COMMENTARY
SUBTITLE I. GENERAL PART

RCC § 22E-101. Short Title and Effective Date.

Explanatory Note. This section provides a short title for the Revised Criminal Code and provisions necessary for an orderly transition. The section ensures that implementation of the Revised Criminal Code will not raise *ex post facto* concerns under the U.S. Constitution by establishing that the Revised Criminal Code does not apply to conduct committed prior to the effective date. Such conduct is instead governed by prior laws, which remain in force solely to deal with these prosecutions.

Relation to Current District Law. This section is in accordance with, but fills a gap in, District law. The use of a short title for a section of the D.C. Code is common practice.[1] Also, several Titles of the D.C. Code set a specific effective date by their own terms.[2] With respect to subsection (c), D.C. Code § 45-404 states that repeal of an act of the Council does not "release or extinguish any penalty . . . incurred pursuant to the act," and that "the [repealed] act shall be treated as remaining in force for the purpose of sustaining any . . . prosecution for the enforcement of any penalty . . . ." This "savings" statute has been used to ensure that crimes committed prior to a change in a criminal law are prosecuted under the prior version.[3] However, neither the savings statute nor any other statute in the D.C. Code states when a penalty is "incurred" under a repealed law. Nor has the DCCA clarified the matter. To resolve this ambiguity and fill a gap in District law, subsection (c) states that if a single element of a crime is committed before the effective date of the Revised Criminal Code, then the superseded law should apply.

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[1] *See*, *e.g.*, D.C. Code § 19-1301.01 ("This chapter may be cited as the 'Uniform Trust Code'."); D.C. Code § 29-101.01(a) ("This title may be cited as the 'Business Organizations Code'."); D.C. Code § 46-351.01 ("This chapter may be cited as the Uniform Interstate Family Support Act.").

[2] *See*, *e.g.*, D.C. Code § 2-118 ("This subchapter shall become effective 6 months from the date of their [sic] approval.").

[3] *See Holiday v. United States*, 683 A.2d 61, 80 (D.C. 1996) ("The general savings statutes, therefore . . . preserve mandatory-minimum sentences in all cases where the offense was committed" before repeal of the mandatory minimum).

RCC § 22E-102. Rules of Interpretation.

1. § 22E-102 (a) — Generally.

Explanatory Note. This subsection codifies the general rules of statutory interpretation that should be used to determine the meaning of provisions in the Revised Criminal Code. The subsection specifies that a provision first shall be interpreted according to the plain meaning of its text. However, in addition to its plain meaning, a provision also may be interpreted based on its structure, purpose, and history when necessary to determine the legislative intent. This subsection is intended to codify existing District law concerning the general rules of interpretation applicable to criminal statutes. Such codification provides notice to the public as to applicable rules of interpretation.

Relation to Current District Law. The D.C. Code currently provides no notice of how criminal statutes are to be interpreted. This subsection codifies the general rules of interpretation in District case law.

Longstanding Supreme Court and District case law holds that the first, mandatory step in statutory interpretation is always examination of the text.[1] This examination of the text should use the ordinary, common sense meaning of words.[2] This requirement has been called the "plain meaning" rule of interpretation, and the rule's primacy stems from the fact that the statutory text is generally the best way to ascertain the legislative intent for a law.[3] The plain meaning rule also reflects the importance of the public being able to understand and comply with criminal laws.[4]

However, as recognized in the second sentence of subsection (a), the plain meaning rule is not necessarily the last or decisive step in interpreting a statutory provision.[5] In some situations, it may be necessary to look beyond the plain meaning of statutory text.[6] In such situations, the purpose,[7] structure,[8] or history[9] of the provision

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[1] *Tippett v. Daly,* 10 A.3d 1123, 1126 (D.C. 2010) (en banc) ("We start, as we must, with the language of the statute") (quoting *Bailey v. United States,* 516 U.S. 137, 144 (1995)).

[2] *Tippett,* 10 A.3d at 1126 ("Moreover, in examining the statutory language, it is axiomatic that 'the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.'") (quoting *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc) (internal citations omitted).

[3] *Peoples Drug Stores*, 470 A.2d at 753 ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used."). *Varela v. Hi-Lo Powered Stirrups, Inc.,* 424 A.2d 61, 64 (D.C.1980) (en banc) (quoting *United States v. Goldenberg,* 168 U.S. 95, 102-03 (1897)).

[4] *Peoples Drug Stores*, 470 A.2d at 755 ("There are strong policy reasons for maintaining the certainty, fairness, and respect for the legal system that the plain meaning rule engenders in most instances. Unless the meaning of statutes can be readily ascertained by a reading of statutory language, the ability of citizens to comply with statutory standards is diminished and the administration of such standards may be unmanageable or even erratic.").

[5] *Id*. at 754 ("Although the 'plain meaning' rule is certainly the first step in statutory interpretation, it is not always the last or the most illuminating step. This court has found it appropriate to look beyond the plain meaning of statutory language in several different situations.").

[6] *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 65 (D.C. 1980) ("However, while (t)he plain meaning of the words is generally the most persuasive evidence of the intent of the legislature ... the plain

and surrounding statutory text may be examined to determine legislative intent. There does not appear to be consensus in District case law about when it is necessary to look beyond the plain meaning of a statutory provision to determine legislative intent.[10] However, there is agreement that looking beyond the plain meaning of a statutory provision to the purpose, structure or history is "unusual",[11] and requires "persuasive reasons" for doing so.[12] To the extent there may be ambiguity in District case law as to when the exceptions to the plain meaning rule should be applied, this subsection is intended merely to codify existing law, not resolve these ambiguities.

2. § 22E-102 (b) — Rule of Lenity.

Explanatory Note. Subsection (b) codifies how to interpret statutory language when the rules of statutory interpretation in subsection (a) fail to resolve the matter. Subsection (b) states that if of the meaning of statutory language remains in doubt after examination of the statute's plain meaning, structure, purpose, and history, then the interpretation that is most favorable to the defendant applies. This codifies existing District case law concerning the rule of lenity.

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meaning rule has limitations. It has long been recognized that the literal meaning of a statute will not be followed when it produces absurd results. And since the judicial function is to ascertain the legislative intention the Court may properly exercise that function with recourse to the legislative history, and may depart from the literal meaning of the words when at variance with the intention of the legislature as revealed by legislative history. (*District of Columbia National Bank v. District of Columbia*, 121 U.S.App.D.C. 196, 198, 348 F.2d 808, 810 (1965) (citations omitted). *See also Davis v. United States*, D.C.App., 397 A.2d 951 (1979).)").

[7] *See, e.g., Tippett,* 10 A.3d at 1127 ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.") (quoting *Bailey v. United States,* 516 U.S. 137, 145 (1995)).

[8] *See, e.g., Tippett,* 10 A.3d at 1127 ("Therefore, 'we do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them.'") (quoting *District of Columbia v. Beretta, U.S.A., Corp*., 872 A.2d 633, 652 (D.C.2005) (en banc)).

[9] *See, e.g., Peoples Drug Stores*, 470 A.2d at 755 ("Finally, a court may refuse to adhere strictly to the plain wording of a statute in order 'to effectuate the legislative purpose.'") (internal citations omitted).

[10] Some judicial opinions suggest that unless absurd, it is never necessary to inquire further if the plain meaning of a provision is clear. *See*, *e.g*., *Eaglin v. District of Columbia*, 123 A.3d 953, 955 (D.C. 2013) ("[I]f the plain meaning of statutory language is clear and unambiguous and will not produce an absurd result, we will look no further." *Smith v. United States,* 68 A.3d 729, 735 (D.C.2013) (quoting *Hood v. United States,* 28 A.3d 553, 559 (D.C.2011))); *In re Al-Baseer*, 19 A.3d 341, 344 (D.C. 2011) ("The court's task in interpreting a statute begins with its language, and, where it is clear, and its import not patently wrong or absurd, our task comes to an end") (quoting *In re Orshansky*, 952 A.2d 199, 210 (D.C. 2008) (internal citations omitted)). Other opinions specifically note that the clarity of a plain meaning interpretation may be misleading and further examination is required. *See*, *e.g*., *Peoples Drug Stores*, 470 A.2d at 754 ("[E]ven where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve.") (quoting *Sanker v. United States,* 374 A.2d 304, 307 (D.C. 1977) (internal citations omitted)).

[11] *District of Columbia v. Place*, 892 A.2d 1108, 1111 (D.C. 2006).

[12] *Peoples Drug Stores*, 470 A.2d at 755.

Relation to Current District Law. The DCCA has held that the rule of lenity is "a secondary canon of construction" that is to be applied after other rules of interpretation, and only if necessary.[13] In other words, the rule of lenity is a rule of last resort.[14] The rule can "tip the balance in favor of criminal defendants only where, exclusive of the rule, a penal statute's language, structure, purpose and legislative history leave its meaning genuinely in doubt."[15] Moreover, the interpretation favoring the defendant must still be a "reasonable" interpretation of a statute's language, structure, purpose and history.[16] The rule of lenity reflects a policy decision that imprisonment should not be imposed except where the legislative intent is clear.[17]

3. § 22E-102 (c) — Effect of Headings and Captions.

Explanatory Note. This subsection states that the headings and captions throughout Title 22E may be used to aid interpretation of statutory provisions that are otherwise ambiguous.

