeals for re-adjudication of sentencing issues. At the same time, the *Garris* decision seems to either overlook or misconstrue at least some of the relevant considerations. The court says little, for example, about the risk of "leav[ing] both sentences standing if for any reason there were no appeal" that exists under the District's present system of dealing with merger issues, which is a concern that has lead at least one state judiciary to explicitly reject adoption of a similar regime.[161]

In addition, the *Garris* decision seems to highlight—as a supposed benefit of the District's present system of dealing with merger issues—the need to safeguard against a "risk to society that an error free count was dismissed."[162] Yet it is not at all clear that this risk actually exists. The situation envisioned by the *Garris* court seems to be as follows: (1) the sentencing judge enters a judgment on one conviction and merges the rest; (2) the defendant files an appeal arguing that an (evidentiary) error should lead to that conviction being overturned; (3) the appellate court agrees, but finds that the error does not effect any of the merged offenses. Under these circumstances, it does not appear—contra *Garris*—that an appellate court would have any difficulty ordering the re-imposition of one of the previously merged offenses by the trial court.

The DCCA's subsequent decision in *Warrick v. United States* is illustrative.[163] In that case, the trial court merged two convictions for burglary, which were respectively based on an underlying assault and theft committed in the same course of conduct, and sentenced the defendant on the former.[164] On the first appeal, the DCCA overturned the

[158] *Mooney*, 938 A.2d at 722–23.
[159] *Id.*
[160] *Id*.
[161] *State v. Cloutier*, 286 Or. 579, 601 (1979). For at least one case where counsel for the defendant overlooked a meritorious merger argument, see *Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014) ("Richardson does not argue that his convictions for ADW and ASBI merge with his conviction for AAWA, but we conclude for the foregoing reasons that they do merge."); *Carter v. United States*, 957 A.2d 9, 22 (D.C. 2008) (raising merger issue *sua sponte* as to co-appellant).
[162] *Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985).
[163] 551 A.2d 1332, 1336 (D.C. 1988). *See, e.g., Byrd*, 500 A.2d at 1389 ("If the unvacated murder conviction is subjected later to a successful collateral attack, the trial court should consider favorably a government motion to reinstate the vacated murder conviction"); *Garris*, 491 A.2d at 515 ("[I]f the count chosen is reversed on grounds independent of the validity of the one vacated, a substitution would have to be made.").
[164] *Id.*

burglary (assault) conviction, and ordered the previously vacated burglary (theft) conviction to be reinstated.[165] Thereafter, the trial court reinstated the burglary (theft) conviction and sentenced the defendant on that conviction.[166] The defendant appealed again arguing that the reinstatement of the burglary (theft) conviction violated the Double Jeopardy Clause.[167] The DCCA rejected this argument, noting that the trial court's "dismissal of the intent to steal count under the merger doctrine was not on the merits."[168]

One other relevant point is the fact that the government may, under District law, "appeal an order which terminates the prosecution in favor of the defendant" so long as it "is not an acquittal on the merits."[169] So, for example, in *D.C. v. Whitley*, the DCCA asserted jurisdiction over a government appeal of a judge's *sua sponte* dismissal of a conviction for want of prosecution, reasoning that "reversal of the dismissal order w[ould] require simple reinstatement of the guilty plea and no further proceedings to determine guilt or innocence."[170]

More generally, U.S. Supreme Court precedent appears to clearly dispense with any constitutional concerns that might arise from a regime in which trial judges conducted merger analyses at initial sentencing. Consider the following passage from *United States v. Wilson*:

> [W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended. In various situations where appellate review would not subject the defendant to a second trial, this Court has held that **an order favoring the defendant could constitutionally be appealed by the Government.** Since the 1907 Criminal Appeals Act, for example, the Government has been permitted without serious constitutional challenge to appeal from orders arresting judgment after a verdict has been entered against the defendant. *See, e.g., United States v. Bramblett*, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955); *United States v. Green*, 350 U.S. 415, 76 S.Ct. 522, 100 L.Ed. 494 (1956); *Pratt v. United States*, 70 App.D.C. 7, 11, 102 F.2d 275, 279 (1939). **Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution.**
>
> **Similarly, it is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the**

[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *United States v. Shorter*, 343 A.2d 569, 571 (D.C. 1975); *see* D.C. Code § 23-104 ("The United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant or defendants as to one or more counts thereof, except where there is an acquittal on the merits.").
[170] 934 A.2d 387, 389 (D.C. 2007) (citing *United States v. Wilson*, 420 U.S. 332, 353 (1975); *United States v. Wall*, 521 A.2d 1140, 1142 n.2 (D.C. 1987)).

> **defendant discharged.** *Forman v. United States*, 361 U.S. 416, 426, 80 S.Ct. 481, 487, 4 L.Ed.2d 412, 419 (1960). If reversal by a court of appeals operated to deprive the Government of its right to seek further review, disposition in the court of appeals would be 'tantamount to a verdict of acquittal at the hands of the jury, not subject to review by motion for rehearing, appeal, or certiorari in this Court.' *Ibid. See also United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 243, 78 S.Ct. 245, 251, 2 L.Ed.2d 234, 240 (1957).
>
> **It is difficult to see why the rule should be any different simply because the defendant has gotten a favorable postverdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge has relied to some degree on evidence presented at trial in making his ruling.** Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.[171]

The foregoing passage from the *Wilson* decision seems to clarify, first, that the improper post-verdict dismissal of a conviction by a trial judge may be appealed by the government without offending the Double Jeopardy Clause so long as there is express statutory authorization to do so; second, that this dismissed conviction may be reinstated by the second tier of appellate review without offending the Double Jeopardy Clause; and third, that if such a conviction is improperly dismissed by the second tier of appellate review, the third tier of appellate review may reinstate it without offending the Double Jeopardy Clause.

Based on the above analysis, it appears that the largest hurdle confronting trial court resolution of merger issues in the District is not constitutional, but rather, pragmatic. Beyond the efficiency issues raised by the *Garris* decision, shifting the initial burden to conduct merger analyses to Superior Court judges might compel more sweeping procedural changes to current District practice. For example, in order to reliably implement such a system, it would probably be necessary to impose a formal requirement that judges provide on-the-record explanations of their sentencing decisions.[172] Further, one probable byproduct of a system of trial level merger analyses

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[171] *United States v. Wilson*, 420 U.S. 332, 344–45 (1975).

[172] Under current District law "the [sentencing] judge [is not] required to provide an explanation for the sentence imposed." *Coles v. United States*, 682 A.2d 167, 173 (D.C. 1996). Which is not to say that Superior Court judges need not provide any information relevant to sentencing; District law recognizes that a "defendant has the right to be informed of [the] information" a trial court considers "in evaluating the appropriate sentence for a defendant." *Foster v. United States*, 615 A.2d 213, 220–21 (D.C. 1992). "This right," in turn, "is intertwined with a defendant's right to allocute and speak to the issue of appropriate punishment, a right which is acknowledged by statute and court rule, but ultimately is a fundamental one which implicates the due process clause." *Bradley v. D.C.*, 107 A.3d 586, 599–600 (D.C. 2015). Nevertheless, while the trial court must specify the facts upon which it is relying for a given sentence, it does not appear that the sentencing judge needs to provide any explanation of *why* a given sentence is being

would be a greater imperative for government appeals (e.g., where the sentencing court inappropriately merges one or more offenses), which is a topic that has garnered considerable attention in the District.[173]

In the final analysis, then, both the District's current appellate-centric approach to adjudicating merger issues and a more conventional trial-level regime present their own set of costs and benefits. With that in mind, and given the distinctively procedural nature of the underlying issues, RCC § 212 has been drafted in a manner that is susceptible to being implemented in accordance with either approach, thereby leaving the discretion to choose between these two systems in the same place that it currently exists: the province of the courts.[174]

The key provision, subsection (e), provides that "[a] person may be found guilty of two or more offenses that merge under [RCC § 212]; however, no person may be subject to a conviction for more than one of those offenses after: (1) The time for appeal has expired; or (2) The judgment appealed from has been affirmed." This language is comprised of two different procedural principles. The first is that RCC § 212 should not be construed as in any way constraining the number of offenses over which the fact finder may deliberate. Rather, the trier of fact may find the defendant guilty of two or more offenses for which sentencing merger is required under RCC § 212.[175] The second, and perhaps more important, procedural principle is that the merger analysis set forth in

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imposed based on those facts. *See also* D.C. Super. Ct. R. Crim. P. 32 ("*Pronouncement.* Sentence shall thereafter be pronounced . . . . *Judgment*. A judgment of conviction shall set forth the plea, verdict or finding, and the adjudication and sentence . . . .").

[173] *See, e.g.*, *D.C. v. Fitzgerald*, 953 A.2d 288, 291 (D.C. 2008), *opinion amended on denial of reh'g*, 964 A.2d 1281 (D.C. 2009); *D.C. v. Whitley*, 934 A.2d 387, 388 (D.C. 2007). *See also* D.C. Code § 11-721(a) ("The District of Columbia Court of Appeals has jurisdiction of appeals from—(1) all final orders and judgments of the Superior Court of the District of Columbia . . . . (3) orders or rulings of the Superior Court of the District of Columbia appealed by the United States or the District of Columbia pursuant to section 23-104 or 23-111(d)(2)."); D.C. Code § 23-111(2) ("If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the prosecutor, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by law. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered."); D.C. Code § 23-104(c) ("The United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant . . . as to one or more counts thereof, except where there is an acquittal on the merits.").

[174] One other alternative worth considering is that proposed by the Oregon Supreme Court in *State v. Cloutier*:

> A trial court might pronounce a judgment of conviction on each of the charges, indicating the sentence he would impose if the conviction stood alone but suspending its execution (or suspending imposition of sentence), and accompany the judgment on each but the gravest charge with an order that the judgment is vacated by its own terms whenever the time for appeal has elapsed or the judgment appealed from has been affirmed. Such an order would make it clear on the record that the conviction on the secondary charge retains no legal effect in the absence of a further order reviving it in case a successful appeal from the judgment on the gravest charge is not followed by a retrial on that charge.

286 Or. 579, 602–03 (1979).

[175] Provided, of course, that the defendant actually satisfies the requirements of liability for those offenses.

RCC § 212 only places limitations on the entry of a final judgment of liability—i.e., a conviction that exists after the expiration of appellate rights or affirmance on appeal—for merging offenses.

The latter clarification is intended to provide Superior Court judges with sufficient leeway to continue their current practice of entering judgment on all counts for which the defendant has been convicted, thereby leaving merger issues to the DCCA for resolution on direct review, should they so choose. At the same time, this provision would not preclude Superior Court judges from changing their current practice, and instead conducting merger analyses at initial sentencing, either. Rather, it is sufficiently flexible to accommodate a change in merger practice should District judges deem one to be appropriate.

Relation to National Legal Trends. RCC § 212 has mixed support in the law of other jurisdictions.

Many of the substantive policies incorporated into RCC § 212—for example, the elements test[176] and the principles of lesser harm, lesser culpability, and more specific offenses[177]—appear to reflect majority or prevailing national trends governing the law of merger. Other policy recommendations—for example, the principle of reasonable accounting[178] and the RCC treatment of offenses comprised of alternative elements[179]—address issues upon which American criminal law is either unclear or divided.

Comprehensively codifying merger principles generally accords with modern legislative practice. However, the manner in which RCC § 212 codifies these requirements departs from modern legislative practice in some basic ways.

A more detailed analysis of national legal trends and their relationship to RCC § 212 is provided below. The analysis is organized according to two main topics: (1) substantive merger policy; and (2) codification practices.

RCC § 212: Relation to National Legal Trends on Merger Policy. The issue of merger is "[o]ne of the more important and vexing legal issues" confronting sentencing courts.[180] At the heart of the problem is the fact that "federal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions."[181] If a defendant is charged with, and subsequently

[176] RCC § 212(a)(1).
[177] RCC § 212(a)(2).
[178] RCC § 212(a)(4).
[179] RCC § 212(a)(c).
[180] Tom Stacy, *Relating Kansas Offenses*, 56 U. KAN. L. REV. 831, 831-32 (2008); *see, e.g.*, Bruce A. Antkowiak, *Picking Up the Pieces of the Gordian Knot: Towards A Sensible Merger Methodology*, 41 NEW ENG. L. REV. 259, 285-86 (2007) ("Merger is one of those portal issues that can take us to the center of our basic conceptions about the place criminal law has in our society. What we make criminal generally defines the frontier we establish between the individual and the state in any democratic society."); *Com. v. Campbell*, 351 Pa. Super. 56, 70, 505 A.2d 262, 269 (1986) ("In recent years, there have not been many issues which have received . . . a more uneven treatment than claims that offenses have merged for purposes of sentencing.").
[181] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 518-19 (2001). To take just a few examples at the state level:

convicted of, two or more of these overlapping crimes based on a single course of conduct,[182] the sentencing court will then be faced with deciding whether to "merge" one or more of these convictions into the other(s).[183]

This judicial determination, while implicating the Fifth Amendment's prohibition against "twice [placing someone] in jeopardy of life or limb" for the "same offense,"[184] is ultimately one of discerning legislative intent, not constitutional limitation.[185] This is because, insofar as the validity of convictions and punishment imposed in a single proceeding is concerned, the United States Supreme Court has held that constitutional double jeopardy protections only preclude the imposition of punishment beyond what the

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> Illinois has ten kidnapping offenses, thirty sex offenses, and a staggering forty-eight separate assault crimes. Virginia has twelve distinct forms of arson and attempted arson, sixteen forms of larceny and receiving stolen goods, and seventeen trespass crimes. In Massachusetts, the section of the code labeled "Crimes Against Property" contains 169 separate offenses.

Id. (collecting citations). Similar issues of offense overlap exist on the federal level. For example, it has been observed that:

> Although the federal criminal code has a generic false statement statute that prohibits lies in matters under federal jurisdiction, it also contains a bewildering maze of statutes banning lies in specified settings. [There may be] 325 separate federal statutes proscribing fraud or misrepresentation.

Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453 (2009)

[182] The merger analysis in this section solely focuses on what are sometimes referred to as "multiple description claims," which "arise when a defendant who has been convicted of multiple criminal offenses under *different* statutes alleges that the statutes punish the same offense." *State v. Smith*, 436 S.W.3d 751, 766 (Tenn. 2014). Excluded are so-called "unit-of-prosecution claims," which arise "when a defendant who has been convicted of multiple violations of the *same* statute asserts that the multiple convictions are for the same offense." *Id.*; *see, e.g.*, Jeffrey M. Chemerinsky, *Counting Offenses*, 58 DUKE L.J. 709 (2009); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 68 (2d. Westlaw 2018).