Relation to Current District Law. Criminal statutes in the District historically have not been in enacted titles of the D.C. Code. To the extent the Official D.C. Code now contains headings and captions for criminal offenses, these are typically notations added by codification counsel or code publication experts. This section is consistent with current D.C. Court of Appeals (DCCA) case law that has held that courts may rely upon headings and captions to interpret statutory provisions.[18] However, both the RCC statute and DCCA clarify that headings and captions should only be used when the text of the statutory provision is ambiguous.[19]

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[13] *Luck v. District of Columbia*, 617 A.2d 509, 515 (D.C. 1992).

[14] *See, e.g., Luck*, 617 A.2d at 515 (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)); *Heard v. United States,* 686 A.2d 1026, 1029 (D.C. 1996) (citing *Moskal v. United States,* 498 U.S. 103, 108 (1990)).

[15] *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C.1989) (quoting *United States v. Otherson*, 637 F.2d 1276, 1285 (9th Cir.1980)).

[16] *Henson v. United States,* 399 A.2d 16, 21 (D.C.1979).

[17] *Luck*, 617 A.2d at 515 ("This policy embodies the instinctive distaste against men [and women] languishing in prison unless the lawmaker has clearly said they should.") (quoting *United States v. Bass,* 404 U.S. 336, 348 (1971)).

[18] *Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013) ("We agree with the Supreme Court of Arizona that in determining the extent and reach of an act of the legislature, the court should consider not only the statutory language, but also the title, *Maricopa County v. Douglas,* 69 Ariz. 35, 208 P.2d 646, 648 (1949), and we shall do so here.").

[19] *In re J.W.*, 100 A.3d 1091, 1095 (D.C. 2014) ("We agree that bolt cutters may be used to commit a crime and that there was abundant evidence that appellant carried them for that purpose. Thus, a cursory comparison of these facts to the title of the statute—"possession of implements of crime"—might lead to the conclusion that appellant is guilty of the crime charged. However, "[t]he significance of the title of the statute should not be exaggerated." *Mitchell v. United States,* 64 A.3d 154, 156 (D.C.2013). "[H]eadings and titles are not meant to take the place of the detailed provisions of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.,* 331 U.S. 519, 528, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). We therefore focus our analysis on the text of the statute, which limits its reach to tools and implements "for picking locks or pockets." Because bolt cutters are not "lock-picking tools" within the definition we have adopted, there was insufficient evidence to sustain J.W.'s adjudication. We therefore vacate the adjudication for possessing implements of crime.").

RCC § 22E-103. Interaction of Title 22E With Other District Laws.

Explanatory Note. This section limits the scope of Title 22E provisions to avoid unintended consequences that otherwise might arise from applying the title's provisions to other laws. Subsection (a) provides that the provisions of Title 22E will not apply to any law outside of Title 22E unless expressly specified by statute. Crimes in other titles of the D.C. Code will not be affected by the general provisions of Title 22E unless a law specifically states that the general provisions so apply.

Subsection (b) provides that unless expressly specified by statute or otherwise provided by law, Title 22E will not have any unintended effect on current civil law. The words "otherwise provided by law" are intended to include all sources of law, including statutes, regulatory provisions, and case law. For example, unless specified by statute or otherwise specified by law, Title 22E's revisions to the crime of assault will not change the elements required for common law assault under the law of torts. However, under general principles of collateral estoppel recognized under D.C. Court of Appeals case law, a person convicted of an assault offense under Title 22E may still be estopped from re-litigating issues of fact in subsequent civil litigation related to the same events.

Relation to Current District Law. None.

RCC § 22E-104. Applicability of the General Part.

Explanatory Note. This section clarifies that provisions in the General Part, subtitle I of the Revised Criminal Code, by default apply to all the statutes contained within Title 22E, unless expressly specified in statute. For example, the definition of the term "recklessly" in Section 22E-205 applies to all instances of the word within Title 22E, including other general provisions. However, any statute within Title 22E may contain a provision stating that one or more provisions in the General Part do not apply to that statute, overriding the default applicability of the General Part provisions. For instance, the Revised Criminal Code's burglary offense could make the Section 22E-205 definition of "recklessly" not applicable if the burglary offense states as much. This section clarifies and fills gaps in current District law regarding the applicability of general provisions.

Relation to Current District Law. The D.C. Code (including Title 22[1]) contains some provisions that are generally applicable.[2] However, these statutes either themselves provide for possible exceptions[3] or are stated as universally applicable. The D.C. Code does not appear to have codified a broad limitation on the applicability of general provisions. District case law, however, has filled this gap. The DCCA has long recognized "the well-settled rule of statutory construction that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms."[4]

[1] *See*, *e.g*., D.C. Code § 22-1801 ("Writing" and "paper" defined) *and* D.C. Code § 22-1802 ("Anything of value" defined.). Other provisions in Chapter 18 of Title 22, labeled "General offenses" by Codification Counsel, also apply generally to Title 22 offenses, as do certain penalty provisions in Chapters 35 and 36.
[2] *See*, *e.g*., D.C. Code §§ 45-601- 606 (Rules of Construction).
[3] *See*, *e.g*., D.C. Code § 22-1801 ("*Except where otherwise provided for* where such a construction would be unreasonable, the words "writing" and "paper," wherever mentioned in this title, are to be taken to include instruments wholly in writing or wholly printed, or partly printed and partly in writing.") (emphasis added).
[4] *Martin v. United States*, 283 A.2d 448 (D.C. 1971).

RCC § 22E-201. Proof of Offense Elements Beyond a Reasonable Doubt.

1. RCC § 22E-201(a)—Proof of Offense Elements Beyond a Reasonable Doubt.

Explanatory Note. Subsection (a) states the burden of proof governing offense elements. It establishes that proof of each offense element beyond a reasonable doubt is the foundation of liability for any offense in the RCC. This provision is intended to codify the well-established constitutional principle recognized by the U.S. Supreme Court in *In re Winship*: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[1] Pursuant to this principle, "it is up to the prosecution 'to prove beyond a reasonable doubt all of the elements included in the definition of the offense.'"[2]

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a statement on the burden of proof governing offense elements, it is well established by the DCCA that every element of an offense must be proven by the government beyond a reasonable doubt in order to support a criminal conviction.[3]

2. RCC § 22E-201 (b) —Burden of proof for exclusions from liability, defenses, and affirmative defenses.

Explanatory Note. Subsection (b) states the burden of proof governing exclusions from liability, defenses, and affirmative defenses. Paragraph (b)(1) specifies that if there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of all elements of the exclusion from liability beyond a reasonable doubt. Paragraph (b)(2) specifies that if there is any evidence of a statutory defense at trial, the government must prove the absence of all elements of the defense

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[1] 397 U.S. 358, 364 (1970). This constitutional principle is a central component of the American criminal justice system:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id.

[2] *Conley v. United States*, 79 A.3d 270, 278 (D.C. 2013) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)).

[3] *See, e.g., Conley*, 79 A.3d at 278 ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. This means it is up to the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense.") (citations, quotations, alterations, and footnote call numbers removed); *Hatch v. United States*, 35 A.3d 1115, 1121 (D.C. 2011).

beyond a reasonable doubt. Paragraph (b)(3) specifies that unless otherwise expressly specified by statute, a defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

Relation to Current District Law. Subsection (b) may change current District law as explained in the commentary accompanying each exclusion from liability, defense, and affirmative defense in the RCC.

2. RCC § 22E-201(c)—Offense Element Defined.

Explanatory Note. Subsection (c) provides the definition of "offense element" applicable to subsection (a) and throughout the RCC. It is an open-ended definition, which establishes that both the objective elements and culpability requirement necessary to establish liability for an offense are among the offense elements subject to the burden of proof set forth in subsection (a).[4] What is left unresolved by this non-exclusive list is whether any other aspect of criminal liability not addressed by the RCC should also be treated as an offense element subject to the burden of proof set forth in subsection (a).[5] Under subsection (c), these issues are left for judicial resolution.

Relation to Current District Law. Subsection (c) codifies District law. While the D.C. Code does not contain a definition of "offense element," it is clear under DCCA case law that an offense's objective elements and culpability requirement are among the facts subject to the proof beyond a reasonable doubt standard.[6]

3. RCC § 22E-201(d)—Objective Element Defined.

Explanatory Note. Subsection (d) provides the definition of "objective element" applicable to subsection (c) and throughout the RCC. It establishes that the objective elements of an offense—often referred to as an offense's *actus reus*—are the conduct elements, result elements, and circumstance elements contained in an offense definition. All of these elements are subject to the burden of proof set forth in subsection (a).

Subsection (d) also provides precise definitions for these three kinds of objective elements. "Conduct element" is narrowly defined in paragraph (d)(1) as an "act" or "omission," which terms are in turn respectively defined in section 202 as a "bodily movement" or "failure to act" under specified circumstances.[7] This definition of conduct element makes it easier to analytically separate what is usually inconsequential (i.e., the required bodily movement, or where relevant, the failure to make one), from other

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[4] *See, e.g., United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur."); *In re Winship*, 397 U.S. at 364 (observing that both of these requirements are among the "fact[s] necessary to constitute the crime with which [the accused] is charged.").