[183] More specifically, the choice presented by merger is whether to: (1) impose multiple convictions for all of the offenses, thereby subjecting the defendant to the prospect of punishment equivalent to the aggregate statutory maxima; or, alternatively, (2) vacate one or more of the underlying convictions, thereby limiting the collective statutory maxima to that authorized by the remaining offenses. *See, e.g., State v. Watkins*, 362 S.W.3d 530, 559 (Tenn. 2012) (observing that where a court concludes that the legislature does not intend to permit dual convictions under different statutes, the remedy is to set aside one of the convictions, even if concurrent sentences were imposed) (citing *Ball v. United States*, 470 U.S. 856, 864-65 (1985) ("The second conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.")).

[184] U.S. Const., Amdt. 5; *see, e.g., North Carolina v. Pearce*, 395 U.S. 711, 717 ("[The double jeopardy] guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.").

[185] *See, e.g.,* Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. Colo. L. Rev. 595, 596–97 (2006) ("Under the Double Jeopardy Clause, when the defendant complains only of multiple punishment, and not successive prosecution, the defendant essentially complains that two convictions were obtained and two sentences were imposed where only one was permitted. But the issue is one of legislative intent rather than constitutional limitation."); Antkowiak, *supra* note 180, at 263 ("[M]erger is not a constitutional issue. It is, from beginning to end and in all particulars, an issue of statutory construction. The court's sole task is to discern the intent of the legislature . . . .").

legislature has authorized.[186] Practically speaking, then, a legislature is free to impose as much overlapping liability upon a single criminal act as it sees fit, provided that the penal consequences fall within the broad range permitted by the constitutional prohibition on cruel and unusual punishment and the due process requirement of fundamental fairness.[187] As a result, when courts are confronted with merger issues, "the focus is legitimately, inevitably, and almost exclusively on legislative intent."[188]

Discerning what the legislature intends in this particular legal context, however, is often quite difficult.[189] In the easy cases, the underlying offenses are part of the same grading scheme, and the only difference between them is that one incorporates a single additional element—for example, assault and assault *of a police officer*. Under these circumstances, it is reasonably safe to assume that the legislature *did not* intend to impose multiple liability. Conversely, where the offenses of conviction are not part of the same grading scheme, and share no common elements—for example, assault and theft—it is reasonably safe to assume that the legislature *did intend* to authorize multiple liability. Frequently, however, the underlying offenses being considered for purposes of a court's merger analysis will not clearly fit into either of these categories.[190] Instead, they will

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[186] *See, e.g.*, *Albernaz v. United States*, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution."); *Whalen v. United States*, 445 U.S. 684, 691–92 (1980) ("The assumption underlying the [*Blockburger*] rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."); *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) ("Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."); *Todd v. State*, 917 P.2d 674, 677 (Alaska 1996) (concluding that role of Double Jeopardy Clause is "limited to protecting a defendant against receiving more punishment than the legislature intended"); *People v. Leske*, 957 P.2d 1030, 1035 (Colo. 1998) ("[D]efendant may be subjected to multiple punishments based upon the same criminal conduct as long as such punishments are 'specifically authorized' by the General Assembly."); *State v. Watkins*, 362 S.W.3d 530, 556 (Tenn. 2012).

[187] Poulin, *supra* note 185, at 647; *see, e.g.*, Susan R. Klein, *Review Essay: Double Jeopardy's Demise: Double Jeopardy: The History, the Law*, 88 CAL. L. REV. 1001, 1006 (2000). For case law illustrating the narrowness of these constitutional restrictions on a legislature's sentencing prerogative, see *Ewing v. California*, 538 U.S. 11 (2003) (rejecting challenge to a sentence of 25 years to life for grand theft under three strikes law); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (rejecting challenge to consecutive terms of 25 years to life based on theft of videotapes worth approximately $150). *See also* MICHAEL S. MOORE, ACT AND CRIME 309 (1993) (discussing difference between a double jeopardy question and an Eighth Amendment question).

[188] Poulin, *supra* note 185, at 647.

[189] *See, e.g.*, *Dixon v. State*, 278 Ga. 4, 8, 596 S.E.2d 147, 150-51 (2004) ("We encourage the legislature to examine this case and make a more recognizable distinction between statutory rape, child molestation, and the other sexual crimes, and to clarify the sort of conduct that will qualify for the ten-year minimum sentence accompanying a conviction for aggravated child molestation. The conflicting nature of the statutory scheme relating to sexual conduct, especially with respect to teenagers, may lead to inconsistent results.").

[190] *See, e.g.*, Stacy, *supra* note 180, at 855 (observing that while "courts must determine the permissibility of multiple convictions and punishments with reference to legislative intent," the "legislature generally has not addressed the matter").

share some common elements but not others, bare a modicum of topical similarity, and will more generally have been drafted in a manner that renders legislative intent as to merger an enigma.[191] In these situations, courts must ultimately rely on default principles of statutory construction to guide their merger analyses.

Over the years, American legal authorities have developed a variety of principles for accomplishing this task.[192] The oldest and most widely adopted principle is the judicially-developed elements test.[193] Originally promulgating by the U.S. Supreme Court in *Blockburger v. United States*[194] as a constitutional limit on cumulative punishments, the elements test has since been utilized as the basis for discerning legislative intent as to merger.[195]

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[191] In rare situations, a criminal statute will communicate legislative intent as to the imposition of multiple liability for specific combinations of offenses. For illustrative examples involving *limits* on multiple liability, see Tenn. Code Ann. § 39–14–404(d) ("Acts which constitute an offense under this section may be prosecuted under this section or any other applicable section, but not both."); Tenn. Code Ann. § 39–14–149(c) ("If conduct that violates this section [a]lso constitutes a violation of § 39–14–104 relative to theft of services, that conduct may be prosecuted under either, but not both, statutes as provided in § 39–11–109."); Tenn. Code Ann. § 39–12–204(e) ("A person may be convicted either of one (1) criminal violation of this section, including a conviction for conspiring to violate this section, or for one (1) or more of the predicate acts, but not both."). For an illustrative example involving the *authorization* of multiple liability, see 18 U.S.C. § 924(c)(1) ("Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.").

[192] *See generally, e.g., Com. v. Jones*, 590 Pa. 356 (2006); *Whitton v. State*, 479 P.2d 302 (Alaska 1970). Likewise, individual jurisdictions have themselves vacillated between principles. *See infra* note 247 (highlighting shifting approaches).

[193] *See, e.g.*, ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 68; *Brown v. Ohio*, 432 U.S. 161 (1977); *Jones*, 590 Pa. at 365; *State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987); *State v. Trail*, 174 W.Va. 656, 328 S.E.2d 671 (1985); *United States v. Mehrmanesh*, 682 F.2d 1303 (9th Cir. 1982); *United States v. Howard-Arias*, 679 F.2d 363 (4th Cir. 1982).

[194] 284 U.S. 299, 304 (1932). The defendant in *Blockburger* was charged with violations of federal narcotics legislation, and was ultimately convicted on one count of having sold a drug not in or from the original stamped package in violation of a statutory requirement, and on another count, of having made the same sale of the same drug not pursuant to a written order of the purchaser as required by the same statute. *Id.* The defendant contended that the two statutory crimes constituted one offense for which only a single penalty could be imposed. *Id.* The Court rejected this argument, holding that although both sections of the same statute had been violated by one sale, two offenses were committed because different evidence was needed to prove each of the violations, and therefore the defendant could be punished for both violations. *Id.*

[195] Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 400-01 (2005) ("The Blockburger test itself originated as a limit on cumulative punishments, but later cases abandoned the elements test as an absolute bar against multiple punishment and instead deployed the test as a guide to legislative intent."). The elements test also governs a variety of different legal issues, including successive prosecutions. *United States v. Dixon*, 509 U.S. 688, 696 (1993) ("The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."); *Gavieres v. United States*, 220 U.S. 338, 342 (1911); *see infra* notes 345-52 and accompanying text. For discussion of the differences between U.S. Supreme Court review of state and federal statutes in the context of multiple punishment issues, see *State v. Keffer*, 860 P.2d 1118, 1131 (Wyo. 1993).

The elements test asks whether, in the situation of a criminal defendant who has engaged in a single course of conduct that satisfies the requirements of liability for two different statutes, "each provision requires proof of an additional fact which the other does not."[196] If an affirmative answer can be given to this question, then the operative assumption is that the legislature intended to impose multiple convictions and punishments, notwithstanding a substantial overlap in the proof offered to establish the crimes.[197] The emphasis of this evaluation is generally (though not invariably) placed on scrutinizing the elements of the two crimes, without regard to how those crimes were committed.[198]

While judicial adoption of the elements test is widespread, there is significant confusion and disagreement surrounding its particular details.[199] For example, although the *Blockburger* rule was first clearly articulated by the U.S. Supreme Court in 1932, "no Court majority exists on how to apply the test."[200] Indeed, both state and federal courts routinely struggle with the particular mechanics of the test.[201] Perhaps the greatest source of confusion revolves around the appropriate unit of analysis under the elements test—and the concomitant relevance (or lack thereof) of factual considerations—where one or more of the underlying offenses can be proven through alternative means.[202]

To illustrate, consider the question of whether multiple convictions for felony murder and the underlying felony, if based on the same course of conduct and perpetrated against a single victim, should be subject to merger under the elements test. The key

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[196] *Blockburger*, 284 U.S. at 304 ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."); *see id.* ("A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.").

[197] *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975).

[198] *See infra* notes 202-11 and accompanying text.

[199] Hoffheimer, *supra* note 195, at 400-01.

[200] George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027, 1032 (1995). As various members of the Court have observed:

> The (elements) test has emerged as a tool in an area of our jurisprudence that the Chief Justice has described as 'a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.' . . . Some will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's "Serbonian Bog . . . Where Armies whole have sunk.

Texas v. Cobb, 532 U.S. 162, 185-86 (2001) (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting) (quoting *Albernaz v. United States*, 450 U.S. 333, 343 (1981) (Rehnquist, C.J.) and I JOHN MILTON, PARADISE LOST 55 (A.W. Verity ed., Cambridge Univ. Press 1934) (1667)).

[201] *See, e.g.*, *Dixon*, 509 U.S. at 711; *Com. v. Jenkins*, 2014 PA Super 148, 96 A.3d 1055, 1056–57 (2014); *Texas v. Cobb*, 532 U.S. 162, 185 (2001) (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 196 (1995) (collecting authorities); Robert A. Scott, *The Uncertain Status of the Required Evidence Test in Resolving Multiple-Punishment Questions in Maryland Eldridge v. State, 329 Md. 307, 619 A.2d 531 (1993)*, 24 U. BALT. L. REV. 251, 272 (1994).

[202] *See, e.g.,* Hoffheimer, *supra* note 195, at 367 ("A [great] source of indeterminacy in applying the elements test results from the fact that legislation routinely defines alternative methods of committing a crime.").

question, per *Blockburger*, is whether each offense requires proof of a fact that the other does not. The answer to that question, however, depends upon how broadly/narrowly one understands the "offense" of felony murder. Consider, for example, a simplified felony murder statute that reads:

> § 100: *Felony Murder*. No person shall unlawfully kill another person in the course of committing or attempting to commit:
>
> (A) Rape;
>
> (B) Burglary;
>
> (C) Arson; or
>
> (D) Robbery.

A conviction for felony murder under this statute, if based on commission of one of the four underlying felonies, is subject to being construed in one of two ways: (1) as *felony murder generally*, in violation of § 100; or (2) as *felony murder as alleged and/or proven*, in violation of one of the specific subsections that comprise § 100.

The choice between these two constructions is quite significant for purposes of understanding the relationship between felony murder and the offense that serves as the basis of aggravation under the elements test. For example, selecting the broader offense-level characterization indicates that felony murder and the underlying offense should not merge since, in order to prove *felony murder generally*, one need not present facts that will establish that underlying offense (i.e., proof of any other underlying offense will suffice).[203] But if, in contrast, one applies the narrower, theory-specific view of felony murder—that is, *felony murder as alleged and/or proven*—then the elements test would seem to support merger as the only difference between the two offenses would be that the greater offense requires proof of a homicide.[204]

The U.S. Supreme Court, both in *Blockburger* and in various other cases, has frequently articulated the elements test in a manner that seems to support the first construction.[205] The Court often says, for example, that the elements test is comprised of

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[203] *See, e.g.*, JOSHUA DRESSLER & ALAN MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION § 14.07[C] (4d ed. 2006) ("If one looks exclusively at the statutory definition of the offenses, as *Blockburger* requires, the crimes of "felony murder" and "robbery" each require proof of an element that the other does not: felony murder requires proof of a killing (which robbery does not); robbery requires proof of a forcible taking of another's personal property (a fact not necessary to prove felony murder, since proof of the commission of a different enumerated felony will suffice).").

[204] *See id.*

[205] *See Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991) ("The Supreme Court [has frequently] reaffirmed the position that in applying [the elements] test, the court looks at the statutorily-specified elements of each offense and not the specific facts of a given case as alleged in the indictment or adduced at trial.") (citing, e.g., *Garrett v. United States*, 471 U.S. 773, 778-79 (1985); *United States v. Woodward*, 469 U.S. 105, 108 (1985); *Gore v. United States*, 357 U.S. 386, 389 (1958); *American Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946)).

a purely legal analysis, which is to be conducted without regard to the facts of a case.[206] If true, however, this would seem to effectively preclude the more theory-specific understanding of an offense that comprises the second construction, which hinges upon a consideration of the charging document and/or the facts proven at trial to appropriately circumscribe the merger analysis.[207]

At the same time, the U.S. Supreme Court has itself done just that, relying on the government's theory of felony murder liability in *Whalen v. United States*[208] to support the conclusion that both felony murder and the underlying offense (in that case, rape[209]) are subject to a presumption *against* cumulative punishment under the elements test.[210] "In this regard, the [*Whalen*] Court demonstrated a recognition that examination of the elements of the crimes *as charged* is sometimes necessary, especially when dealing with an offense that can be proven in alternate ways."[211]

Nuances in application aside, though, one aspect of the elements test is clear: it constitutes an exceedingly narrow approach to merger. In general, two offenses satisfy the elements test when (but only when) it is impossible to commit one offense without

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[206] *See, e.g.*, *Albernaz v. United States*, 450 U.S. 333, 338 (1981) ("'[T]he Court's application of the test focuses on the statutory elements of the offense.'") (quoting *Iannelli v. United States*, 420 U.S. 770, 785, n.17 (1975)); *United States v. Dixon*, 509 U.S. 688, 716–17 (1993) ("Our double jeopardy cases applying *Blockburger* have focused on the statutory elements of the offenses charged, not on the facts that must be proved under the particular indictment at issue . . ."); *Grady v. Corbin*, 495 U.S. 508, 528 (1990) ("Th[e] test focuses on the statutory elements of the two crimes with which a defendant has been charged, not on the proof that is offered or relied upon to secure a conviction").

[207] *See, e.g.*, Dressler & Michaels, *supra* note 203, at § 14.07[C].

[208] *Whalen v. United States*, 445 U.S. 684 (1980).

[209] The version of the District of Columbia felony murder statute at issue in *Whalen* reads:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, . . . rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

D.C. Code § 22–2401 (1973). And the version of the District rape statute under consideration reads, in relevant part: "Whoever has carnal knowledge of a female forcibly and against her will . . . shall be imprisoned for any term of years or for life." D.C. Code § 22–2801 (1973).

[210] *Whalen*, 445 U.S. at 689-90. *Compare Whalen*, 445 U.S. at 708-12 (Rehnquist, J. dissenting) (rather than defining "felony murder" in a factual vacuum, the *Whalen* court effectively "looked to the facts alleged in a particular indictment" to deem rape an LIO of felony murder) *with Whalen*, 445 U.S. at 694 ("Contrary to the view of the dissenting opinion, we do not in this case apply the *Blockburger* rule to the facts alleged in a particular indictment . . . We have simply concluded that . . . Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of rape.").

[211] *Com. v. Baldwin*, 604 Pa. 34, 48, 985 A.2d 830, 839 (2009) ("A 'strict elements approach,' which does not consider the offenses as charged and proven in each particular case, invariably leads to the conclusion that the crimes do not merge. Nevertheless, a majority of the Court, relying on *Blockburge*r (often used synonymously with 'strict elements approach') held that the two convictions merged for sentencing."); *see, e.g.*, Hoffheimer, *supra* note 195, at 370 ("Though this result makes good sense, commentators have had difficulty reconciling it with the elements test because it is possible, analyzing the elements in the abstract, to commit the more serious crime (murder) without committing the less serious crime . . ."); DRESSLER & MICHAELS, *supra* note 203, at § 14.07[C] (same).

also committing the other offense. Practically speaking, this means that even the most minor variances in the elements between two substantially related offenses can provide the basis for concluding that one "requires proof of a fact that the other does not."[212] In effect, then, application of the elements test to issues of merger creates a strong presumption in favor of multiple liability for substantially overlapping offenses.[213]

With that presumption in mind, the drafters of the Model Penal Code sought to develop a statutory approach to dealing with issues of offense overlap and multiple liability that was both broader and clearer than the common law approach. What they ultimately produced, Model Penal Code § 1.07, establishes that, "[w]hen the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense," but that the defendant "may not . . . be convicted of more than one offense" whenever the combination of offenses satisfy any one of a collection of legal principles.[214]

The narrowest principle is that embodied by the elements test. The relevant subsection, Model Penal Code § 1.07(4)(a), bars "convict[ion] of more than one offense if . . . [one offense is] established by proof of the same or less than all the facts required to establish the commission of the [other] offense." Such language, as the accompanying commentary clarifies, was intended to incorporate the approach to merger reflected in the U.S. Supreme Court's decision in *Blockburger v. United States.*[215]

Aside from codifying the *Blockburger* rule, the Model Penal Code also embraces a variety of merger principles that go beyond the elements test. For example, Model Penal Code § 1.07(1)(c) bars "convict[ion] of more than one offense if . . . inconsistent findings of fact are required to establish the commission of the offenses." This principle, as the accompanying commentary explains, was intended to preclude the imposition of logically inconsistent convictions, such as, for example, "robbery and receiving the stolen

[212] *See, e.g.*, King, *supra* note 201, at 196 (discussing the "remarkable decision by the Illinois Court of Appeals in *People v. Pudlo*, 651 N.E.2d 676 (Ill. App. Ct. 1995), in which two of the three judges decided that two offenses were not the same under *Blockburger* because one required a property owner to remove refuse and the other prohibited the owner from allowing it to accumulate").

[213] *See, e.g.*, Stacy, *supra* note 180, at 856 ("The Blockburger test, and even more so the same-elements test, reflexively stack the deck in favor of multiple convictions and punishments."); *State v. Carruth*, 993 P.2d 869, 875 (Utah 1999) ("I believe that the 'statutory elements' test (contained in the state legislation) is too rigid and should be repealed by the legislature and replaced with a more realistic test.") (Howe, C.J., concurring in the result).

[214] Note that the meaning of the phrase "same conduct," as employed in Model Penal Code § 1.07, is left vague. *See* Model Penal Code § 1.07, cmt. at 118 ("The term[] 'the same conduct' [is] intended to be sufficiently flexible to relate realistically to the defendant's behavior and, at the same time, to provide sufficiently definite guidance to make administration reasonably certain."). The word "conduct" is defined under the Code as "an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions." Model Penal Code § 1.13(5). So, while "same conduct" certainly covers the scenario where a single act constitutes multiple offenses, it also protects a defendant from multiple convictions in cases where the offenses were committed by different physical acts. *See, e.g.*, Model Penal Code § 1.07 cmt. at 108 (precluding multiple liability for solicitation and completed offense, such as where X solicits Y to commit crime and Y thereafter commits the crime, notwithstanding the fact that the solicitation by X and subsequent perpetration by Y constitute distinct acts). What remains unclear from the Model Penal Code language and accompanying commentary is where the boundary lies.

[215] *See* Model Penal Code § 1.07, cmt. at 107-08 (discussing *Brown v. Ohio*, and citing *Blockburger* test).

property, in which it was clear that the defendant had either robbed or received the goods but could not have done both."[216]

The Model Penal Code further precludes multiple convictions when one offense is merely a more specific version of the other. The relevant subsection, Model Penal Code § 1.07(1)(d), establishes that a person may not be convicted of more than one offense if "the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." To illustrate, the accompanying commentary gives the example of "a general statute prohibiting lewd conduct and [] a specific-statute prohibiting indecent exposure."[217] "In the absence of an expressed intention to the contrary," the drafters argue, "it is fair to assume that the legislature did not intend that there be more than one conviction under these circumstances."[218]

Yet another bar on multiple liability established by the Model Penal Code applies where one offense is simply a less serious form of the other. The relevant subsection, Model Penal Code § 1.07(4)(c), establishes that a person may not be convicted of more than one offense if one "differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission."[219] Such language, as the accompanying commentary explains, was intended to address two "conceptually distinct situations; either one or both may apply to a given fact pattern."[220] In the first situation, the two offenses at issue differ "only in that a less serious injury or risk of injury is necessary to establish [] commission [of one]."[221] This includes, for example, the relationship between an "offense consisting of an intentional infliction of bodily harm" and "the charge of intentional homicide."[222] The second situation, in contrast, arises

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[216] Model Penal Code § 1.07, cmt. at 112 n.32. The Model Penal Code drafters understood this rule to reflect both longstanding common law and important constitutional considerations. *See id.* (citing *Fulfon v. United States*, 45 App.D.C. 27 (1916); *People v. Koehn*, 207 Cal. 605 (1929); *Bargesser v. State*, 95 Fla. 404, (1928); *Fletcher v. State*, 31 Md. 19 (1933); *Commonwealth v. Phillips*, 215 Pa.Super. 5 (1961); *Peek v. State*, 213 Tenn. 323 (1964)).

[217] Model Penal Code § 1.07, cmt. at 114.

[218] *Id.*

[219] This may go beyond the scope of *Blockburger*. Note, for example, that the Commentary to the Hawaii Criminal Code observes that the state's comparable provision, Haw. Rev. Stat. Ann. § 701-109(c), varies from *Blockburger* rule

> in that, although the included offense must produce the same result as the inclusive offense, there may be some dissimilarity in the facts necessary to prove the offense. Therefore [the *Blockburger* rule] would not strictly apply and (c) is needed to fill the gap. For example, negligent homicide would probably not be included in murder under [the *Blockburger* rule], because negligence is different in quality from intention. It would obviously be included under (c), because the result is the same and only the required degree of culpability changes.

Commentary on Haw. Rev. Stat. Ann. § 701-109(c); *see also Stepp v. State*, 286 Ga. 556, 557, 690 S.E.2d 161 (2010) (describing comparable Georgia provision as one of several "additional statutory provisions concerning prohibitions against multiple convictions for closely related offenses") (citation omitted).

[220] Model Penal Code § 1.07, cmt. at 133.

[221] *Id.*

[222] *Id.*

where one offense differs from another "only in that it requires a lesser degree of culpability," i.e., "offenses that are less serious types of homicides."[223]

The Model Penal Code further precludes multiple liability for an inchoate offense designed to culminate in an offense that is, in fact, completed. The relevant subsection, Model Penal Code § 1.07(1)(b), establishes that a person may not be convicted of more than one offense if one offense "consists only of a conspiracy or other form of preparation to commit the other."[224] The Model Penal Code commentary recognizes that convictions for both a substantive offense and an inchoate offense designed to culminate in that same offense "would not necessarily be barred under the *Blockburger* test."[225] Nevertheless, convictions for both kinds of offenses, the drafters argue, "is not justifiable."[226] Reasoning that general inchoate offenses are "not designed to cumulate sanctions for different stages of conduct culminating in a criminal offense but to reach the preparatory conduct if the offense is not committed,"[227] the drafters ultimately concluded that "[i]t would be a perversion of the legislative intent to use these statutes to pyramid convictions and punishment."[228]

The Model Penal Code provides one other bar on multiple liability for general inchoate crimes in Article 5, which precludes punishing a defendant for combinations of

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[223] *Id.* (also noting "offenses that are the same [] except that they require recklessness or negligence while the [other] offense [] requires a purpose to bring about the consequences, or, finally, offenses that are the same as the [] except that they require only negligence while the [other] offense [] requires either recklessness or a purpose to bring about the consequences").

[224] Note that Model Penal Code § 1.07(1)(a) also establishes that no person may be convicted of more than one offense if one offense is "included in the other charge," which, as defined in § 1.07(4)(b), includes "an attempt or solicitation to commit the offense charged." *See also, e.g., State v. Mitchell*, 625 P.2d 1155, 1159 (Mont. 1981) (finding that while solicitation is not referred to specifically in state statute barring multiple convictions, the offense is considered a "form of preparation," and thus conviction for the solicitation as well as the target offense was barred) (interpreting Mont. Code Ann. § 46-11-410(2)(b)).

[225] Model Penal Code § 1.07, cmt. at 108 ("For example, convictions of both a substantive offense and its solicitation would be possible since solicitation requires proof of an element, the solicitation, which would not be required to prove the substantive offense, and the substantive offense requires proof of an element, actual commission of the offense, not required to prove the solicitation.").

[226] The drafters of the Model Penal Code recognized that "[c]onviction for both the conspiracy and the completed offense has generally been allowed" as a historical matter. Model Penal Code § 1.07, cmt. at 109.

[227] *Id.* at 108.

[228] *Id.* at 108. It's worth noting, however, that the Model Penal Code still allows for the conviction of a general inchoate crime and the intended substantive offense "if the prosecution shows that the objective of the [general inchoate crime] was the commission of offenses in addition to that for which the defendant has been convicted." *Id.* at 109 ("[T]he limitation of the Code is confined to the situation where the completed offense was the sole criminal objective of the conspiracy"); *see id.* at 110 ("The position taken with regard to conspiracy applies equally to any other conduct that is made criminal only because it is a form of preparation to commit another crime."); Model Penal Code § 5.05, cmt. at 492 ("[A] person may be convicted for one substantive offense and for attempt, solicitation or conspiracy in relation to a different offense."). The drafters believed such conduct to "involve[] a distinct danger in addition to that involved in the actual commission of any specific offense." Model Penal Code § 1.07, cmt. at 109.

This exception is most relevant where a "conspiracy ha[s] as its objective engaging in a continuing course of criminal conduct." *Id.* "For example, if D1 and D2 conspire to rob Bank V and then do so, they may be convicted and punished for robbery or conspiracy, but not for both offenses." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.03 (6th ed. 2012). "In contrast, if D1 and D2 conspire to rob Banks V1, V2, and V3, and they are arrested after robbing Bank V1—thus, before their other criminal objectives were fully satisfied—the conspiracy does not merge with the completed offense." *Id.*

inchoate offenses designed to culminate in the same offense. More specifically, the relevant provision, § 5.05(3) establishes that: "A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime." This language, as the accompanying commentary explains, reflects a policy "of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object."[229] Viewed in this way, the drafters believed there to be "no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense."[230]

Only a plurality of jurisdictions that have undergone comprehensive criminal code reform have opted to codify a comprehensive legislative framework modeled on Model Penal Code § 1.07.[231] Nevertheless, the individual limitations on multiple liability endorsed by the Model Penal Code drafters have had a broader influence on the current state of American merger policy as it is reflected in both criminal codes and reported cases.[232]

For example, numerous reform codes incorporate general provisions that—consistent with Model Penal Code § 1.07(4)(a)—preclude multiple liability where one offense "is established by proof of the same or less than all the facts required to establish the commission of the [other] offense."[233] And, various courts in jurisdictions lacking such general provisions have relied on the Model Penal Code's codification of *Blockburger*.[234]

Beyond *Blockburger*, however, "[m]any modern code jurisdictions follow the lead of the Model Penal Code and bar multiple convictions for offenses" that satisfy one of more of the broader general merger principles proscribed by section 1.07.[235] This is reflected in state general provisions applicable: (1) where, in accordance with Model Penal Code § 1.07(1)(c), the offenses implicate inconsistent findings of fact[236]; (2) where,

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[229] Model Penal Code § 5.05, cmt. at 492.

[230] *Id.* Where, however, a defendant's general inchoate "conduct . . . has multiple objectives, only some of which have been achieved," the Model Penal Code would allow for that individual to be "prosecuted under the appropriate section of Article 5." Explanatory Note on Model Penal Code § 5.05(3).

[231] *See, e.g.*, Ala. Code § 13A–1–9; Ark. Code Ann. § 5–1–110(b); Colo. Rev. Stat. § 18–1–408(5); Del. Code Ann. tit. 11, § 206(b); Ga. Code Ann. § 16–1–6; Haw. Rev. Stat. § 701–109(4); Ky. Rev. Stat. § 505.020(2); Mont. Code Ann. § 46–1–202(8); N.J. Rev. Stat. § 2C:1–8(d).

[232] *See, e.g.*, Model Penal Code § 1.07, cmt. at 106 ("Though differing in the circumstances to which they apply, provisions limiting conviction of more than one offense when the same conduct involves multiple offenses have been enacted or proposed in twenty one of the jurisdictions that have recently enacted or proposed revised penal codes."); *State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999); ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 68.

[233] *See, e.g.*, Ala. Code § 13A-1-9(a)(1); Ark. Code Ann. § 5-1-110(b)(1); Colo. Rev. Stat. Ann. § 18-1-408(5)(a); Del. Code Ann. tit. 11, § 206(b)(1); Ga. Code Ann. §§ 16-1-6(1), 16-1-7(a)(1); Haw. Rev. Stat. Ann. § 701-109(4)(a); Kan. Stat. Ann. § 21-5109(b)(2); Ky. Rev. Stat. Ann. § 505.020(2)(a); Mo. Ann. Stat. § 556.046(1)(1); Mont. Code Ann. §§ 46-1-202(9)(a), 46-11-410(2)(a); N.J. Stat. Ann. § 2C:1-8(d)(1); Utah Code Ann. § 76-1-402(3)(a); Wis. Stat. Ann. § 939.66(1).