[5] Other aspects of liability not addressed by this provision include facts establishing: the absence of a general justification defense, jurisdiction, venue, or satisfaction of a statute of limitations.

[6] *See, e.g., Conley*, 79 A.3d at 278; *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987).

[7] RCC §§ 22E-202(b), (c).

aspects of a criminal offense that are more central to assessing culpability.[8] One such aspect is a "result element," which is defined in paragraph (d)(2) as "any consequence caused by a person's act or omission that is required to establish liability for an offense." The other relevant aspect is a "circumstance element," which paragraph (d)(3) defines as "any characteristic or condition relating to either a conduct element or result element that is required to establish liability for an offense."

Under this definitional scheme, any verb employed in an offense definition is likely to constitute either a conduct element and a result element or a conduct element and a circumstance element. For example, in a homicide offense that prohibits "knowingly killing another human being," the verb "killing" implies an act or omission—such as pulling the trigger of a gun—performed by the defendant (a conduct element), which causes death (a result element). Similarly, in a destruction of property offense that prohibits "knowingly destroying property of another without consent," the verb "destroying" implies an act or omission—for example, swinging a baseball bat—performed by the defendant (a conduct element), which causes destruction (a result element).

Verbs such as "killing" and "destroying" refer to a consequence caused by a person's conduct. Where, in contrast, a verb employed in an offense definition refers to a particular characteristic of a person's conduct, that verb is instead likely to constitute a conduct element and a circumstance element.[9] For example, in a joyriding offense that prohibits "knowingly using a motor vehicle without consent," the verb "using" implies an act or omission—such as stepping on the accelerator—performed by the defendant (a conduct element), which is of a specific character, namely, it amounts to use in the particular context in which it occurs (a circumstance element). Similarly, in a theft offense that prohibits "knowingly taking property of another without consent," the verb "taking" implies an act or omission—for example, reaching for a wallet—performed the defendant (a conduct element), which is of a specific character, namely, it amounts to a taking in the particular context in which it occurs (a circumstance element).[10]

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[8] This definition of conduct element reflects the view that in any causal sequence initiated by a bodily movement, "there are no further actions, only further descriptions." DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 61 (2d ed. 2001). These "further descriptions," in turn, are reflected in the result and circumstance elements of an offense definition.

[9] Which is to say: this definitional scheme treats all "issues raised by the nature of one's conduct"—for example, whether one's bodily movement amounts to "use" or a "taking"—"as circumstance elements." Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 712 (1983); *compare* Model Penal Code § 2.02(2) (defining culpable mental states with respect to "nature of [the] conduct" elements). For this reason, it will no longer makes sense to refer to "conduct crimes" under the RCC. Every offense under the prescribed framework will be comprised of, at minimum, a conduct element and either a circumstance element or result element. *See* Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 380 (2008) (observing that a person's "willed bodily movement may be qualified by circumstances and results so that [one's] conduct can be redescribed in any number of ways; and some redescriptions render [that person's] conduct criminal.").

[10] Note that the same verb employed in an offense definition may constitute either a combined conduct/circumstance element or conduct/result element depending upon how the crime was committed in a given case. For example, although the verb "taking" may typically constitute a combined conduct/circumstance element (see above theft illustration), it would constitute a combined conduct/result element in a theft prosecution where the causal nexus between the defendant's conduct and the prohibited

Under this definitional scheme, the terms that modify the verbs in an offense definition (other than mental states) are likely to constitute circumstance elements. So, for example, the requirement that the victim of a homicide offense be a "human being" is a circumstance element. Similarly, the requirement in a property destruction offense that the object destroyed be "property of another" is a circumstance element, as is the requirement that this destruction have occurred "without consent." Likewise, the requirements in a joyriding offense that the object used be a "motor vehicle" and that this use have occurred "without consent" are both circumstance elements, as are the requirements in a theft offense that the object taken be "property of another" and that this taking have occurred "without consent."

Relation to Current District Law. Subsection (d) broadly reflects District law. Although the D.C. Code lacks any explicit reference to the classification of objective elements, the DCCA has recently recognized the distinction between "conduct, resulting harm, [and] attendant circumstances"—as well as the importance of clearly making it—in recent opinions.[11]

4. RCC § 22E-201(e)—Culpability Requirement Defined.

Explanatory Note. Subsection (e) provides the definition of "culpability requirement" applicable to subsection (c) and throughout the RCC. It is an open-ended definition, which establishes that the voluntariness requirement and culpable mental state requirement are among the facts that comprise the culpability requirement of an offense. Also included in this definition is "[a]ny other aspect of culpability specifically required by an offense," such as, for example, the premeditation, deliberation, and absence of

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social harm is mediated by another person or object. Consider the situation of a parent who tells his young child to go inside a neighbor's unlocked house and retrieve the neighbor's wallet resting on the backyard patio based on the lie that the neighbor has "volunteered" to give it to him. Under these conditions, the parent is liable for the theft based on the child's role as an innocent or irresponsible agent. *See* RCC § 22E-211(a) ("A person is legally accountable for the conduct of another when, acting with the culpability required by an offense, the person causes an innocent or irresponsible person to engage in conduct constituting an offense."). In this situation, however, the act, the communication to the child, is clearly distinct from the resultant taking, which does not occur until the child retrieves the wallet. A similar analysis applies if the parent employs a drone, rather than his child, to steal the wallet. Under these conditions, the parent is liable for the theft based on his use of an automated intermediary to retrieve the neighbor's property. Here again, however, the act, the movement of the drone remote, is clearly distinct from the resultant taking, which does not occur until the drone retrieves the wallet.

[11] *See, e.g., Jones v. United States*, 124 A.3d 127, 130 n.3 (D.C. 2015) ("Ideally, instead of describing a crime as a 'general intent' or 'specific intent' crime, courts and legislatures would simply make clear what mental state . . . is required for whatever material element is at issue (for example, *conduct, resulting harm, or an attendant circumstance* such as dealing drugs in a school zone or assaulting a police officer).") (italics added); *Carrell v. United States*, 165 A.3d 314, 320 n.13 (D.C. 2017) (*en banc*) ("We adopt these ["conduct element," "result element," and "circumstance element"] classifications from the Model Penal Code § 1.13 (9) (Am. Law Inst., Proposed Official Draft 1962)."); *see also Harris v. United States*, 125 A.3d 704, 708 n.3 (D.C. 2015).

mitigating circumstances that are required to secure a first degree murder conviction.[12] All facts that comprise an offense's culpability requirement are subject to the burden of proof set forth in subsection (a). What is left unresolved by this non-exclusive list is whether any other aspect of criminal liability not addressed by the RCC should also be treated as part of an offense's culpability requirement (and therefore subject to that burden of proof).[13] Under subsection (e), these issues are left for judicial resolution.

Relation to Current District Law. *See* Commentary on the voluntariness requirement, RCC § 22E-203, and the culpable mental state requirement, RCC § 22E-205.

RCC § 22E-201(f)—Act and Omission definitions.

Subsection (f) specifies that the terms "act" and "omission" have the meanings specified in RCC § 22E-202.

[12] *See, e.g.,* RCC § 22E-1101(b) (requiring premeditation and deliberation for first degree murder); *id.* at § (f)(3) ("If evidence of mitigation is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt [for murder].").
[13] Other aspects of liability not addressed by this provision include facts establishing the absence of a general excuse defense.

RCC § 22E-202. Conduct Requirement.

1. RCC § 22E-202(a)—Conduct Requirement

Explanatory Note. Subsection (a) states the conduct requirement governing all offenses in the RCC. It establishes that commission of an act or omission is a prerequisite to criminal liability. This provision is intended to codify the well-established prohibition against punishing a person for merely possessing undesirable thoughts or status.[1] By establishing that some conduct—whether an act or omission—is necessary for criminal liability under the RCC, subsection (a) safeguards a "basic premise of Anglo-American criminal law,"[2] which is also "constitutionally required."[3]

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a statement on the conduct requirement, the DCCA has clearly recognized that the conduct requirement is a basic and necessary ingredient of criminal liability given that "bad thoughts alone cannot constitute a crime."[4]

2. RCC § 22E-202(b)—Act Defined

Explanatory Note. Subsection (b) provides the definition of "act" applicable to both subsection (a) and throughout the RCC. It establishes that the term "act" is to be understood narrowly, as a person's bodily movement. This narrow definition should make it easier to distinguish between a person's relevant conduct—for example, throwing

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[1] *See, e.g.,* Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 282 (2002) ("The maxim that civilized societies should not criminally punish individuals for their 'thoughts alone' has existed for three centuries."); *United States v. Muzii,* 676 F.2d 919, 920 (2d Cir. 1982) ("The reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts.") (citing S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 207 (1969)).

[2] WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 6.1(b) (3d ed. Westlaw 2019) ("One basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone. Something in the way of an act, or of an omission to act where there is a legal duty to act, is required too."). As LaFave observes:

> To wish an enemy dead, to contemplate [sexual assault], to think about taking another's wallet—such thoughts constitute none of the existing crimes (not murder or rape or larceny) so long as the thoughts produce no action to bring about the wished-for results. But, while it is no crime merely to entertain an intent to commit a crime, an attempt (or an agreement with another person) to commit it may be criminal; but the reason is that an attempt (or a conspiracy) requires some activity beyond the mere entertainment of the intent.