[234] *See, e.g., United States v. Whitaker*, 447 F.2d 314, 317 n.5 (D.C. Cir. 1971) (citing *Fuller v. United States*, 407 F.2d 1199, 1228 n.28 (D.C. Cir. 1967)); *State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999).

[235] ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 68.

[236] *See, e.g.*, Ala. Code § 13A-1-8(b)(3); Ark. Code Ann. § 5-1-110(a)(3); Colo. Rev. Stat. Ann. § 18-1-408(1)(c); Del. Code Ann. tit. 11, § 206(a)(3); Haw. Rev. Stat. Ann. § 701-109(1)(c); Ky. Rev. Stat. Ann. § 505.020(1)(b); Mo. Ann. Stat. § 556.041(2); Mont. Code Ann. § 46-11-410(2)(c); N.J. Stat. Ann. § 2C:1-8(a)(3).

in accordance with Model Penal Code § 1.07(1)(d), one offense is a more specific version of another more general offense[237]; and (3) where, in accordance with Model Penal Code § 1.07(4)(c), one offense implicates a less serious harm and/or a less culpable mental state.[238] These principles have also been endorsed through case law.[239]

The Model Penal Code approach to dealing with merger issues relevant to general inchoate crimes has also been influential. For example, it has been observed that, consistent with Model Penal Code § 1.07(1)(b), "[i]t is almost universally the rule that a defendant may not be convicted of both a substantive offense and an inchoate offense designed to culminate in that same offense."[240] And it has also been observed that, in

[237] *See, e.g.*, Ala. Code § 13A-1-8(b)(4); Ark. Code Ann. § 5-1-110(a)(4); Colo. Rev. Stat. Ann. § 18-1-408(1)(d); Ga. Code Ann. § 16-1-7(a)(2); Haw. Rev. Stat. Ann. § 701-109(1)(d); Kan. Stat. Ann. § 21-5109(d); Mo. Ann. Stat. § 556.041(3); Mont. Code Ann. § 46-11-410(2)(d); N.J. Stat. Ann. § 2C:1-8(a)(4).

[238] *See, e.g.*, Ala. Code § 13A-1-9(a)(4); Ark. Code Ann. § 5-1-110(b)(3); Colo. Rev. Stat. Ann. § 18-1-408(5)(c); Del. Code Ann. tit. 11, § 206(b)(3); Ga. Code Ann. §§ 16-1-6(2), 16-1-7(a)(1); Haw. Rev. Stat. Ann. § 701-109(4)(c); Ky. Rev. Stat. Ann. § 505.020(2)(d); Mont. Code Ann. §§ 46-1-202(9)(c), 46-11-410(2)(a); N.J. Stat. Ann. § 2C:1-8(d)(3); Wis. Stat. Ann. § 939.66 (2)-(3), (5-7) (codifying limitation only for specific offenses); *see also, e.g.*, *State v. Kaeo*, 132 Haw. 451, 465, 323 P.3d 95, 109 (2014) (applying Haw. Rev. Stat. Ann. § 701-109(4)(c) to uphold merger of assault offenses); *State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999) (interpreting Model Penal Code provision "to include offenses that are still logically related to the charged offense in terms of the character and nature of the offense but in which the injury or risk of injury, damage, or culpability is of a lesser degree than that required for the greater offense"); *Sullivan v. State*, 331 Ga. App. 592, 595–96, 771 S.E.2d 237, 240 (2015).

[239] ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 68. For case law consistent with Model Penal Code § 1.07(1)(c), see, for example, *United States v. Thompson*, 22 M.J. 40 (U.S.C.M.A. 1986); *People v. Hoffer*, 106 Ill.2d 186, 88 Ill.Dec. 20, 478 N.E.2d 335 (1985). For case law consistent with Model Penal Code § 1.07(1)(d), see, for example, *State v. Davis*, 68 N.J. 69, 80 (1975); *State v. Williams*, 829 P.2d 892, 897 (Kan. 1992); *State v. Wilcox*, 775 P.2d 177, 178-79 (Kan. 1989). And for case law consistent with Model Penal Code § 1.07(4)(c), see, for example, *Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014); *Washington v. United States*, 884 A.2d 1080, 1085 (D.C. 2005). *See generally Com. v. Carter*, 482 Pa. 274, 290, 393 A.2d 660, 668 (1978) (identifying overlap between Model Penal Code and Pennsylvania approaches to merger); *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999) (adopting much of Model Penal Code § 1.07).

[240] ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84. Within this trend, however, there is significant variance. Some jurisdictions have adopted general provisions, which explicitly provide that "[n]o person shall be guilty of both the inchoate and the principal offense." 720 Ill. Comp. Stat. Ann. 5/8-5; *see* Utah Code Ann. § 76-4-302; Ala. Code § 13A-4-5(b); Ark. Code Ann. § 5-1-110(a)(2); Haw. Rev. Stat. Ann. § 701-109(1)(b), (4)(b); Ky. Rev. Stat. Ann. § 506.110(1); Mont. Code Ann. § 46-11-410(2)(b); Or. Rev. Stat. Ann. § 161.485; Wis. Stat. Ann. § 939.72. More frequently, though, jurisdictions adopt general provisions that bar conviction for the substantive offense and specific enumerated inchoate offenses. "The list of enumerated offenses commonly includes all inchoate offenses, although either conspiracy or solicitation are often omitted, thereby permitting conviction for those inchoate offenses and the related substantive offense." ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; *see, e.g.*, Alaska Stat. Ann. § 11.31.140(c) (codifying limitation for attempt and solicitation only); Ariz. Rev. Stat. Ann. § 13-111 (codifying limitation for attempt only); Colo. Rev. Stat. Ann. § 18-1-408(5)(b) (codifying limitation for attempt and solicitation only); Del. Code Ann. tit. 11, § 206(b)(2) (codifying limitation for attempt only); Ga. Code Ann. §§ 16-4-2 (codifying limitation for attempt), 16-4-8.1 (codifying limitation for conspiracy); Ind. Code Ann. § 35-41-5-3(b) (codifying limitation for attempt only); Iowa Code Ann. § 706.4 (codifying limitation for conspiracy only); Kan. Stat. Ann. § 21-5109(b)(2) (codifying limitation for attempt only); Minn. Stat. Ann. § 609.04(2) (codifying limitation for attempt only); Mo. Ann. Stat. §§ 556.014 (codifying limitation for conspiracy), 556.046(1)(3) (codifying limitation for attempt); N.J. Stat. Ann. § 2C:1-8(d)(2) (codifying limitation for conspiracy and attempt); Ohio Rev. Code Ann. §§ 2923.01(G) (codifying limitation for conspiracy), 2923.02(C) (codifying limitation for attempt); Okla. Stat. Ann. tit. 21, § 41 (codifying limitation for attempt); Tenn. Code Ann. § 39-12-106(b)-(c) (codifying limitation for attempt

accordance with Model Penal Code § 5.05(3), "[m]any American jurisdictions prohibit conviction for more than one statutory inchoate crime for conduct designed to culminate in the same completed offense."[241]

While the substantive policies incorporated into the Model Penal Code have generally been influential, they nevertheless fail to capture at least three important aspects of contemporary American merger practice.[242] The first relates to the issue discussed earlier in the context of *Blockburger*: whether and to what extent factual considerations have a role to play in the application of merger principles. The Model Penal Code is ambiguous on the issue,[243] which, in practical effect, not only preserves much of the confusion surrounding application of the elements test,[244] but also extends it to many of the other principles contained in § 1.07.[245] Absent clarification by the Model

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and solicitation only and explicitly permitting conviction of conspiracy and substantive offense which was the object of that conspiracy); Va. Code Ann. § 18.2-23.1 (codifying limitation for conspiracy only).

[241] Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 5 n.8 (1989); *see* ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84 ("Most jurisdictions bar multiple convictions for combinations of inchoate offenses designed to culminate in the same offense."). Here again there is some variance between jurisdictions. For example, "[s]ome jurisdictions bar convictions for any and all combinations of inchoate offenses." ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; *see* Ala. Code § 13A-4-5(c); Alaska Stat. Ann. § 11.31.140(b); Ark. Code Ann. § 5-3-102; Haw. Rev. Stat. Ann. § 705-531; Ind. Code Ann. § 35-41-5-3(a); Ky. Rev. Stat. Ann. § 565.110(3); Ohio Rev. Code Ann. §§ 2923.01(G), 2923.02(C); Or. Rev. Stat. Ann. § 161.485(2); 18 Pa. Stat. and Cons. Stat. Ann. § 906; Tenn. Code Ann. § 39-12-106(a). In contrast, "[o]ther jurisdictions bar only certain combinations [] apparently permitting conviction for other combinations." ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; s*ee* Utah Code Ann. § 76-4-302 ("No person shall be convicted of both… an attempt to commit an offense and a conspiracy to commit the same offense."). "Still other jurisdictions provide no statutory guidance on multiple offense limitations for multiple inchoate offenses." ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; *compare, e.g.*, *Monoker v. State*, 321 Md. 214, 223 (1990) (merging solicitation and conspiracy to commit the same offense); *Walker v. State*, 213 Ga. App. 407, 411 (1994) (merging attempt and conspiracy to commit the same offense); *State v. Cintron*, No. A-3874-15T4, 2017 WL 5983201, at *1 (N.J. Super. Ct. App. Div. Dec. 1, 2017) (same), *with People v. Jones*, 601 N.E.2d 1080, 1088 (Ill. App. Ct. 1992) (upholding conviction of attempted armed robbery and conspiracy to commit armed robbery); *see also* sources cited *infra* notes 269-74 and accompanying text (discussing jurisdictions with general categorical bars on multiple liability).

[242] *Cf.* Cahill, *supra* note 123, at 604 (noting that the Model Penal Code does not provide the basis for "a clear and comprehensive [approach] that sets out in detail an underlying basis or practical method for punishing multiple offenses").

[243] *See, e.g.*, Hoffheimer, *supra* note 195, at 410-12 (discussing Model Penal Code § 1.07, cmt. at 130).

[244] *See, e.g.*, Mark E. Nolan, *Diverging Views on the Merger of Criminal Offenses: Colorado Has Veered Off Course*, 66 U. COLO. L. REV. 523, 530–31 (1995) (noting that the Model Penal Code's "reference to proof of the same or less than all the facts seems to indicate that courts making a merger determination should look at the specific evidence surrounding the criminal acts," but that at least one court "has rejected this approach in applying [a similar state-level] merger statute, the doctrine of judicial merger, and the Double Jeopardy Clause").

[245] To illustrate, consider whether multiple convictions for both a reckless manslaughter and a reckless assault perpetrated during a barroom fight against the same victim would be permitted under Model Penal Code § 1.07(a)(4), which precludes multiple liability where one offense "differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission."

The relevant offenses are defined by the Model Penal Code as follows:

§ 210.3. Manslaughter.

(1) Criminal homicide constitutes manslaughter when:

Penal Code, resolution of this issue has, in most cases, been delegated to state and federal courts.[246]

Contemporary legal trends pertaining to this issue are difficult to identify with precision.[247] Nevertheless, it can at least generally be said that American legal practice is comprised of three main approaches to conducting "analysis of lesser and greater included offenses" in the context of merger determinations.[248] In some jurisdictions, this judicial analysis is "limit[ed] to comparing the elements of the crimes, without reference

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> (a) it is committed recklessly; or
>
> (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

§ 211.1 Assault.

A person is guilty of assault if he:

> (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
>
> (b) negligently causes bodily injury to another with a deadly weapon; or
>
> (c) attempts by physical menace to put another in fear of imminent serious bodily injury.

At first glance, it would seem that merger is clearly required under Model Penal Code § 1.07(a)(4) since the only difference between the manslaughter and the assault raised by the requisite facts is that the latter requires a less serious injury. But is this really the only difference between the two "offense[s]"? That depends upon the appropriate unit of analysis. If the point of comparison is specifically reckless manslaughter, § 210.3(1)(a), and reckless assault, § 211.1(a), then, yes, it seems clear that convictions for manslaughter and simple assault should merge under the Model Penal Code approach. However, if the point of comparison is the statutory elements of "manslaughter" and "assault," otherwise unconstrained by the theories of manslaughter and assault liability raised in the case, then it would seem that other differences between "manslaughter" and "assault" exist, such as, for example, the fact that one prong of assault incorporates, as an alternative element, the use of a "deadly weapon." *See generally* Hoffheimer, *supra* note 195, at 410.

[246] *See, e.g., People v. Rivera*, 186 Colo. 24 (1974); *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999).

[247] *See, e.g., Hopkins v. Reeves*, 524 U.S. 88, 98 (1998) (observing that "Nebraska has alternated between [approaches] in a relatively short period of time") (citing *State v. Williams*, 243 Neb. 959, 963-965, 503 N.W.2d 561, 564-565 (1993) (readopting statutory elements test), *overruling State v. Garza*, 236 Neb. 202, 207-208, 459 N.W.2d 739, 743 (1990) (reaffirming cognate evidence test), disapproving *State v. Lovelace*, 212 Neb. 356, 359-360, 322 N.W.2d 673, 674-675 (1982) (applying statutory elements test)); *Com. v. Jones*, 590 Pa. 356, 361, 912 A.2d 815, 818 (2006) (observing that the Pennsylvania Supreme Court's "own analysis of lesser and greater included offenses has evolved over time, in the sentencing merger context, from a strict statutory elements test to a hybrid of both the statutory elements and cognate-pleadings approaches."); *State v. Schoonover*, 281 Kan. 453, 481, 133 P.3d 48, 70 (2006).

[248] *Com. v. Jones*, 590 Pa. 356, 360–61, 912 A.2d 815, 817–18 (2006). Note that "analysis of lesser and greater included offenses" applies to both merger and other issues, such as the availability of jury instructions for an uncharged crime. *See id.*

to how the crimes were committed in a particular case."[249] The courts in other jurisdictions "assess the relationship between crimes by looking at the pleadings in a case."[250] And in still other jurisdictions, courts "analyze the actual proof submitted at trial, rather than only the pleadings, to examine the relationship between the crimes committed."[251] As a general rule, the fact-sensitive analyses conducted in the latter two groups of jurisdictions are broader, and therefore more likely to support merger, than the purely element-based analyses conducted in the former.[252]

The second way in which the Model Penal Code approach to merger fails to capture contemporary legal practice is reflected in the fact that many jurisdictions have adopted—whether through case law or legislation—general merger principles that are broader than those contained in § 1.07. The proportionality-based standards currently applied across a range of common law and reform jurisdictions are illustrative.