Id.

[3] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.04(c) (6th ed. 2012) ("Some conduct by the defendant is constitutionally required in order to punish a person.") (discussing *Robinson v. California*, 392 U.S. 514 (1968) and *Powell v. Texas*, 392 U.S. 514 (1968)); *see* LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 6.1(b) ("A statute purporting to make it criminal simply to think bad thoughts would, in the United States, be held unconstitutional.") (collecting cases).

[4] *Trice v. United States*, 525 A.2d 176, 187 n.5 (D.C. 1987) (Mack, J. dissenting) (internal quotations and alterations omitted); *see, e.g., Conley v. United States*, 79 A.3d 270, 278-79 (D.C. 2013); *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987).

an object in the direction of a child—and any results or circumstances associated with that conduct—for example, the serious bodily injury to the child inflicted by the projectile.[5]

Relation to Current District Law. Subsection (b) fills a gap in District law. Neither the D.C. Code nor District case law provides a definition of the term "act." However, the DCCA has recognized in passing that an "act" is, generally speaking, a "bodily movement."[6]

3. RCC § 22E-202(c) & (d)—Omission Defined and Existence of Legal Duty

Explanatory Note. Subsection (c) provides the definition of "omission" applicable to subsection (a) and throughout the RCC. Broadly speaking, this definition establishes that the term "omission" is to be understood narrowly, as a person's failure to engage in an "act" (i.e., a bodily movement) that he or she is otherwise obligated to perform. This narrow definition should make it easier to distinguish between a person's relevant conduct—for example, failing to turn off the bath water after having placed one's infant child in the tub—and any results or circumstances associated with that conduct—for example, the fatal drowning of the infant that ensues after the parent leaves the room for a significant period of time.[7]

The definition of omission contained in subsection (c) also incorporates two important principles of omission liability. The first principle, set forth in paragraph (c)(1), is that only a failure to perform a *legal* duty constitutes an omission. Pursuant to this well-established common law principle, "[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty.'"[8]

The second principle, set forth in paragraph (c)(2), is that the requisite legal duty must be one of which the accused is either aware or culpably unaware.[9] This limitation on omission liability amounts to a culpability requirement governing the existence of a legal duty in omission prosecutions.[10] It is intended to codify the D.C. Court of Appeals'

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[5] *See* RCC § 22E-201(c): Explanatory Note (discussing differences between conduct, result, and circumstance elements).
[6] *Trice*, 525 A.2d at 187 n.5 (Mack, J. dissenting).
[7] *See* RCC § 22E-201(c): Explanatory Note (discussing differences between conduct, result, and circumstance elements).
[8] *See, e.g., United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) ("It is a long-established principle that criminal law generally regulates action, rather than omission, and that '[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty.'") (quoting LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 6.1(b)); Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1571 (2013) ("[T]he general rule is that one is not liable for omissions absent a legal duty to act.").
[9] A person is "culpably unaware" of a legal duty when a reasonable person in the actor's situation would have been aware of the legal duty.
[10] *See, e.g.,* Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 602 (1958) ("The maxim, 'ignorance of the law is no excuse,' ought to have no application in the field of criminal omissions, for the mind of the offender has no relationship to the prescribed conduct if he has no knowledge of the relevant regulation. The strictest liability that makes any sense is a liability for culpable ignorance.").

decision in *Conley v. United States*,[11] which interprets the U.S. Supreme Court's decision in *Lambert v. California*[12] to stand for the proposition that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy."[13]

Subsection (d) addresses the scope of a legal duty to act for purposes of omission liability. Specifically, it establishes that a legal duty to act exists under two different sets of circumstances. The first, addressed in paragraph (d)(1), is where the criminal statute for which the accused is being prosecuted expressly defines the offense in terms of an omission.[14] The second, addressed in paragraph (d)(2), is where a law—whether criminal or civil—distinct from the offense for which the defendant is being prosecuted creates a legal duty.[15]

Relation to Current District Law. Subsections (c) and (d) fill a gap in, but are consistent with, various aspects of District law concerning omission liability.

While the D.C. Code does not contain a generally applicable definition of omission (or any other general statement on omission liability), a handful of District statutes expressly criminalize omissions to fulfill particular legal duties, such as the "duty to provide care [to] a vulnerable adult or elderly person"[16] or the duty "to appear before any court or judicial officer as [legally] required."[17] And District case law generally establishes that the imposition of criminal liability under these circumstances is appropriate.[18]

District case law also establishes, however, that omission liability premised on the failure to perform a legal duty not otherwise specified in an offense definition may be appropriate. For example, the U.S. Court of Appeals for the District of Columbia Circuit (CADC) in *Jones v. United States*[19]—a decision handed down before the creation of the local District judicial system[20]—recognized that "the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, [can] make the other chargeable."[21] However, the *Jones* court also noted that "the omission of a duty owed by one individual to another" can only establish

[11] 79 A.3d at 273.
[12] 355 U.S. 225 (1957).
[13] *Conley*, 79 A.3d at 273.
[14] Illustrative of such offenses are statutes criminalizing a motorist's failure to stop after involvement in an accident, a taxpayer's failure to file a tax return, a parent's neglect of the health of his child, and a failure to report certain communicable diseases. PAUL H. ROBINSON, 1 CRIM. L. DEF. § 86 (Westlaw 2019).
[15] Illustrative of such duties are those created by special relationships, landowners, contract, voluntary assumption of responsibility, and the creation of peril. ROBINSON, *supra* note 17, at 1 CRIM. L. DEF. § 86.
[16] D.C. Code § 22-934.
[17] D.C. Code § 23-1327.
[18] *See, e.g., Fearwell v. United States*, 886 A.2d 95, 100 (D.C. 2005); *Jackson v. United States*, 996 A.2d 796 (D.C. 2010).
[19] 308 F.2d 307 (D.C. Cir. 1962).
[20] *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).
[21] *Jones*, 308 F.2d at 310 (citations and internal quotation marks omitted).

criminal liability when "the duty neglected [is] a legal duty"—i.e., "[i]t must be a duty imposed by law or by contract" rather than a "mere moral obligation."[22]

Recently, the DCCA appears to have established that not just any legal duty will suffice for purposes of omission liability. Rather, it must be a legal duty that the actor "knew or should have known" about under the circumstances.[23] In *Conley v. United States*, the DCCA struck down a District statute criminalizing unlawful presence in a motor vehicle containing a firearm[24] on the basis that it "criminalize[d] entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle[]—without requiring the government to prove that the defendant had notice of any legal duty to behave otherwise."[25] Observing that "the average person [would not] know that he may be committing a felony offense merely by remaining in [a] vehicle, even if the gun belongs to someone else and he has nothing to do with it," the DCCA concluded that the statute created a form of omission liability that violated the requirements of due process, and, therefore, was "facially unconstitutional."[26]

The *Conley* decision rested upon the court's reading of the U.S. Supreme Court's opinion in *Lambert v. California*, which, in the view of the DCCA, stands for the proposition that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy."[27]

Subsections (c) and (d) are intended to collectively codify the foregoing District precedents concerning omission liability.

[22] *Id.*
[23] *Conley*, 79 A.3d at 281.
[24] D.C. Code § 22-2511 (Repealed).
[25] 79 A.3d at 273.
[26] *Id*. at 286.
[27] *Id*. at 273.

RCC § 22E-203. Voluntariness Requirement.

1. RCC § 22E-203(a)—Voluntariness Requirement.

Explanatory Note. Subsection (a) states the voluntariness requirement governing all offenses in the RCC. It establishes that the voluntary commission of an offense's conduct element is a prerequisite to liability for any crime. This provision is intended to codify the well-established prohibition against punishing a person in the absence of volitional conduct.[1] Both this prohibition and the RCC's codification of it are based on the "fundamental principle of morality that a person is not to be blamed for what he has done if he could not [fairly] help doing it."[2] Absent voluntary commission of an offense's conduct element, it cannot be said that the defendant possessed a reasonable opportunity to avoid committing the charged offense,[3] or that criminal liability would be appropriate under the circumstances.[4]

Relation to Current District Law. Subsection (a) generally reflects District law. Although there is no voluntariness requirement stated in the D.C. Code, District courts have recognized the voluntariness requirement—as well as the basic principle upon which it rests—through case law.

For example, in *Conley v. United States*, the DCCA recognized that the requirement of a voluntary act is a "basic jurisprudential point" supported by a wide range of authorities.[5] The court also recognized that the same basic principle applies to omissions as well: "[n]o one, of course, can be held criminally liable for failing to do an act that he is physically incapable of performing."[6] And in *Easter v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit (in an oft-cited pre-1971 decision) observed the basic principle underlying the voluntariness requirement: "An

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[1] *See, e.g.,* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 6.1(c) (3d ed. Westlaw 2019) ("At all events, it is clear that criminal liability requires that the activity in question be voluntary."); Paul H. Robinson et. al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 92 (2015) ("[A] voluntary act is the most fundamental requirement of criminal liability."); Kevin W. Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443, 443–44 (1988) ("The concept of the voluntary act lies at the very foundation of the criminal law, since 'there cannot be an act subjecting a person to . . . criminal liability without volition.'") (quoting *Bazley v. Tortorich*, 397 So. 2d 475, 481 (La. 1981)).

[2] H.L.A. HART, *Punishment and the Elimination of Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 168, 174 (1968).

[3] *See, e.g.,* Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1571 (2013) (ability to do otherwise is the "*sine qua non* of voluntariness"); *State v. Deer*, 244 P.3d 965, 968 (Wash. Ct. App. 2010) ("It is [the] volitional aspect of a person's actions that renders her morally responsible.").

[4] *See, e.g.,* LAFAVE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.1(c) ("The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no reason to impose punishment on this basis as to those whose actions were not voluntary.").

[5] 79 A.3d 270, 279 n.37 (D.C. 2013) (citing Model Penal Code § 2.01; ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 669 (3d ed. 1982); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 25, at 143–44 (15th ed. 1993)).

[6] *Conley*, 79 A.3d at 279.

essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime. Action within the definition is not enough. To be guilty of the crime a person must engage responsibly in the action."[7]

2. RCC § 22E-203(b)—Scope of Voluntariness Requirement

Explanatory Note. Subsection (b) clarifies the scope of the voluntariness requirement under the RCC. It is comprised of two substantively similar legal standards, which account for whether the government's theory of liability in a given case is based on an act or omission.

Paragraph (b)(1) is directed towards situations where a person's act provides the basis for liability. Specifically, it establishes that the conduct element of an offense is voluntarily committed when the required act was the product of conscious effort or determination[8]; or, if it was not the product of conscious effort or determination, when it was otherwise subject to the control of the actor.[9]

The "conscious effort and determination" standard stated in subparagraph (b)(1)(A) calls upon the factfinder to consider whether the requisite act was an external manifestation of the defendant's will. This is the crux of the voluntariness requirement, and in all but the most rare cases involving physical abnormalities—such as those where the requisite act was a reflex, part of an epileptic seizure, or occurred while the actor was sleeping—it is likely to be satisfied.

The "otherwise subject to the person's control" standard stated in subparagraph (b)(1)(B) constitutes an alternative, catch-all means of establishing the voluntariness requirement. It is intended to address exceptional situations[10] where, although the act most directly linked to the social harm may not be the product of conscious effort or determination, there nevertheless exists an acceptable basis for determining that the defendant, due to some earlier culpable conduct, possessed a reasonable opportunity to avoid committing the offense.[11]

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[7] 361 F.2d 50, 52 (1966).

[8] RCC § 22E-203(b)(1)(A).

[9] RCC § 22E-203(b)(1)(B).

[10] An example is a blackout-prone drinker, X, who decides to imbibe to excess in his parked car prior to driving to a social engagement. If X effectively loses consciousness while the car is parked (Time 1), and then begins driving, only to crash into a group of pedestrians while still blacked-out (Time 2), the fact that X was not acting consciously at the time of the accident (Time 2) should not preclude a determination that X's conduct was nevertheless subject to X's control, and therefore voluntary, under the circumstances.

[11] Under RCC § 22E-203(b)(1)(B), there is no specific threshold level of risk awareness that must be met at Time 1 concerning the likelihood that an act which is not the product of conscious effort or determination would occur at Time 2 in order to deem that act subject to a person's control at Time 1. However, the person's level of awareness at Time 1 must at the very least be sufficient to meet the culpability requirement governing the charged offense. Consider, for example, the situation of a person, X, who suffers from chronic epilepsy but declines to take her medically necessary anti-seizure medication. At Time 1, X decides to drive on the highway un-medicated. Sixty minutes later, at Time 2, X suffers a seizure on the road, which leads her to crash into another driver on the road, V, who dies from the impact. X ultimately survives the accident and is charged with reckless manslaughter. To establish that X recklessly killed V, the government would have to prove that at Time 1—when X decided to get behind the wheel of her car un-medicated—X was aware of a substantial risk that she might suffer a deadly seizure

Paragraph (b)(2) is directed towards situations where a person's omission provides the basis for liability. Specifically, it establishes that the conduct element of an offense is voluntarily committed where a person is physically capable of performing the required legal duty[12]; or, if the person lacked that physical capacity, then where the failure to act was otherwise subject to the control of the actor.[13]

The "physical capacity" standard stated in subparagraph (b)(2)(A) is the logical corollary of the "conscious effort and determination" standard stated in subparagraph (b)(1)(A). It establishes that just as one typically cannot be criminally liable on account of a bodily movement that is not the product of volition, so one cannot be criminally liable for failing to do an act that he or she is physically incapable of performing.

The "otherwise subject to the person's control" standard stated in subparagraph (b)(2)(B) recognizes the same alternative, catch-all means of establishing the voluntariness requirement applicable under subparagraph (b)(1)(B) in situations where a person's omission provides the basis for liability. It is intended to address exceptional situations[14] where, although the omission most directly linked to the social harm may not be the product of conscious effort or determination, there nevertheless exists an acceptable basis for determining that the defendant, due to some earlier culpable conduct, possessed a reasonable opportunity to avoid committing the offense.[15]

Because the existence of a reasonable opportunity to avoid committing the conduct element of an offense is the animating principle underlying all voluntariness evaluations, section 203 should be construed to exclude exceptional situations involving physical interference by a third party.[16]

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while on the road, and that X's decision was clearly blameworthy under the circumstances. *See* RCC § 22E-206(d).

[12] RCC § 22E-203(b)(2)(A).

[13] RCC § 22E-203(b)(2)(B).

[14] An example is a blackout-prone drinker, X, who decides to imbibe to excess at home a few hours before a court hearing that X knows she is legally obligated to attend. If X becomes unconscious before the hearing (Time 1), and thereafter is unable to travel to the hearing at the appointed time (Time 2), the fact that X is physically incapable of fulfilling her duty of attendance should not preclude a determination that X's conduct was nevertheless subject to her control, and therefore voluntary, under the circumstances.

[15] Under RCC § 22E-203(b)(2)(B), there is no specific threshold level of risk awareness that must be met at Time 1 concerning the likelihood that the defendant would be physically incapable of performing a required legal duty at Time 2 in order to deem that person's failure to act to be subject to his or her control at Time 1. However, the person's level of awareness at Time 1 must at the very least be sufficient to meet the culpability requirement governing the charged offense. Consider the situation of a nurse, X, who is the sole person responsible for supervising a number of infants who are in critical condition, and demand constant attention. While on the job, at Time 1, X decides to take an extremely large dose of heroin for recreational purposes and is immediately thereafter incapacitated. Sixty minutes later, at Time 2, one of the infants, V, has a medical ventilator that suffers a routine malfunction. Although merely requiring a simple reboot, X is unable to fix the ventilator because she is still incapacitated. As a result, V dies from lung failure. X is thereafter charged with reckless manslaughter. To establish that X recklessly killed V, the government would have to prove that at Time 1—when X decided to subject herself to an extremely large dose of heroin—X was aware of a substantial risk that she might, due to her incapacitated state, be unable to fulfill her critical, life-preserving duties (e.g., addressing a ventilator malfunction), and that X's decision was clearly blameworthy under the circumstances. *See* RCC § 22E-206(d).

[16] Consider the situation of a person, X, who becomes intoxicated at a friend's home and is thereafter carried against his will into a public space by another partygoer, Y. If X is subsequently arrested for public intoxication, there would be an insufficient basis for deeming X's conduct voluntary under section 203.

Relation to Current District Law. Subsection (b) fills a gap in, but is consistent with, District law. The only District authority on the voluntariness requirement is the case law discussed in the commentary to RCC § 22E-203(a).

Here, the physical interference of Y is sufficient to deny X a reasonable opportunity to avoid engaging in the proscribed conduct. The same can also be said about the situation of a person, X, who places a controlled substance in her pocket while at home, is immediately thereafter arrested, and then transported to jail without ever being searched or asked about the contraband. If, having entered the jail (and still physically restrained), X is subjected to another charge for introducing a controlled substance into a government facility, there would be an insufficient basis for deeming X's conduct voluntary under section 203. Here, the physical interference of the police is sufficient to deny X a reasonable opportunity to avoid engaging in the proscribed conduct.

RCC § 22E-204. Causation Requirement.

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

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

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

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

Explanatory Note. Subsection (b) provides a comprehensive definition of "factual cause." In the vast majority of cases, factual causation will be proven under paragraph (b)(1) by showing that the defendant was the logical, but-for cause of a result.[5] The inquiry required by this paragraph is essentially empirical, though also hypothetical: it asks what the world would have been like if the defendant had not performed his or her

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

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

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

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

[5] *See, e.g., LAFAVE, supra note 1, at* 1 SUBST. CRIM. L. § 6.4(b) ("In order that conduct be the actual cause of a particular result, it is almost always sufficient that the result would not have happened in the absence of the conduct; or, putting it another way, that 'but for' the antecedent conduct the result would not have occurred."); *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (quoting 4 F. HARPER, F. JAMES, & O. GRAY, TORTS § 20.2, p. 100 (3d ed. 2007)) ("The concept of [f]actual cause 'is not a metaphysical one but an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it.'").

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

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

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

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

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

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

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

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

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

currently reflected in District law. This departure improves the clarity and consistency of the RCC.