Consider, for example, the Alaska approach to merger. In a "seminal case,"[253] *Whitton v. State*, the Alaska Court of Appeals opted to abandon the *Blockburger* rule, which, while "widely used by the courts," failed to "cop[e] satisfactorily with the problem it was designed to solve."[254] More specifically, the *Whitton* court reasoned that:

> Legislative refinement of an essentially unitary criminal episode into numerous separate violations of the law has resulted in a proliferation of offenses capable of commission by a person at one time and in one

[249] *Jones*, 590 Pa. at 360 (quoting WAYNE R. LAFAVE ET AL., 6 CRIM. PROC. § 24.8(e)) (4th ed. 2018)) (collecting cases in accordance with "statutory elements" approach); *see Howard v. State*, 578 S.W.2d 83, 85 (Tenn. 1979) ("[Multiple jurisdictions] hold that an offense is necessarily included in, or a lesser included offense of, the indicted offense only if it is logically impossible to commit the indicted offense without committing the lesser offense, *under any set of facts that might be imagined*.") (citing, e.g., *State v. Arnold*, 223 Kan. 715, 576 P.2d 651 (1978); *State v. Redmon*, 244 N.W.2d 792 (Iowa 1976); *State v. Leeman*, 291 A.2d 709 (Me. 1972); *Raymond v. State*, 55 Wis.2d 482, 198 N.W.2d 351 (1972)).

[250] *Jones*, 590 Pa. at 360 (quoting LAFAVE ET AL., *supra* note 249, at 6 CRIM. PROC. § 24.8) (collecting cases accordance with "cognate pleadings" approach); *see Howard*, 578 S.W.2d at 85 ("[Multiple jurisdictions] hold that an offense is included in another if it is impossible to commit the greater offense i*n the manner in which that offense is set forth in the indictment without committing the lesser*.") (citing, e.g., *Christie v. State*, 580 P.2d 310 (Alaska 1978); *State v. Neve*, 174 Conn. 142, 384 A.2d 332 (1977); *People v. St. Martin*, 1 Cal.3d 524, 83 Cal. Rptr. 166, 463 P.2d 390 (1970); *State v. Magai*, 96 N.J. Super. 109, 232 A.2d 477 (1967)).

[251] *Jones*, 590 Pa. at 360; (quoting LAFAVE ET AL., *supra* note 249, at 6 CRIM. PROC. § 24.8) (collecting cases in accordance with "evidentiary" approach); *People v. Beach*, 429 Mich. 450, 462, 418 N.W.2d 861, 866-867 (1988) (one offense is an lesser included offense even though all of the statutory elements of the lesser offense are not contained in the greater offense, if the "overlapping elements relate to the common purpose of the statutes" and the specific evidence adduced would support an instruction on the cognate offense) (internal quotation marks and citation omitted)); *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971). The fact-based standards applied to merger of kidnapping in particular would similarly qualify. *See, e.g.*, WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 18.1 (2d ed., Westlaw 2017); *Gov't of Virgin Islands v. Berry*, 604 F.2d 221, 227 (3d Cir. 1979) (summarizing approaches); *People v. Gonzalez*, 80 N.Y.2d 146, 149-50, 603 N.E.2d 938, 941 (1992); *People v. Timmons*, 4 Cal.3d 411, 415, 93 Cal. Rptr. 736, 739, 482 P.2d 648, 651 (1971).

[252] *See, e.g., Com. v. Kimmel*, 2015 PA Super 226, 125 A.3d 1272, 1282 (2015) ("The pure statutory elements approach involves a more restrictive analysis and results in the fewest instances of merger."); Hoffheimer, *supra* note 195, at 432-33 ("Elements test jurisdictions have employed five different strategies to limit the overapplication of the test . . . .").

[253] *Todd v. State*, 917 P.2d 674, 681 (Alaska 1996).

[254] *Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970).

> criminal transaction. Since each violation by definition will usually require proof of a fact which the others do not, application of the same-evidence test will mean that each offense is punishable separately. But as the separate violations multiply by legislative action, the likelihood increases that a defendant will actually be punished several times for what is really and basically one criminal act.[255]

Given these shortcomings, the Alaska Court of Appeals chose to instead apply a proportionality-based approach to merger that "focus[es] upon the quality of the differences, if any exist, between the separate statutory offenses," with an eye towards discerning whether the "differences relate to the basic interests sought to be vindicated or protected by the statutes."[256]

More specifically, the *Whitton* framework, which has been applied in Alaska for over four decades, dictates that:

> The trial judge first would compare the different statutes in question, as they apply to the facts of the case, to determine whether there were involved differences in intent or conduct. He would then judge any such differences he found in light of the basic interests of society to be vindicated or protected, and decide whether those differences were substantial or significant enough to warrant multiple punishments. The social interests to be considered would include the nature of personal, property or other rights sought to be protected, and the broad objectives of criminal law such as punishment of the criminal for his crime, rehabilitation of the criminal, and the prevention of future crimes.
>
> If such differences in intent or conduct are significant or substantial in relation to the social interests involved, multiple sentences may be imposed, and the constitutional prohibition against double jeopardy will not be violated. But if there are no such differences, or if they are insignificant or insubstantial, then only one sentence may be imposed under double jeopardy. Ordinarily the one sentence to be imposed will be based upon or geared to the most grave of the offenses involved, with degrees of gravity being indicated by the different punishments prescribed by the legislature.[257]

For another state-level approach to proportionality-based merger, consider the framework applied in Maryland. Under Maryland law, the elements test constitutes the baseline for addressing merger issues, but this baseline is also complemented by two other general merger principles that go beyond *Blockburger*.[258]

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[255] *Id.*

[256] *Id.* at 312.

[257] *Id*. (also requiring a statement of reasons for purposes of merger analysis); *see, e.g., Artemie v. State*, No. A-10463, 2011 WL 5904452, at *13 (Alaska Ct. App. Nov. 23, 2011); *Jacinth v. State*, 593 P.2d 263, 266–67 (Alaska 1979); *Catlett v.. State*, 585 P.2d 553, 558 (Alaska 1978).

[258] *See, e.g., Pair v. State*, 33 A.3d 1024, 1035 (Md. 2011); *State v. Jenkins*, 515 A.2d 465, 473 (Md. 1986).

The first is a principle of lenity, which holds that, "even though offenses may be separate and distinct under the *Blockburger* [rule]," judges may nevertheless "find as a matter of statutory interpretation that the Legislature did not intend, under the circumstances involved, that a person could be convicted of two particular offenses growing out of the same act or transaction."[259] This principle effectively affords "the defendant the benefit of the doubt"[260] whenever the courts are "uncertain as to what the Legislature intended," notwithstanding the results generated by the elements test.[261]

The second, and even broader principle, applied by the Maryland courts is one of "fundamental fairness."[262] Under this principle, Maryland courts bar multiple convictions and punishment for substantially related offenses whenever it would be "[fundamentally] unfair to uphold convictions and sentences for both crimes."[263] Such an approach, as the Maryland courts have observed, make "[c]onsiderations of fairness and reasonableness" central to merger[264] in the context of an analysis that is "heavily and intensely fact-driven."[265]

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[259] *Brooks v. State*, 397 A.2d 596, 600 (Md. 1979).

[260] *Pair*, 33 A.3d at 1035–36.

[261] *Id.* (noting that, in comparison to *Blockburger*, "merger based on the rule of lenity is a different creature entirely").

[262] *Monoker v. State*, 582 A.2d 525, 529 (Md. 1990) ("One of the most basic considerations in all our decisions is the principle of fundamental fairness in meting out punishment for a crime."); *see id.* at 529 ("While solicitation and conspiracy do not merge under the required evidence test, we find it unfair to uphold convictions and sentences for both crimes."); *see, e.g.*, *Alexis v. State*, 87 A.3d 1243, 1262 (Md. 2014).

[263] *Monoker*, 582 A.2d at 529.

[264] *Williams v. State*, 593 A.2d 671, 676 (Md. 1991) ("Considerations of fairness and reasonableness reinforce our conclusion."); *Claggett v. State*, 108 Md.App. 32, 54 (1996) ("The fairness of multiple punishments in a particular situation is obviously important.").

[265] *Pair*, 33 A.3d at 1039 (whereas "[m]erger pursuant to [*Blockburger*] can be decided as a matter of law, virtually on the basis of examination confined within the "four corners" of the charges").

A similar fact-driven, proportionality-based principle is reflected in the New Jersey. Interpreting their state's Model Penal Code-influenced provision governing issues of multiple liability, N.J. Stat. Ann. § 2C:1-8, the New Jersey courts have recognized a holistic approach to merger, which entails:

> [A]nalysis of the evidence in terms of, among other things, the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.

State v. Tate, 79 A.3d 459, 463 (N.J. 2013) (concluding that defendant's conviction for third-degree possession of a weapon for an unlawful purpose merged with his conviction for first-degree aggravated manslaughter); *see State v. Davis*, 68 N.J. 69, 77, 342 A.2d 841, 845 (1975) ("Such a proscription not only tends to insure that the punishment imposed is commensurate with the criminal liability, by limiting judges and prosecutors alike to acting within the bounds of the legislative design; but it also addresses the inevitable conflict between legislative attempts to stuff all kinds of anti-social conduct into the general language of a limited number of criminal offense categories, and the legislative desire not to be inordinately vague about what behavior is deemed 'criminal.'"); *see also State v. Robinson*, 439 N.J. Super. 196, 200, 107 A.3d 682, 684 (App. Div. 2014) (discussing *Tate* and *Davis*).

For other comparatively broad approaches, *see, e.g.*, *United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012) ("[I]t was within the military judge's discretion to conclude that for sentencing purposes the three specifications should be merged and that it would be inappropriate to set the maximum punishment based on an aggregation of the maximum punishments for each separate offense. It is not

While, in most instances, these more expansive merger principles have been promulgated by courts, in at least a few instances, they are the product of legislative enactment. For example, the Ohio Criminal Code contains a broad general merger provision, which provides that, "[w]here the same conduct . . . can be construed to constitute two or more allied offenses of similar import . . . the defendant may be convicted of only one."[266]

"The basic thrust of the section," as the accompanying commentary explains, "is to prevent 'shotgun' convictions":

> For example, a thief theoretically is guilty not only of theft but of receiving stolen goods, insofar as he receives, retains, or disposes of the property he steals. Under this section, he may be charged with both offenses but he may be convicted of only one, and the prosecution sooner or later must elect as to which offense it wishes to pursue . . . .
>
> [Conversely,] an armed robber who holds up a bank and purposely kills two of the victims can be charged with and convicted of one count of aggravated robbery and of two counts of aggravated murder. Robbery and murder are dissimilar offenses, and each murder is necessarily committed with a separate animus, though committed at the same time.[267]

Interpreting this statute, the Ohio courts have explained that:

> [W]hen determining whether offenses are allied offenses of similar import within the meaning of [the Ohio Criminal Code], courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.[268]

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difficult to see how the three specifications in this case might have exaggerated Appellant's criminal and punitive exposure in light of the fact that, from Appellant's perspective, he had committed one act implicating three separate criminal purposes."); *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971) (analysis of LIO based on existence of an 'inherent' relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense."); *see also, e.g.*, *Staton v. Berbary*, No. 01-CV-4352(JG), 2004 WL 1730336, at *8-9 (E.D.N.Y. Feb. 23, 2004) ("The guiding principle," for purposes of merger of kidnapping and other crimes against persons, "is whether the restraint was so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that *independent criminal responsibility may not fairly be attributed to them*.") (quoting *People v. Gonzalez*, 80 N.Y.2d 146, 153, 603 N.E.2d 938, 943 (1992)).

[266] Ohio Rev. Code Ann. § 2941.25.

[267] *Id.*

[268] *State v. Pope*, 2017-Ohio-1308, ¶ 32, 88 N.E.3d 584, 591–92.

Most expansive of all merger principles—whether judge-made or legislatively enacted—are the categorical bars on multiple convictions incorporated into the criminal codes in Minnesota and California (and perhaps also Arizona[269]). For example, Section 609.035 of the Minnesota Criminal Code establishes, in relevant part, that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses . . ."[270] Motivated by a legislative desire "to protect against exaggerating the criminality of a person's conduct and to make both punishment and prosecution commensurate with culpability,"[271] the Minnesota courts have construed this provision to "prohibit[] multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident."[272]

The California legislature has adopted a similar approach through § 654 of its state code, which provides, in relevant part, that:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.[273]

This language, as the California courts have explained, is intended:

> to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense—the one carrying the highest punishment. In this way, punishment is commensurate with a defendant's culpability.[274]

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[269] Note that Arizona incorporates a comparable bar on *consecutive sentences*. *See* Ariz. Rev. Stat. Ann. § 13-116 ("An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent."). However, this statute appears to have been interpreted as applying to *multiple convictions* too. *See, e.g., State v. Rogowski*, 130 Ariz. 99, 101, 634 P.2d 387, 389 (1981) ("The provision also bars double convictions for one act or offense.") (quoting *State v. Castro*, 27 Ariz. App. 323, 325, 554 P.2d 919, 921 (1976)).

[270] Minn. Stat. Ann. § 609.035.

[271] *State ex rel. Stangvik v. Tahash*, 281 Minn. 353, 360, 161 N.W.2d 667, 672 (1968) (quoting *People v. Ridley*, 63 Cal. 2d 671, 678, 408 P.2d 124 (1965)). *Compare State v. Edwards*, 774 N.W.2d 596, 605 (Minn. 2009) ("[M]ultiple convictions arising from a single behavioral incident did not violate our rule against double punishment because where multiple victims are involved, a defendant is equally culpable to each victim.") *with State v. Ferguson*, 808 N.W.2d 586, 589–90 (Minn. 2012) ("But a defendant 'may not be sentenced for more than one crime for each victim' when the defendant's conduct is motivated by a single criminal objective.'") (quoting *State v. Prudhomme*, 303 Minn. 376, 379, 228 N.W.2d 243, 245 (1975).

[272] *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn.1986); *see, e.g., State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016); *State v. Terry*, 295 N.W.2d 95, 96 (Minn. 1980).

[273] Cal. Penal Code § 654.

[274] *People v. Myers*, 59 Cal. App. 4th 1523, 1529, 69 Cal. Rptr. 2d 889, 892 (1997); *see, e.g., People v. Kelly*, 245 Cal. App. 4th 1119, 1136, 200 Cal. Rptr. 3d 477, 489 (2016); *see also People v. Latimer*, 5 Cal. 4th 1203, 1208, 858 P.2d 611, 614 (1993) ("Section 654 has been applied not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute and the

The above general merger principles, all of which would appear to expand upon the protections afforded in the Model Penal Code, are to be contrasted with the third significant way that many jurisdictions depart from the Model Penal Code approach: by more narrowly curtailing the constraints on multiple liability for general inchoate crimes. This curtailment is reflected in two different ways. First, whereas Model Penal Code § 1.07 would preclude multiple liability for both a substantive offense and *any* inchoate offense designed to culminate in that offense, most jurisdictions instead bar conviction for the substantive offense and specific enumerated inchoate offenses.[275] This departure from the Model Penal Code approach is clearest in the context of criminal conspiracies.