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

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

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

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[12] *See, e.g., District of Columbia v. Carlson,* 793 A.2d 1285, 1288 (D.C. 2002); *Lacy v. District of Columbia*, 424 A.2d 317, 321 (D.C. 1980); *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003).
[13] *Blaize v. United States*, 21 A.3d 78, 81 (D.C. 2011); D.C. Crim. Jur. Instr. § 4.230.
[14] *Blaize*, 21 A.3d at 82; *see also Roy v. United States*, 871 A.2d 507, 5087 (D.C. 2005) (citing *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003)).
[15] *United States v. Pitt-Des Moines, Inc.*, 970 F. Supp. 1359, 1364-65 (N.D. Ill. 1997) *aff'd*, 168 F.3d 976 (7th Cir. 1999).
[16] *See, e.g.,* David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1264-66 (1978); LAFAVE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.4; W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 41, at 267-68 (5th ed. 1984).
[17] RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Tentative Draft No. 2, 2002).
[18] *See, e.g.,* Eric Johnson, *Criminal Liability for Loss of A Chance*, 91 IOWA L. REV. 59, 87-88 (2005); Model Penal Code § 2.03 cmt. at 259; *United States v. Neadle*, 72 F.3d 1104, 1120 (3d Cir. 1995) *amended*, 79 F.3d 14 (3d Cir. 1996) (Becker, J. dissenting).
[19] Robert Strassfeld, *Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 355 (1992); *see* Kimberly Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2201-02 (1994).
[20] *Pitt-Des Moines, Inc*., 970 F. Supp. at 1364-65.

Second, for those few cases where application of a more expansive approach is arguably necessary—namely, where the defendant is one of multiple concurrent causes—the substantial factor test offers a highly discretionary standard to support an outcome that a bright line rule would more effectively facilitate. A simple, straightforward statement deeming independently sufficient causes to be factual causes—such as that provided in RCC § 22E-204(b)(2)—is preferable to the "spectacular vagueness"[21] of the substantial factor test. Indeed, even proponents of the substantial factor test are "uncertain about [its] precise application," and have had a difficult time specify[ing] how important or how substantial a cause must be to qualify."[22]

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

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

Explanatory Note. Subsection (c) provides a comprehensive definition of "legal cause." Under the proscribed definition, legal causation exists where it can be proven that the result was reasonably foreseeable in its manner of occurrence, and not too

[21] Johnson, *supra* note 18, at 89 n.190.
[22] *Burrage*, 134 S. Ct. at 892.
[23] Consider, for example, the District's current approach to factual causation in gun battle cases, where X and D culpably shoot at one another, and D subsequently hits either an innocent victim or another culpable participant. Under these circumstances, X will be held criminally responsible for D's conduct so long as X's conduct is, *inter alia*, "a substantial factor in bringing about the death. D.C. Crim. Jur. Instr. § 4.230; *see, e.g.*, *Roy v. United States*, 871 A.2d 498, 508 (D.C. 2005); *Bryant v. United States*, 148 A.3d 689, 2016 WL 6543533 (D.C. 2016); *McCray v. United States*, 133 A.3d 205 (D.C. 2016); *Blaize v. United States*, 21 A.3d 78 (D.C. 2011); *Blaine v. United States*, 18 A.3d 766 (D.C. 2011). This approach, which is currently being reconsidered by the DCCA *en banc*, effectively "ignore[s] the actual or but-for cause requirement" governing the District's homicide statutes. *Fleming v. United States*, 148 A.3d 1175, 1187 (D.C. 2016), *reh'g en banc granted, opinion vacated*, 164 A.3d 72 (D.C. 2017) (Easterly, J., dissenting). In contrast, under RCC § 22E-204(b), the government would have to prove that either: (1) but for X's shooting at D, D would not have shot the innocent bystander or another culpable participant; or (2) X's conduct was sufficient—even if not necessary—to lead D to shoot an innocent bystander or another culpable participant. While the RCC's analytical approach differs from that in past DCCA case law, the RCC approach does not preclude liability in gun battle cases. *See, e.g.*, *Phillips v. Com*, 17 S.W.3d 870, 874 (Ky. 2000) (upholding homicide conviction of a defendant who participated in a gun battle but did not fire the shot which caused the death of an innocent bystander notwithstanding state criminal code's traditional factual causation requirement); *Com. v. Gaynor*, 538 Pa. 258, 263, 648 A.2d 295, 298 (1994) (same); *Com. v. Santiago*, 425 Mass. 491, 504, 681 N.E.2d 1205, 1215 (1997) ("By choosing to engage in a shootout, a defendant may be the cause of a shooting by either side because the death of a bystander is a natural result of a shootout, and the shootout could not occur without participation from both sides."); Model Penal Code § 2.03 cmt. at 263 ("[I]f one of the participants in a robbery shoots at a policeman with intent to kill and provokes a return of fire by that officer that kills a bystander . . . the robber who initiates the gunfire could be charged with purposeful murder.").
[24] *Burrage*, 134 S. Ct. at 892.

dependent upon another's volitional conduct to hold the person responsible for it.[25] This is a normative evaluation, which requires the factfinder to assess whether it would be appropriate to hold a person criminally responsible for a social harm of which he or she is the cause in fact due to the influence of intervening forces, such as natural events, the conduct of a third party, or the conduct of the victim.[26]

The influence of these intervening forces can generally be divided into two categories. The first category relates to foreseeability; the focus here is on the extent to which a given result can be attributed to intervening forces—whether human[27] or natural[28]—of a remote and/or accidental nature.[29] The second category relates to human volition; the focus here is on the extent to which a given result can be attributed to the free, deliberate, and informed conduct of a third party[30] or the victim.[31]

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

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

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

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

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

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

[31] For example, imagine X stabs V with intent to kill, but only manages to inflict a minor wound on V's arm before the police intercede. Thereafter, V is taken to the hospital to receive stiches, at which point

There is no precise formula for determining the point at which intervening influences becomes so great as to break the causal chain between a defendant's conduct and the prohibited result for which he or she is being prosecuted.[32] Rather, the legal causation standard enunciated in subsection (c) simply (and necessarily) calls for an "intuitive judgment"[33] that revolves around whether "although intervening occurrences may have contributed to [a result], the defendant can still, in all fairness, be held criminally responsible for [causing it]."[34]

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

It is well established in the District that "a criminal defendant proximately causes, and thus can be held criminally accountable for, all harms that are reasonably foreseeable consequences of his or her actions."[35] Reasonable foreseeability is thus at the heart of legal causation under District law—a point reflected in the D.C. Criminal Jury Instructions on homicide which state that "A person causes the death of another person if . . . it was reasonably foreseeable that death or serious bodily injury could result from such conduct."[36] Notwithstanding the centrality of the phrase "reasonably foreseeable" in the District's law of causation, however, it is far from clear what it actually means.

District courts have made a wide range of statements on the nature of reasonable foreseeability. Relying on the requirement of reasonable foreseeability, for example, the DCCA has held that a defendant "may not be held liable for harm actually caused where

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point V refuses medical treatment so that he can try to heal the wound on his own. Over the course of a few days, V repeatedly administers a toxic substance to the wound, against his doctor's orders, which results in a serious infection from which V ultimately dies. In this scenario, X is the factual cause of V's death: but for X's infliction of a knife wound, V would not have received the gash that would later become infected. However, because V freely chose to pursue this fatal course of treatment against the advice of a medical professional, X should not be deemed the legal cause of V's death. (And this is so, moreover, even if V's terrible medical judgment could have been deemed reasonably foreseeable under the circumstances.)

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

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

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

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

[36] D.C. Crim. Jur. Instr. § 4.230.

the chain of events leading to the injury appears 'highly extraordinary in retrospect.'"[37] Reasonable foreseeability is also the basis of the DCCA's observation that "[a]n intervening cause will be considered a superseding legal cause that exonerates the original actor if it was so unforeseeable that the actor's . . . conduct, though still a substantial causative factor, should not result in the actor's liability."[38]

The diversity and complexity of statements regarding the nature of reasonable foreseeability perhaps explains why at least some District judges have refrained from providing jurors with any further elaboration of the concept in their instructions—notwithstanding specific requests from jurors for further clarification.[39] This is unfortunate, however, given that these statements all revolve around a basic and intuitive moral question (which is reflected in the case law): can the defendant, given all of the "intervening occurrences [that] may have contributed to" producing the result for which he or she is being prosecuted, "in all fairness[] be held criminally responsible" for that result?[40]

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

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

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

In this scenario, X is the factual cause of V's injuries: but for X's scoring the game-winning basket, D would not have gone on to assault V. But is X the legal cause of

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

V's injuries? Intuitively, it would seem that the answer to this question should be "no" given that D freely chose to assault, while X did not in any way desire D to engage in such conduct—rather, D merely desired to win the game. Thus, after accounting for all of the "intervening occurrences [that] may have contributed to" producing V's injury—namely, D's volitional conduct—it cannot be said that "in all fairness" X should "be held criminally responsible" for V's injuries.[41] And yet, under the District's strict reasonable foreseeability approach it would appear that X *must* be deemed the legal cause of V's injury since D's intervening conduct was in no way a surprise—indeed, D's intervening conduct was specifically foreseen by X.