Consider that the drafters of the Model Penal Code, in precluding convictions for both a conspiracy and its completed target, sought to overturn the common law rule, which authorized multiple liability for a conspiracy and its completed target.[276] The common law approach rested on a belief that, as the U.S. Supreme Court famously observed in *Callanan v. United States*, "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts."[277] The Model Penal Code drafters ultimately rejected this rationale, however. Motivated by their belief that punishment for inchoate offenses is justified because of the potential danger that the substantive offense intended will be committed, the drafters concluded that a conviction for a completed offense alone "adequately deals with such conduct."[278] Since publication of the Model Penal Code, however, "only [] a minority of the modern recodifications" have been persuaded by this argument.[279] Rather, the contemporary majority approach recognizes that, "[u]nlike the crimes of attempt and solicitation, the offense of conspiracy does not merge into the [] completed offense that was the object of the conspiracy."[280]

The second area of curtailment relates to merger of multiple general inchoate crimes. Both the text of Model Penal Code § 5.05(3) and the accompanying commentary indicate that the drafters intended to preclude liability for more than one general inchoate crime directed towards a single criminal objective, without regard to the nature of the conduct/amount of time that has elapsed between criminal efforts.[281] Practically

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problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.").

[275] *See* sources cited *supra* note 240 and accompanying text.

[276] Model Penal Code § 1.07 cmt. at 109 (noting that the common law rule would "generally [] allow[]" multiple "[c]onviction[s] for both the conspiracy and the completed offense").

[277] 364 U.S. 587, 593-94 (1961). More specifically, the common law rule emphasized that the "collective criminal agreement" at the heart of conspiracies: (1) "increases the likelihood that the criminal object will be successfully attained"; (2) "decreases the probability that the individuals involved will depart from their path of criminality"; and, perhaps most importantly, (3) "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Id.*

[278] Model Penal Code § 1.07 cmt. at 109.

[279] LAFAVE, *supra* note 251, at 2 SUBST. CRIM. L. § 12.4(d) (collecting statutes).

[280] DRESSLER, *supra* note 228, at § 29.03; *see, e.g.*, WAYNE R. LAFAVE, 2 SUBST. CRIM. L. §12.4(d) (3d ed. Westlaw 2018); Commentary on Ky. Rev. Stat. Ann. § 506.110; *Lythgoe v. State*, 626 P.2d 1082, 1083 (Alaska 1980).

[281] *See, e.g.*, Model Penal Code § 5.05(3) ("A person may not be convicted of more than one offense defined by this Article for *conduct designed to commit or to culminate in the commission of the same crime*."); Explanatory Note on Model Penal Code § 5.05(3) (noting exception where inchoate "conduct . . . has *multiple objectives*, only some of which have been achieved"); Model Penal Code § 5.05(3), cmt. at

speaking, this means that (for example) where X unsuccessfully attempts to murder V in 2010, and thereafter unsuccessfully attempts to murder V again (or, alternatively, unsuccessfully solicits Y to murder V) in 2012, X *cannot* be convicted for more than one general inchoate crime.[282] Given the unintuitive nature of this outcome, many jurisdictions with general provisions based on Model Penal Code § 5.05(3) appear to have incorporated—whether by statutory revision[283] or through judicial interpretation[284]—a "same course of conduct" requirement, which effectively limits merger to situations where the multiple inchoate offenses share a relatively close temporal/substantive relationship to one another.[285]

Viewed holistically, American merger practice exists on a spectrum. On the narrowest end are those jurisdictions that strictly apply the elements test without regard to any factual considerations. On the broadest end are those jurisdictions that apply a categorical bar on multiple convictions anytime they rest on the same course of conduct. And, in between those extremes, rests a variety of alternative approaches, including the various principles proscribed by the Model Penal Code and the broader proportionality-based standards. Which, then, is the best approach, all things considered?

In expert commentary, one finds a variety of perspectives on this question. Nevertheless, there appears to be general consensus on two key points. First, and perhaps most clear, is that the elements test is ill suited to provide the sole basis for merger analysis. In support of this conclusion, scholarly critics of the *Blockburger* rule tend to

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492 ("This provision reflects the policy, frequently stated in Article 5, of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object. Thus conceived, there is no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense.").

[282] ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; *see id.* ("Apparently the drafters [of the Model Penal Code] believe that . . . where there are two inchoate offenses arising out of separate courses of conduct directed toward the same substantive offense there is only one harm.")

[283] *See, e.g.*, Ala. Code § 13A-4-5(c) ("A person may not be convicted of more than one of the offenses defined in Sections 13A-4-1, 13A-4-2 and 13A-4-3 for a *single course of conduct* designed to commit or to cause the commission of the same crime."); Ky. Rev. Stat. Ann. § 506.110(3) ("A person may not be convicted of more than one (1) of the offenses defined in KRS 506.010, 506.030, 506.040 and 506.080 for a *single course of conduct* designed to consummate in the commission of the same crime.").

[284] *See, e.g.*, *State v. Badillo*, 317 P.3d 315, 321 (Or. Ct. App. 2013) ("[T]he commission intended ORS 161.485(2) to prevent multiple convictions for attempt, solicitation, and conspiracy on the basis of a defendant's *single course of conduct*, as opposed to preventing multiple convictions for multiple instances of one or another of the inchoate crimes."); *State v. Huddleston*, 375 P.3d 583, 586 (Or. Ct. App. 2016).

[285] *Compare State v. Gonzales-Gutierrez*, 171 P.3d 384 (Or. Ct. App. 2007) (merging convictions of attempt, solicitation, and conspiracy to commit murder based on a series of phone conversations had between the defendant and the same police officer posing as a hit man), *with State v. Badillo*, 317 P.3d 315, 321 (Or. Ct. App. 2013) (upholding separate convictions for two counts of solicitation because the defendant solicited two separate individuals, several days apart); *State v. Habibullah* 373 P.3d 1259, 1263 (Or. Ct. App. 2016) (upholding multiple convictions for conspiracy/solicitation to commit murder and attempt to murder the same victim because conduct that formed the basis of the conspiracy/solicitation convictions occurred a month after the attempt); *Id.* (upholding separate convictions for two counts of attempted aggravated murder because the defendant separately solicited two different individuals, weeks apart); *see also Com. v. Grekis*, 601 A.2d 1284, 1295 (Pa. Super. Ct. 1992) (upholding multiple convictions of criminal solicitation to commit involuntary deviate sexual intercourse where each solicitation occurred on unrelated occasions, several weeks apart because the court viewed each solicitation as a discrete act designed to culminate in a different offense).

highlight—above and beyond the issues of clarity and consistency discussed earlier[286]—three main problems.

The first is one of disproportionality in convictions. This critique asserts that the elements test, as applied to any criminal code comprised of many substantially related overlapping offenses, effectively treats "defendants who commit what is, in ordinary terminology, a single crime [] as though they committed many different crimes."[287] Such treatment is, sentence length aside, problematic when viewed in light of the many "adverse collateral consequences of convictions."[288] This includes, for example, "the harsher treatment that may be accorded the defendant under the habitual offender statutes of some States; the possible impeachment by prior convictions, if the defendant ever becomes a witness in future cases; and, in some jurisdictions, less favorable parole opportunities."[289]

The second problem, which follows directly from the first, is that of disproportionality in sentencing. It is a product of the fact that a person who has been convicted of two or more offenses will, in many cases, be subject to a period of incarceration equal to the combined statutory maxima (and mandatory minima, if any) of those offenses.[290] Assuming that the statutory maximum (and mandatory minimum, if any) for individual offenses in a criminal code is proportionate, then it will necessarily be the case that aggregating the punishments for two of more substantially overlapping offenses based on the same course of conduct will lead a defendant to face an overall level of sentencing exposure that is disproportionately severe.[291]

The third problem commonly recognized by critics of the elements test emphasizes the corrosive procedural dynamics that flow from the two proportionality problems just noted.[292] More specifically, it is argued that the narrow scope of merger inherent in the elements test encourages a prosecutorial practice known as "charge-

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[286] *See, e.g.,* Hoffheimer, *supra* note 195, at 437 ("Growing judicial experience with the elements test demonstrates that the test fails to achieve the simplicity and ease of application promised by its promoters. The test is formally indeterminate, has no ready application to common crimes with alternative elements, and facilitates result-oriented manipulation of elements."); LAFAVE ET AL., *supra* note 249, at 6 CRIM. PROC. § 24.8) (noting "the sustained critique of the *Blockburger* rule in the double jeopardy context"); William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 463 (1993); Eli J. Richardson, *Eliminating Double-Talk from the Law of Double Jeopardy*, 22 FLA. ST. U. L. REV. 119, 122 (1994); Aquannette Y. Chinnery, Comment, *United States v. Dixon: The Death of the Grady v. Corbin "Same Conduct" Test for Double Jeopardy*, 47 RUTGERS L. REV. 247, 281 (1994).

[287] Stuntz, *supra* note 181, at 519-20; Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 770-71 (2004) ("from the intuitive perspective of a layperson, the defendant has committed a single crime").

[288] *Com. v. Jones*, 382 Mass. 387, 396 (1981).

[289] *Id.* (citing, e.g., *Benton v. Maryland*, 395 U.S. 784, 790-791 & n.5 (1969); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 299-300 n.161 (1965); Note, *Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970)).

[290] *See, e.g.,* Stacy, *supra* note 180, at 832 ("Allowing multiple convictions can add years to criminal sentences because consecutive sentences are imposed or because the elevated criminal history score lengthens the term of imprisonment for subsequent offenses."); King, *supra* note 201, at 194.

[291] For illustrations, see *supra* notes 93-117 and accompanying text. *See generally, e.g.,* Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 U. LOUISVILLE L. REV. 173, 178 (2015); King, *supra* note 201, at 193.

[292] *See, e.g.,* Stacy, *supra* note 180, at 832 ("Aside from obvious impacts on offenders' loss of liberty and on public protection, [overlapping offenses/narrow merger] affects prosecutorial charging discretion, judicial sentencing discretion, plea bargaining incentives, and stresses on prison capacity.").

stacking," wherein the government brings as many substantially-overlapping charges as possible, thereby providing defendants with "greater incentives to plead guilty."[293]

While the legal commentary clearly supports rejecting an approach to merger limited to the elements test, the relevant authorities are less clear on what, precisely, should replace it. There appears to be general agreement that the right approach is one that goes beyond "merely [] examin[ing] whether two charges share elements," and instead asks judges to engage in a broader evaluation of "whether the statutes serve the same functional purpose or protect against the same harm and public interest, such that punishment under both for a single act constitutes double punishment."[294] Rooted in a "code's implicit principle of proportionality,"[295] this kind of analysis inevitably requires the exercise of judicial "common sense" in determining whether the differences between two or more substantially overlapping crimes "fundamentally change the character of one relative to the other."[296]

The most concrete example of this kind of approach is reflected in the writings and draft legislation developed by Paul Robinson and Michael Cahill.[297] Through this

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[293] Husak, *supra* note 287, at 770-71 ("Thus the main effect of these overlapping offenses is to allow 'charge-stacking' and thereby subject defendants to more severe punishments. As a consequence, defendants have greater incentives to plead guilty."); Brown, *supra* note 181, at 453 ("Redundant and overlapping criminalization poses a considerable risk for prosecutorial misuse in a relatively low-visibility manner that is hard to monitor. Prosecutors can stack charges that drive defendants into hard bargains; even when charges are ultimately dropped, they have done their work as bargaining chips.").

Here's one useful illustration:

> Suppose a given criminal episode can be charged as assault, robbery, kidnapping, auto theft, or any combination of the four. By threatening all four charges, prosecutors can, even in discretionary sentencing systems, significantly raise the defendant's maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty. The odds of conviction are therefore higher if the four charges can be brought together than if prosecutors must choose a single charge and stick with it—even though the odds that the defendant did any or all of the four crimes may be the same.

Stuntz, *supra* note 181, at 519-20; *compare* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 275 (2007) ("Expansive codes contain more offenses with varying penalties that prosecutors can leverage in bargaining, but there is little evidence that unnecessarily expansive (or duplicative) provisions affect plea practice much.").

[294] Brown, *supra* note 181, at 453; *see, e.g.*, MOORE, *supra* note 187, at 337-50; Thomas, *supra* note 200, at 1032; King, *supra* note 201, at 196; Stacy, *supra* note 180, at 855-59; *see also* Antkowiak, *supra* note 180, at 268 ("If merger is all about legislative intent, then determining legislative intent is all about identifying the harm, evil, or mischief the statute is supposed to remedy.").

[295] Stacy, *supra* note 180, at 855 ("In developing a common law of offense interrelationships, courts do not and should not stand on their own, much less in opposition to the legislature. Instead, they can be guided first by the overall aims of the criminal code, particularly the code's implicit principle of proportionality, and second by offense relationship doctrines.").

[296] Adam J. Adler, *Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem*, 124 YALE L.J. 448, 463–65 (2014); *see, e.g.*, Stacy, *supra* note 180, at 855 ("So how should a court deal with two crimes whose elements overlap only in part? Unfortunately, there is no simple heuristic. Courts should compare the elements of the two offenses, recognize the ways in which the crimes differ, and then use common sense to determine whether the differences between the crimes fundamentally change the character of one crime relative to the other.").

[297] The most recent version of this framework, which has been incorporated into a proposed revision to the Delaware Criminal Code, reads:

body of work, Robinson and Cahill have developed a comprehensive statutory framework for dealing with issues of multiple liability that generally mirrors the Model Penal Code approach, with one important exception: the elements test is replaced with a broader principle that "asks whether the gravamen of one offense duplicates that of another."[298] More specifically, the key provision would preclude a court from:

> [E]nter[ing] a judgment of conviction for more than one of any two offenses if:
>
> (a) the two offenses are based on the same conduct and:

(a) *Limitations on Conviction for Multiple Related Offenses*. The trier of fact may find a defendant guilty of any offense, or grade of an offense, for which he or she satisfies the requirements for liability, but the court shall not enter a judgment of conviction for more than one of any two offenses or grades of offenses if:

(1) they are based on the same conduct and:

(A) the harm or evil of one is:

(i) entirely accounted for by the other; or

(ii) of the same kind, but lesser degree, than that of the other; or

(B) they differ only in that:

(i) one is defined to prohibit a designated kind of conduct generally, and the other to prohibit a specific instance of such conduct; or

(ii) one requires a lesser kind of culpability than the other; or

(C) they are defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses; or

(2) one offense consists only of an attempt or solicitation toward commission of:

(A) the other offense; or (B) a substantive offense that is related to the other offense in the manner described in Subsection (a)(1); or

(3) each offense is an inchoate offense toward commission of a single substantive offense; or

(4) the two differ only in that one is based upon the defendant's own conduct, and another is based upon the defendant's accountability, under Section 211, for another person's conduct; or

(5) inconsistent findings of fact are required to establish the commission of the offenses or grades.

Proposed Del. Crim. Code § 210(a)(2017); *see* Proposed Ill. Crim. Code § 254(1)(a) (2003); Proposed Ky. Penal Code § 502.254(1)(a) (2003).

[298] Cahill, *supra* note 123, at 606; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

(i) *the harm or wrong of one offense is*:

(A) *entirely accounted for by the other offense*[.][299]

This italicized language is intended to "require[] facing squarely the challenge of determining what is, and what is not, a distinct harm meriting separate liability."[300] Which is to say: rather than "considering the theoretical possibility of committing one offense without committing another" under *Blockburger*, this "proposed standard calls for a consideration of the relevant offenses' purposes."[301]

One important aspect of the "entirely account for" standard, which sets it apart from the similarly broad standards currently applied by many courts,[302] is that it "could be implemented without reference to the particular facts of specific cases."[303] As a result, application of this standard

> would present issues of law regarding how defined offenses relate to each other—specifically, whether their relation is such that multiple liability is appropriate, or whether imposing liability for one offense would needlessly and improperly duplicate liability already imposed by a conviction for another offense.[304]

This aspect of the provision brings with it important benefits, namely, it means that "a court's finding regarding the appropriateness of multiple convictions for two separate offenses could be binding on all future cases involving those same offenses, thereby enhancing predictability, stability, and evenhandedness in the imposition of multiple liability."[305]

In accordance with the above analysis of national legal trends, RCC § 212 incorporates a comprehensive merger framework comprised of substantive policies derived from—but which also depart in important ways from—the Model Penal Code approach.

The first three general merger principles contained in subsection (a) are substantively identical to the corresponding Model Penal Code principles contained in § 1.07. More specifically, RCC § 212(a)(1) adopts the Model Penal Code formulation of the elements test as reflected in § 1.07(4)(a).[306] Thereafter, RCC § 212(a)(2) recognizes

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[299] Proposed Del. Crim. Code § 210(a); Proposed Ill. Crim. Code § 254(1)(a); Proposed Ky. Penal Code § 502.254(1)(a).

[300] Cahill, *supra* note 123, at 606; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[301] Cahill, *supra* note 123, at 606; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[302] *See supra* notes 253-65 and accompanying text.

[303] Cahill, *supra* note 123, at 607; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[304] Cahill, *supra* note 123, at 607; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[305] Cahill, *supra* note 123, at 607; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

[306] *See* Model Penal Code § 1.07(4)(a) ("[I]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged.").

the lesser harm, lesser culpability, and greater specificity principles codified by the Model Penal Code.[307] Then, RCC § 212(a)(3)—in accordance with Model Penal Code § 1.07(1)(c)—creates a presumption of merger where conviction for one offense is logically inconsistent with the other.[308] Adoption of these principles finds broad support in nationwide legislation, case law, and commentary.[309]

The fourth merger principle incorporated into subsection (a) goes beyond, and therefore is not rooted in, the Model Penal Code. More specifically, RCC § 212(a)(4) establishes a presumption of legislative intent as to merger when "[o]ne offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each." This principle, which is the broadest in subsection (a), is a modified form of the proposal developed by Professors Robinson and Cahill.[310] Adoption of a broader, proportionality-based standard is consistent with judicial practice in several states as well as general scholarly trends.[311] Because, however, the standard codified by RCC § 212(a)(4) is solely focused on a comparison of the elements of offenses—rather than on the specific facts of each case—it is also narrower than many of the proportionality-based approaches applied in the states.[312] Narrowing the scope of

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[307] *See* Model Penal Code § 1.07(1)(d) ("[T]he offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct"); Model Penal Code § 1.07(4)(c) (c) ("[I]t differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.").

[308] *See* Model Penal Code § 1.07(1)(c) ("[I]nconsistent findings of fact are required to establish the commission of the offenses . . .").

[309] *See* sources cited *supra* notes 233-39 and accompanying text. *Compare* Cahill, *supra* note 123, at 606 ("The provision above does not refer to the concept of an 'included offense.'") *with* Nolan, *supra* note 244, at 547 ("A more appropriate application of the merger rule would first look to the *Blockburger* test as the baseline of rights which defendants must be afforded. However, the *Blockburger* test suffers from some of the weaknesses of the older forms of merger analysis."); Stacy, *supra* note 180, at 859 ("Mechanical elements tests can be useful tools. But they must be used in conjunction with other considerations as part of a larger framework.").

[310] Most significant is that RCC § 212(a)(4) modifies Robinson and Cahill's proposed "*entirely* accounted for" standard with a "*reasonably* accounted for" standard, which may be slightly broader. The following hypothetical illustrates the potential difference.

Imagine the prosecution of an actor who steals a new car worth $75,000 from a victim who has left the keys to her vehicle in the ignition while filling it with gas/has her back turned. Assume the actor satisfies the requirements of liability for two offenses. The first is second degree theft, which applies to anyone who "intentionally takes property of another valued at more than $70,000 dollars." It is subject to a statutory maximum of 5 years, and no mandatory minimum. The second is a carjacking offense, which applies to anyone who "intentionally takes a motor vehicle in the immediate possession of another." It is subject to a statutory maximum of 20 years, alongside a 5-year mandatory minimum. Finally, assume that, for purposes of the hypothetical, 95% of carjackings involve vehicles valued at less than $70,000 dollars.

The determination of whether, as a matter of law, convictions for second degree theft and carjacking merge under an "entirely accounted for" standard is unclear. For example, one might argue that they do not since the carjacking statute does not really speak to the theft of *expensive* automobiles, which is outside of the statistical norm (at least as assumed here). *But see* Commentary on Proposed Ill. Crim. Code § 254(1)(a) ("The offense of robbery is essentially a compound offense comprised of theft and an assault offense, and thus *fully accounts* for the harm of wrongfully taking another's property."). In contrast, a "reasonably accounted for" standard would lead to merger based on an evaluation of the harm or wrong, culpability, and penalty proscribed by each.

[311] *See* sources cited *supra* notes 253-65, 287-301 and accompanying text.

[312] *See* sources cited *supra* notes 253-65 and accompanying text.

merger in this way is justified by the interests of administrative efficiency and uniformity of application.[313]

RCC § 212(a) thereafter incorporates two merger principles for addressing multiple liability in the context of general inchoate crimes. Both are based on, but each is ultimately narrower than, the corresponding Model Penal Code principles.

The first of these principles, RCC § 212(a)(5), generally precludes multiple liability for an attempt or solicitation—but not a conspiracy—and the completed offense.[314] This is in contrast to Model Penal Code § 1.07, which *also* precludes multiple liability for a conspiracy and the completed offense.[315] Both the coverage of attempt and solicitation in this bar on multiple liability, as well as the concomitant exclusion of conspiracy,[316] is supported by nationwide legislation, case law, and legal commentary.[317]

The second relevant merger principle, RCC § 212(a)(6), generally precludes multiple liability for multiple inchoate crimes directed toward completion of the same criminal objective. Because this principle, like the other principles established in subsection (a), is subject to a "same course of conduct" limitation, it is more limited in scope than the principle reflected in Model Penal Code § 5.05(3), which appears to apply without regard to the amount (or nature) of time that has elapsed between criminal efforts.[318] This departure is justified by both state legislative and judicial practice, as well

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[313] *See* sources cited *supra* notes 304-05 and accompanying text.

[314] Note that the RCC version of this principle also applies to both the target offense and an offense that is effectively included in the target offense (e.g., attempted armed murder and armed murder, murder, or aggravated assault). *See* RCC § 212(5)(B) ("A different offense that is related to the other offense in the manner described in paragraphs (1)-(4)"). While this outcome is not explicitly endorsed by the Model Penal Code, it seems implicit in the Code's approach. *See supra* notes 224-30 and accompanying text. It is derived from the Robinson and Cahill proposals. For example, the Illinois version requires merger whenever: "(b) one offense consists only of an inchoate offense toward commission of . . . (i) the other offense, or . . . (ii) a substantive offense that is related to the other offense in the manner described in Subsection (1)(a)." Proposed Ill. Crim. Code § 254(1)(b); *see* Commentary on Proposed Ill. Crim. Code § 254(1)(b)(ii)("Section 254(1)(b)(ii) expands on [the rule barring multiple convictions for an inchoate offense and its target] to bar convictions for both (1) an inchoate offense, and (2) any offense that relates to the inchoate offense's target offense in such a way that Section 254(1)(a) would bar convictions for both of them. For example, 254(1)(b)(ii) would preclude convictions (based on the same conduct) for both battery and attempted aggravated battery, or for attempted battery and aggravated battery.") It also finds support in case law and legislation. *See, e.g.*, *People v. Thomas*, 531 N.E.2d 84, 88 (Ill. App. 1988) (vacating aggravated battery conviction where same stabbing was basis for attempted murder conviction); Ala. Code § 13A-1-9(2) ("An offense is an included one if . . . It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense."); Kan. Stat. Ann. § 21-5109(4) (same).

[315] Model Penal Code § 1.07(1)(b) ("[O]ne offense consists only of a conspiracy or other form of preparation to commit the other"); Model Penal Code § 1.07(4)(b) ("[I]t consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein.").

[316] Given the bilateral definition of conspiracy incorporated into RCC § 303(a), this exclusion is arguably even more justifiable. *See* DRESSLER, *supra* note 228, at § 30.01 ("[I]f the focus of the offense is on the dangerousness of the individual conspirator, her punishment should be calibrated to the crime that she threatened to commit; punishing her for both crimes is duplicative. *The non-merger rule makes sense, however, if one focuses on the alternative rationale of conspiracy law, i.e., to attack the special dangers thought to inhere in conspiratorial groupings.*"); *see also United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) ("[Conspiratorial] agreement is 'a distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.'") (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

[317] *See* sources cited *supra* notes 240, 275-80, & 316 and accompanying text.

[318] *See* sources cited *supra* note 281 and accompanying text.

as, more broadly, the unintuitive outcomes that application of the Model Penal Code approach would otherwise appear to support.[319]

Subsections (b), (c), and (d) of RCC § 212 thereafter provide three substantive merger policies, which address issues upon which the Model Penal Code to merger is silent. The first, contained in RCC § 212(b), clarifies that the principles stated in subsection (a) are inapplicable "whenever the legislature clearly manifests an intent to authorize multiple convictions for different offenses arising from the same course of conduct." This explicitly codifies what is otherwise well established in American criminal law: that legislative intent is the touchstone of judicial merger analysis.[320]

The second, RCC § 212(c) provides a legal framework for applying the principles set forth in subsections (a) and (b) to statutes comprised of alternative elements. It requires judges to conduct the merger inquiry with reference to the unit of analysis most likely to facilitate proportionality in sentencing. This framework is supported by both case law and legal commentary.[321]

The third, RCC § 212(d), establishes a rule of priority to guide judicial selection of merging offenses. Under this rule, where two or more offenses are subject to merger, the conviction that ultimately survives—whether at trial or on appeal—should be [t]he most serious offense among the offenses in question."[322] However, "[i]f the offenses are of equal seriousness," then "any offense that the courts deems appropriate" may remain.[323] This framework reflects American legal practice.[324]

The final provision in RCC § 212, subsection (e), establishes two general procedural principles relevant to the administration of the above-enumerated legal framework. The first is that "[a] person may be found guilty of two or more offenses that

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[319] *See* sources cited *supra* notes 241, 281-85 and accompanying text.

[320] *See supra* notes 186-88 and accompanying text.

[321] *See, e.g.,* Antkowiak, *supra* note 180, at 270 ("Criminal statutes 'contain different elements designed to protect different interests' and it is in the elements that the core of legislative intent may be seen.") (quoting *Commonwealth v. Sayko*, 515 A.2d 894, 895 (Pa. 1986)); *Baldwin*, 604 Pa. at 45 (where crimes comprised of alternative elements, "we caution that trial courts must take care to determine which particular 'offenses,' *i.e.* violations of law, are at issue in a particular case); *Com. v. Jones*, 590 Pa. 356, 365, 912 A.2d 815, 820 (2006) (permitting an analysis of "the elements as charged in the circumstances of a case"); *Commonwealth v. Johnson*, 874 A.2d 66, 71 n.2 (Pa. Super. 2005) (recognizing that a particular subsection of a criminal statute may merge with another crime as a lesser-included offense even though a different subsection of that same statute may not).

[322] RCC § 212(d)(1).

[323] RCC § 212(d)(2).

[324] *See, e.g., State v. Fergus*on, 808 N.W.2d 586, 589 (Minn. 2012) ("[The Minnesota Penal Code contemplates that a defendant will be punished for the 'most serious' of the offenses arising out of a single behavioral incident because 'imposing up to the maximum punishment for the most serious offense will include punishment for all offenses.'") (quoting *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006)); 42 Pa.C.S. § 9765 ("Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense."); Richard T. Carlton, III, *The Constitution Versus Congress: Why Deference to Legislative Intent Is Never an Exception to Double Jeopardy Protection*, 57 HOW. L.J. 601, 606-07 (2014) ("When a merger occurs . . . the 'lesser' included offense merges into the 'greater' offense, and a sentence is imposed only for the offense with the additional element or elements."); *cf. United States v. Gaddis*, 424 U.S. 544, 550, 96 S.Ct. 1023, 47 L.Ed.2d 222 (1976) (establishing a "rule of priority" for jury consideration of greater and lesser-included offenses). *But see State v. Armengau*, 2017-Ohio-4452, ¶¶ 123-124, 93 N.E.3d 284, 317–18 ("When it is determined that the defendant has been found guilty of allied offenses of similar import, 'the trial court must accept the state's choice among allied offenses . . . .'") (quoting *State v. Bayer*, 10th Dist. No. 11AP-733, 2012-Ohio-5469, 2012 WL 5945118, ¶ 21).

merge under this [s]ection."[325] And the second is that "no person may be subject to a conviction for more than one of those offenses after: (1) the time for appeal has expired; or (2) the judgment appealed from has been affirmed."[326] The former ensures that the law of merger does not impinge upon the ability of the fact finder to render verdicts, whereas the latter provides trial courts with the flexibility to leave resolution of merger issues to appellate courts. Both of these principles are rooted in state case law; however, it is unclear whether and to what extent they are representative of national legal trends.[327]

RCC § 212: Relation to National Legal Trends on Codification. There is wide variance between jurisdictions insofar as the codification of general merger policies are concerned.[328] Generally speaking, though, the Model Penal Code's general provision, § 1.07,[329] provides the basis for most contemporary reform efforts.[330] The general merger

[325] RCC § 212(e). More generally, RCC § 212 does not bar inclusion of multiple counts in a single indictment or information for two or more merging crimes. *See, e.g.*, Alaska Stat. Ann. § 11.31.140; Ala. Code § 13A-4-5.