Or so it would seem. In at least some situations, however, District law may actually look beyond reasonable foreseeability in the formulation of legal causation principles. For example, the DCCA has held that where the intervening cause "is the victim's own response to the circumstances that the defendant created, the victim's reaction must be an abnormal one in order to supersede the defendant's act."[42] Notably, though, an abnormal response is not necessarily an unforeseeable one, such as, for example, where the victim has a known penchant for pursuing unconventional and extremely dangerous methods of care (e.g., administering highly toxic creams).[43] Under these circumstances, the victim's "abnormal" response to treating minor injuries indeed suggests that "in all fairness"—and separate and apart from considerations of foreseeability—the perpetrator of a minor assault should not "be held criminally responsible" in the event that fatal consequences ensue.[44]

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

One final aspect of District law that weighs in favor of viewing the volitional conduct of another as a distinct consideration independent of reasonable foreseeability is the law of accomplice liability. The District's law of accomplice liability, both inside and outside the District, constitutes the primary method for holding one actor responsible for

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[41] *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting).
[42] *Bonhart v. United States*, 691 A.2d 160, 162 (D.C. 1997).
[43] *See also* LAFAVE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.4(f)(4) (noting that "there may well be instances . . . in which the refusal is so extremely foolish as to be abnormal," and that "voluntary harm-doing usually suffices to break the chain of legal cause").
[44] *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting).
[45] D.C. Crim. Jur. Instr. § 4.230.
[46] *Id.*

the criminal conduct of another.[47] Yet in order to attribute criminal responsibility in this way, a mere showing of reasonable foreseeability *will not suffice*.[48] Instead, the would-be accomplice must act with a "purposive attitude towards" the other person's/principal's criminal conduct.[49] So, for example, where X sells D a baseball bat, believing that D will subsequently use it to assault V, X cannot be held criminally liable for D's conduct as an accomplice.[50] True, D's conduct may have been foreseen by X (and was surely reasonably foreseeable under the circumstances). Nevertheless, absent proof that X "designedly encouraged or facilitated"[51] D's subsequent assault of V, the law of accomplice liability will not support the attribution of criminal responsibility.

This stringent approach to dealing with the attribution of criminal responsibility is founded upon the general belief that "the way in which a person's acts produce results in the physical world is significantly different from the way in which a person's acts produce results that take the form of the volitional actions of others."[52] As such, it would be inappropriate to view criminal responsibility for the volitional actions of others as solely being a matter of reasonable foreseeability. Conceptually, this would reduce the culpable choices of others to mere "caused happenings," rather than the independently blameworthy subjects of prosecution that the criminal law assumes them to be.[53] And as a matter of practice, it would effectively negate—by rendering superfluous—the District's well-established principles of accomplice liability.[54]

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[47] *See generally* Commentary on RCC § 22E-210: Accomplice Liability.
[48] *Wilson-Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006) (*en banc*) ("We therefore conclude that it serves neither the ends of justice nor the purposes of the criminal law to permit an accomplice to be convicted under a reasonable foreseeability standard when a principal must be shown to have specifically intended the decedent's death and to have acted with premeditation and deliberation, and when such intent, premeditation, and deliberation are elements of the offense.").
[49] *Id.* at 831.
[50] *Id.* ("To establish a defendant's criminal liability as an aider and abettor, [] the government must prove . . . that the accomplice . . . *wished to bring about* [the criminal venture] . . . . "); *see, e.g., Robinson v. United States*, 100 A.3d 95, 106 (D.C. 2014); *Gray v. United States*, 79 A.3d 326, 338 (D.C. 2013); *Joya v. United States*, 53 A.3d 309, 314 (D.C. 2012); *Ewing v. United States*, 36 A.3d 839, 846 (D.C. 2012).
[51] *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)); *Evans v. United States*, 160 A.3d 1155, 1161 (D.C. 2017); *see also English v. United States*, 25 A.3d 46, 53 (D.C. 2011) ("The key question is whether, drawing all reasonable inferences in the prosecution's favor, an impartial jury could fairly find beyond a reasonable doubt that Anderson intentionally participated in English's reckless flight from the pursuing officer, and that he not only wanted English (and his passengers) to succeed in eluding the police (which Anderson undoubtedly did), but that he also took concrete action to make his hope a reality.").
[52] Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 327, 369-70 (1985) (other people's criminal conduct are not typically viewed "as caused happenings, but as the product of the actor's self-determined choices, so that it is the actor who is the cause of what he does, not [the individual] who set the stage for his action."); *see, e.g.,* H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 326 (2d ed. 1985) ("The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."); JOHN KAPLAN ET AL., CRIMINAL LAW 261 (6th ed. 2008) ("Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions.").
[53] Kadish, *supra* note 51, at 391.
[54] As the DCCA has observed:

The second clause of subsection (c) is intended to give voice to the above considerations by stating that—in addition to assessing reasonable foreseeability—the factfinder must consider whether a result is "too dependent upon another's volitional act to hold the person responsible for it." Thereafter, the explanatory note provides further clarity on this inquiry by highlighting that "the focus here is on the extent to which a given result can be attributed to the free, deliberate, and informed actions of a third party or the victim," while providing numerous illustrative examples of how such considerations operate in practice. Viewed collectively, these provisions expand the District approach to legal causation in a manner that better coheres with District law as a whole.

[In so doing, however, these provisions may alter the operative causal principles governing one narrow yet contested area of District law: gun battle liability.[55] Specifically, the District law governing homicides arising from gun battles dictates that where X and D culpably shoot at one another, and D subsequently hits either an innocent bystander or another culpable participant, that X will be held criminally responsible for D's conduct so long as "it was reasonably foreseeable that death or serious bodily injury could result."[56] In practical effect, this causal theory of attribution—which is currently being reconsidered by the DCCA *en banc*[57]—suggests that the influence of the volitional conduct of another (i.e., other participants in a shoot out) should be immaterial to liability in the context of gun battle prosecutions.[58]

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

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

[55] *Compare Roy v. United States*, 871 A.2d 498, 502 (D.C. 2005) (upholding jury instruction that permitted the jury to find that the defendant, by engaging in a gun battle in a public space, was responsible for causing the death of an innocent bystander killed by a stray bullet even if it was not the defendant who fired the fatal round, provided that the death was reasonably foreseeable), *with Fleming v. United States*, 148 A.3d 1175, 1177 (D.C. 2016) (Easterly, J., dissenting) ("[E]ven assuming arming oneself with a gun and firing it could satisfy the direct causation requirement, the volitional, felonious act of someone else then shooting and killing the decedent is an 'intervening cause' that breaks this chain of criminal causation.").

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

[57] *See generally Fleming v. United States*, 148 A.3d 1175, (D.C. 2016), *reh'g en banc granted, opinion vacated*, 164 A.3d 72 (D.C. 2017).

[58] Notably, the government's briefing in *Fleming* does not seek to apply this causal theory of liability in all cases, only those where the relevant conduct is "as dangerous as a gun battle." *En Banc* Brief for Appellee, at 39 n.25. For example, the government distinguished gun battle-type situations from the "homicide liability imposed on, e.g., a drug dealer, gambler, or prostitute who is the subject of a robbery, and whose robber inadvertently shoots and kills a third person; or a telegraph company that negligently fails to warn a victim that killers are on their way." *Id.* This recognized distinction was offered in response to the following argument presented in PDS' briefing:

In contrast, the RCC approach to legal causation would make intervening conduct of this nature a relevant consideration. Specifically, it would ask the factfinder to assess whether, in a gun battle fact pattern such as the one discussed above, the result for which the government is seeking to hold X criminally responsible is "too dependent upon [D's volitional act to hold [D] responsible for it."][59]

> Extending [the] causation logic [inherent in the District's gun battle liability case law] to other factual scenarios reveals its distortion of criminal causation. For example, consider a drug dealer who works in a heavily trafficked open-air drug market, where it is reasonably foreseeable that somebody (likely armed) might one day try to rob him. If that should come to pass, and in the course of that robbery his assailant fires a shot that kills a bystander, is the dealer liable for some degree of murder under a theory that he should have foreseen the inevitable violence? Or, to take the real case of Ross (cited [earlier in PDS' brief]), consider a telegraph company that fails to deliver a warning to a person that he is being pursued by killers. Assuming that the delivery of the warning would have averted the death (and thus the failure to deliver is a but-for cause), is the telegraph company liable for the killing? (Ross said no.) Assuming the conduct is sufficiently reckless, [the District's analysis of proximate cause would say yes [on the basis that a] defendant is "criminally accountable for[] 'all harms that are reasonably foreseeable consequences of his or her actions.'" [] But this simple focus on foreseeability ignores the common-sense (and common-law) notion that the drug dealer and telegraph company are not liable where the death was the direct result not of their conduct, but of the intervening volitional act of someone else.

En Banc Brief of Amicus Curiae Public Defender Service in Support of Appellant, at 16-17 (internal citations and footnote call number omitted).

[59] After this portion of the commentary was drafted, the DCCA issued its *en banc* opinion in *Fleming v. United States*, No. 14-CF-1074, 2020 WL 488651, (D.C. Jan. 30, 2020). The CCRC is still reviewing the decision, and may provide updates to the RCC or accompanying commentary in the future in light of the decision.

RCC § 22E-205. Culpable Mental State Requirement.