[326] RCC § 212(e).

[327] *See Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985); *Warrick v. United States*, 528 A.2d 438, 443 n.6 (D.C. 1987); *Fuller v. United States*, 407 F.2d 1199, 1224–25 (D.C. Cir. 1967); *see also State v. Cloutier*, 286 Or. 579, 601–03, 596 P.2d 1278, 1289–91 (1979) ("A trial court might pronounce a judgment of conviction on each of the charges, indicating the sentence he would impose if the conviction stood alone but suspending its execution (or suspending imposition of sentence), and accompany the judgment on each but the gravest charge with an order that the judgment is vacated by its own terms *whenever the time for appeal has elapsed or the judgment appealed from has been affirmed*."); *Green v. State*, 856 N.E.2d 703, 704–05 (Ind. 2006) (observing that "a merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is unproblematic as far as double jeopardy is concerned") (citing *Laux v. State*, 821 N.E.2d 816, 820 (Ind. 2005)).

[328] *See generally* Model Penal Code § 1.07, cmt. at 106-36.

[329] The text of Model Penal Code § 1.07 reads, in relevant part:

> (1) **Prosecution for Multiple Offenses; Limitation on Convictions.** When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
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> (a) one offense is included in the other, as defined in Subsection (4) of this Section; or
>
> (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or
>
> (c) inconsistent findings of fact are required to establish the commission of the offenses; or
>
> (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
>
> (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses . . . .
>
> (4) **Conviction of Included Offense Permitted.** A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:

principles incorporated into RCC § 212 incorporate 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 general thrust of the Model Penal Code approach to communicating statutory limitations on multiple liability is commendable. Section 1.07 codifies a broad set of principles for addressing the issues of sentencing merger that arise when a defendant satisfies the requirements of liability for two or more substantially related criminal offenses arising from the same course of conduct. However, the framework through which the relevant merger principles are articulated suffers from two basic flaws.

The first, and more general, is that the Code's limitations on multiple liability are articulated alongside a variety of other policies, which address materially distinct procedural issues. Beyond issues of sentencing merger, for example, Model Penal Code § 1.07 also addresses: (1) when a defendant may be subject to separate trials for multiple offenses based on the same conduct[331]; (2) the authority of the court to order separate

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> (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

[330] *See generally* Model Penal Code § 1.07 cmt. at 106-36. Prior to the Code's completion in 1962, few jurisdictions had any legislation directly addressing sentencing merger. *See id.* Since then, however, numerous American jurisdictions have gone on to codify merger provisions in their criminal codes at least loosely influenced by Model Penal Code § 1.07. *See, e.g.*, Ala. Code § 13A–1–9; Ark. Code Ann. § 5–1–110; Colo. Rev. Stat. § 18–1–408(5); Del. Code Ann. tit. 11, § 206(b); Ga. Code Ann. § 16–1–6; Haw. Rev. Stat. § 701–109(4); Ill. Stat. 5/2-9 609.04; Mo. Stat. § 556.041; Mont. Code Ann. § 46–1–202(8); N.J. Rev. Stat. § 2C:1–8(d); Utah Stat. § 76-1-402; Wis. Stat. Ann. § 939.66; Kan. Stat. Ann. § 21-5109. In addition, some courts have judicially adopted the Model Penal Code's overarching framework. *See State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999); *see also State v. Henning*, 238 W. Va. 193, 200 (2016) (highlighting legal trends); *but see Commonwealth v. Carter*, 393 A.2d 660, 662 (Pa. 1978) (Pomeroy, J., dissenting) (lamenting lack of attention to Model Penal Code). For recently proposed legislation modeled, in large part, on Model Penal Code § 1.07, see Proposed Del. Crim. Code § 210 (2017); Proposed Ill. Crim. Code § 254 (2003); Proposed Ky. Penal Code § 502.254 (2003).

[331] *See* Model Penal Code § 1.07(2) ("[A] defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.").

trials[332]; and (3) when a jury may be instructed on (and the defendant convicted of) an offense that was never charged in the indictment.[333]

As a purely organizational matter, employing a single general provision to address disparate topics such as these is problematic. Grouping proportionality-based limitations relevant to multiple punishment alongside procedural limitations on separate trials and the submission of jury instructions is both confusing and unintuitive. However, the specific manner in which these materially different policies are intertwined with one another is—organizational concerns aside—particularly troublesome given that it may have substantive policy implications. This is because the Model Penal Code's approach to both sets of issues, "like most legislative efforts, ultimately leans on the notion of an 'included offense.'"[334]

Consider that Model Penal Code § 1.07(1)(a) precludes multiple convictions where, *inter alia* "one offense is included in the other, as defined in Subsection (4) of this Section."[335] Subsection (4) thereafter enumerates a variety of principles—including the elements test—for determining what constitutes an included offense.[336] Importantly, however, these principles do not only place limitations on multiple convictions under the Code. Rather, they also provide the legal basis for determining: (1) when, pursuant to Subsection (4), "[a] defendant may be convicted of an [uncharged] offense"[337]; as well as (2) when, pursuant to Subsection (5), the court is "obligated to charge the jury with respect to an [uncharged offense]."[338] Subsequent general provisions in the Model Penal Code then further rely on the same included offense principles proscribed in § 1.07(4). For example, Model Penal Code § 1.08(1) provides that "[a] finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside."[339]

That both the Model Penal Code and many state criminal codes utilize the included offense concept in this overlapping way is not surprising. "The Model Penal Code was drafted during the high point of the general theory of lesser included offense law in the mid-twentieth century."[340] And, still today, the included offense concept is employed by the American legal system to serve a variety of functions, which include: (1) "provid[ing] notice to defendants of what crimes, not named in an indictment or formal charge, may be prosecuted at trial"; (2) "offer[ing] prosecutors flexibility in charging offenses by permitting them to add or substitute less serious charges without suffering the cost and delay that would be occasioned by reindicting or amending charging instruments"; (3) "bestow[ing] on defendants an opportunity to reduce their

[332] *See* Model Penal Code § 1.07(3) ("When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.").
[333] *See* Model Penal Code § 1.07(5) ("The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.").
[334] Cahill, *supra* note 123, at 605.
[335] Model Penal Code § 1.07(1)(a).
[336] Model Penal Code § 1.07(4).
[337] Model Penal Code § 1.07(4).
[338] Model Penal Code § 1.07(5).
[339] Model Penal Code § 1.08(1).
[340] Hoffheimer, *supra* note 195, at 356.

liability to a more appropriate, less serious level"; (4) "recogniz[ing] the right of jurors to be informed of related offenses that might apply"; and (5) "establish[ing] limits on multiple prosecutions and cumulative punishments."[341]

That said, this overlapping usage—reflected in both the Model Penal Code and American legal practice more generally—is problematic given the materially distinct interests safeguarded by the included offense concept across such varied contexts.[342] To illustrate, consider just one of the procedural issues the included offense concept is utilized as the basis for answering: determining when a jury may or should be instructed on an offense that was not specifically charged in the indictment.[343] The general rule is that a jury may be instructed on an uncharged offense if it is necessarily included in a charged offense.[344]

Because instructing a jury on uncharged offenses directly implicates a defendant's constitutional rights to "due process and notice," while raising basic "concerns of fundamental fairness," it may make sense to apply a narrow/formalistic interpretation of what actually constitutes an included offense in this particular context.[345] Where, in contrast, "sentencing merger is at issue," the central policy interest of proportionate punishment arguably supports a broader reading of what constitutes an included offense.[346] And, just as important, there is no countervailing constitutional interest weighing against an expansive interpretation of "included offense" in the context of merger.[347] (Indeed, if anything, a broader reading of "included offense" in the merger

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[341] *Id.* at 357.

[342] *See, e.g.*, Poulin, *supra* note 185, at 596 ("[S]uccessive prosecutions—reprosecution after acquittal or conviction—pose markedly different issues from multiple punishment imposed in a single proceeding."); Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183 (2004) (same); *Grady v. Corbin*, 495 U.S. 508, 509, *overruled by United States v. Dixon*, 509 U.S. 688 (1993) ("Successive prosecutions, whether following acquittals or convictions, raise concerns that extend beyond [] the possibility of an enhanced sentence" implicated by merger/multiple punishment).

[343] *See, e.g.*, *Schmuck v. United States*, 489 U.S. 705, 718 (1989); *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Cole v. Arkansas*, 333 U.S. 196 (1948).

[344] LAVE ET AL., *supra* note 249, at 6 CRIM. PROC. § 24.8(d) ("No area of law relating to jury instructions has created more confusion than that governing when a court may or must put before the jury for its decision a lesser-included offense, that is, an offense not specifically charged in the accusatory pleading that is both lesser in penalty and related to the offense specifically charged.").

[345] As the Pennsylvania Supreme Court has observed:

> Where due process and notice are at issue, it is prudent to primarily focus the analysis on the statutory elements of a crime to determine whether crimes are lesser and greater included offenses because due process protects an accused against any unfair advantage. [] When a defendant may be convicted on a charge absent from the indictment, concerns of fundamental fairness dictate that analysis of potential greater and lesser included offenses proceed in a more narrow fashion than when sentencing merger is at issue.

Com. v. Jones, 590 Pa. 356, 369-70 (2006) (internal quotations and citations omitted).

[346] *Id.*; *see also Reynolds v. State*, 706 P.2d 708, 711 (Alaska Ct. App. 1985) ("For if two offenses are so fundamentally disparate—so different in their basic social purposes—that merger between them is not compelled and separate sentences would be permissible upon conviction of both, then no greater/lesser-included offense relationship can arise, no matter how clearly intertwined these offenses may be in the factual and evidentiary setting of a given case.").

[347] *See, e.g.*, *Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991) ("The gradation of punishment for an offense is clearly a matter of legislative choice, whether it be as severe as authorizing dual punishment for

context affirmatively serves a defendant's constitutional rights to be free from cruel and unusual punishment and afforded substantive due process.[348])

Employing the same included offense concept to address different issues which implicate distinct policy/constitutional considerations has the potential to cause a variety of problems.[349] Most relevant here, however, is that it creates a risk that courts will—either unintentionally or unthinkingly—transplant an appropriately limited view of what constitutes an "included offense" for purposes of dealing with instructional issues into the sentencing context for purposes of evaluating legislative intent as to multiple punishment.[350] (Conversely, broad construction of what constitutes an "included offense" for purposes of dealing with sentencing merger may "dilute[] double jeopardy protection from successive prosecution."[351]) From a drafting perspective, then, there appears to be little to gain, and much to lose, from applying a single concept to address the qualitatively "different" and "distinct" issues that traditionally fall under the included offense umbrella.[352]

The RCC approach to drafting a general merger provision addresses the above codification problems as follows. First, and most fundamentally, RCC § 212 is solely limited to the topic of merger, and, therefore, avoids the general organizational issues created by the Model Penal Code drafters' decision to address multiple procedural issues—otherwise unrelated to sentencing—in § 1.07. Second, and more specifically, RCC § 212 codifies the requisite sentencing policies without relying on the concept of an "included offense." Instead, the RCC affirmatively articulates the relevant included offense principles in a manner that is specifically oriented towards addressing merger, alongside clarification in accompanying commentary of their substantive independence from other contexts outside of sentencing.

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lesser-included offenses . . . *or as mild as prohibiting the imposition of multiple convictions even where two offenses clearly involve different elements*.").

[348] *See supra* note 187 and accompanying text.

[349] *See, e.g.*, Hoffheimer, *supra* note 195, at 371 (noting that the elements "test goes too far towards permitting subsequent prosecutions and under-protects defendants from multiple prosecution and punishment"); *State v. Keffer*, 860 P.2d 1118, 1131 (Wyo. 1993) ("We are satisfied the statutory elements analysis should be used as the foundation for double jeopardy protection in connection with both multiple prosecutions and multiple or cumulative punishments."); *see generally, e.g.*, Poulin, *supra* note 185; Antkowiak, *supra* note 180; Nolan, *supra* note 244.

[350] *See, e.g., Jones*, 590 Pa. at 356-72 (highlighting historical development of elements test in Pennsylvania); *Fraser v. State*, 523 S.W.3d 320, 330 (Tex. App. 2017) (observing that the "query" into merger of felony murder with the underlying offense "is not the same as determining whether the underlying offense is a lesser-included offense to the offense of murder."); *see also Matter of D.B.H.*, 549 A.2d 351, 353 (D.C. 1988) ("[W]hether or not simple assault is a lesser-included offense of a charged robbery in general, it cannot be considered, for purposes of providing sufficient notice to the accused, a lesser-included offense of the robbery charged here.").

[351] Poulin, *supra* note 185, at 598 ("[M]ultiple punishment as a double jeopardy question not only generates unwarranted confusion, but also dilutes double jeopardy protection from successive prosecution. Because of the dominant role of legislative intent in determining appropriate punishment, the protection from multiple punishment should simply not be treated as an aspect of double jeopardy protection . . ."); *see also id.* at 646 (["T]he courts must distinguish between the analysis appropriate for double jeopardy claims based on successive prosecution, and that appropriate for claims of multiple punishment. Although conflating the two types of analysis has not led to excessive protection against punishment, it has eroded double jeopardy protection against successive prosecution, making it vulnerable to legislative fragmentation of offenses.").

[352] Cahill, *supra* note 123, at 606-07.

Each of the above revisions finds support in case law,[353] legislation,[354] and legal commentary.[355] When viewed collectively, they should go a long way towards "disentangl[ing]" the problematic "Gordian knot" that overlapping usage of the included offense concept has effectively tied between the law of merger and other procedural topics.[356] And, when considered in light of the substantive modifications/additions to the Model Penal Code made by the rest of RCC § 212, they comprise part of a clear, comprehensive, and accessible merger framework.

[353] *See* sources cited *supra* notes 344 & 354 (cases recognizing the importance of distinguishing between contexts when applying the included offense concept).

[354] *See* sources cited *supra* notes 328-39 (statutes specifically addressing sentencing merger).

[355] *See* sources cited *supra* note 298 (highlighting importance of addressing merger issues separate from other procedural issues, and without reliance on included offense concept).

[356] Poulin, *supra* note 185, at 598; *see id.* at 647 ("Once the courts understand that the propriety of successive prosecution is a question distinct from the question of multiple punishment and that, unlike punishment, successive prosecution threatens the core of double jeopardy protection, they will have taken a critical step toward cutting the Gordian knot of double jeopardy jurisprudence."). At minimum, this separation serves the interests of clarity and consistency. However, it may also serve the interests of proportionality by mitigating the risk that the law of merger will be narrowed in pursuit of unrelated constitutional and policy goals.