Explanatory Note. Subsection (a) states the culpable mental state requirement governing all criminal offenses in the RCC. It establishes that a culpable mental state is applicable to every result and circumstance element in an offense definition, with the exception of those result and circumstance elements that are subject to strict liability under the rule of interpretation established in RCC § 22E-207(b).[1]

In so doing, subsection (a) more broadly communicates the RCC's basic commitment to viewing culpable mental states on an element-by-element basis—a practice known as "element analysis."[2] This commitment is based on the dual recognition that: (1) "the mental ingredients of a particular crime may differ with regard to the different elements of the crime"[3]; and, therefore, (2) "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[4]

Under the RCC approach to element analysis, it is necessary to consider what culpable mental state (if any) applies to the result and circumstance elements in an offense definition.[5] Conduct elements are accordingly excluded from the requisite

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[1] *See* RCC § 22E-207(b) ("A person is strictly liable for any result or circumstance in an offense: (1) That is modified by the phrase 'in fact,' or (2) When another statutory provision explicitly indicates strict liability applies to that result or circumstance.").

[2] Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683 (1983); *see, e.g.,* Model Penal Code § 2.02(1) ("Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1436–37 (1968) ("This way of putting the matter acknowledges that the required mode of culpability may not only vary from crime to crime but also from one to another element of the same offense—meaning by material element an attribute of conduct that gives it its offensive quality"); *see also* Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 577 (1988) (describing element analysis as the Model Penal Code's greatest achievement).

[3] WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.1(d) (3d ed. Westlaw 2019). As LaFave illustrates:

> One might imagine a carefully drafted statutory crime worded: "Whoever sells intoxicating liquor to one whom he knows to be a policeman and whom he should know to be on duty" is guilty of a misdemeanor. Such a statute, aside from its *mens rea* aspects, covers several different [objective] elements—(1) the sale (2) of intoxicating liquor (3) to a policeman (4) who is on duty. As to elements (1) and (2), the statute evidently provides for liability without fault: if he in fact sells intoxicating liquor it is no defense that he either reasonably or unreasonably thinks he is making a gift rather than a sale, or thinks he is selling Coca-Cola rather than whiskey. As to element (3), however, the statute requires the seller to have actual knowledge that the purchaser is a policeman; so a reasonable or even unreasonable belief that he is a fireman would be a defense. As to element (4), a negligence type of fault is all that is required; a reasonable belief that the policeman is off duty is a defense, but an unreasonable belief is not.

Id.

[4] *United States v. Bailey*, 444 U.S. 394, 406 (1980) (quoting Model Penal Code § 2.02 cmt. at 123); *see, e.g., Carrell v. United States*, 165 A.3d 314, 321 (D.C. 2017) (*en banc*).

[5] *See also, e.g.,* RCC § 22E-206 (defining purpose, knowledge, intent, recklessness, and negligence as to results and circumstances, but not conduct).

culpable mental state evaluation required by subsection (a).[6] In practice, this means that the only aspect of an actor's culpability as to his or her own present conduct[7] which is necessary to establish affirmative liability under the RCC is its voluntariness, as proscribed in RCC § 22E-203.[8]

Subsection (a) also recognizes that in certain instances the legislature may decide to refrain from requiring proof of a culpable mental state as to a given result or circumstance element, thereby holding an actor strictly liable for it.[9] In that case, however, the legislature must explicitly communicate its intent to impose strict liability in accordance with RCC § 22E-207(b).[10]

Subsection (b) provides the definition of "culpable mental state" applicable to RCC § 22E-205(a) and throughout the RCC. The first part of this definition refers to the primary culpability terms employed in the RCC—purpose, knowledge, intent, recklessness, and negligence, as defined in RCC § 22E-206. Proof that the defendant brought about the result and circumstance elements required by an offense with a state of mind that satisfies any one of these terms will satisfy the culpable mental state requirement codified in subsection (a).[11]

The second part of subsection (b) establishes that the object of the phrases "with intent" and "with the purpose" also constitutes part of a "culpable mental state." This aspect of the definition is intended to clarify the nature of the culpable mental state requirement governing the RCC's various inchoate offenses (e.g., theft, burglary, and attempt),[12] the hallmark of which is the imposition of liability for unrealized criminal plans.[13]

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[6] *See, e.g.,* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994) (requiring proof of *mens rea* as to conduct unnecessarily "duplicates the voluntariness requirement."); Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003) ("It is normally unduly confusing, and not analytically helpful, to retain [the conduct culpability] category [in an element analysis scheme].").

[7] That is, the act, omission, or series of acts or omissions that satisfy the objective elements of an offense.

[8] *See* RCC § 22E-203(a) ("No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense.").

[9] *See* RCC § 22E-205(c) (defining strict liability).

[10] *See* RCC § 22E-207(b) ("A person is strictly liable for any result or circumstance in an offense: (1) That is modified by the phrase 'in fact,' or (2) When another statutory provision explicitly indicates strict liability applies to that result or circumstance.").

[11] That is, assuming the offense of prosecution does not require proof of a more culpable state of mind.

[12] There exist two categories of inchoate offenses: general inchoate offenses and specific inchoate offenses. *See generally* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989). Specific inchoate offenses, such as burglary and theft, require proof of some preliminary consummated harm—for example, an unlawful entry or taking—accompanied by a requirement that this conduct have been committed "with intent to" commit a more serious harm—for example, a crime inside the structure or a permanent deprivation. *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27 (4th ed. 2012).

General inchoate offenses, in contrast, accomplish the same outcome, but in a characteristically different way. They constitute "adjunct crimes"—that is, a category of offense that "cannot exist by itself, but only in connection with another crime," *Cox v. State*, 534 A.2d 1333, 1335 (Md. 1988)—that generally do not require that any harm actually have been realized. *See, e.g.,* Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 956 (2007).

For example, whereas burglary and theft respectively require proof of a taking or a trespass, a criminal attempt merely requires proof of significant progress towards completion of the target offense—without regard to whether this progress was itself harmful. Like burglary and theft, however, general

It is helpful to think of the object of the phrases "with intent to" and "with the purpose of" as part of the culpable mental state governing these inchoate offenses since the relevant propositional content need only exist in an actor's mind. The RCC's possession of stolen property statute is illustrative.[14] The objective elements of this offense, the "purchase[]" or "possess[ion]" of "property," are subject to two distinct culpable mental states, (1) "with intent *that the property be stolen*" and (2) "with intent *to deprive the owner of the property*."[15] Here, the objects of both culpable mental states—the stolen-ness of the property and the deprivation to the owner—do not actually need to transpire to support liability.[16]

Classifying the object of the phrases "with intent" and "with the purpose" as part of the culpable mental state governing an inchoate offense also appropriately ensures that the relevant propositional content will be subject to the burden of proof stated in RCC § 22E-201.[17]

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inchoate offenses such as criminal attempts similarly incorporate a "with intent to" requirement, that is, a requirement that the relevant conduct have been committed "with intent to" commit the target offense. *See generally* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997).

[13] *E.g.,* Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 759 (2012). For example, theft is an inchoate offense because it does not require proof that the defendant *actually* deprived the victim of property in a permanent manner; instead, proof of a taking committed "with intent to deprive" will suffice. Similarly, attempt (to commit murder) is an inchoate offense because it does not require proof that the defendant *actually* killed the victim; instead, proof that the defendant, acting "with intent to kill," engaged in significant conduct, which goes beyond mere preparation, directed towards killing the victim will suffice.

[14] RCC § 22E-2401.

[15] *Id.* It should be noted that the purchase or possession of property is also subject to a "knowingly" mental state under RCC § 22E-2401.

[16] A similar analysis is also applicable to the RCC crime of attempted second-degree assault, per subparagraph (c)(2)(A) of the assault statute in conjunction with the general attempt provision. *See* RCC § 22E-1202(c)(2)(A) ("A person commits the offense of second degree assault when that person . . . (2) Recklessly causes significant bodily injury to another person; and . . . [s]uch injury is caused with recklessness as to whether the complainant is a protected person."); RCC § 22E-301 (criminalizing attempts to commit an offense). The objective elements of this offense, "enag[ing] in conduct . . . that comes *dangerously close* to *completing that offense*," must be perpetrated with two culpable mental states comprised of distinct objects that need not occur, (1) intending *to cause significant bodily injury* and (2) a substantial belief *that the victim is a protected person*. *See* RCC § 22E-301(a) (setting forth dangerous proximity requirement for attempt); *id.* at § (b) ("[T]o be guilty of an attempt the defendant must at least have the intent to cause any results required by the target offense.").

[17] This is because subsections 201(a) and (b) require the government to prove the "objective elements" and "culpability requirement" of an offense beyond a reasonable doubt. RCC § 22E-201(a) ("No person may be convicted of an offense unless the government proves each offense element beyond a reasonable doubt."); *id.*at § (b) ("'Offense element' includes the objective elements and culpability requirement necessary to establish liability for an offense."). As the object of the phrases "with intent" and "with the purpose" need not occur, the relevant propositional content (e.g., the *deprivation* in theft or the crime *committed within the dwelling* for burglary) clearly does not constitute part of that offense's "objective elements," all of which by definition must actually occur. RCC § 22E-201(c)(1) ("Conduct element" means any act or omission that is required to establish liability for an offense."); *id.* at § (c)(2)("Result element" means "any consequence caused by a person's act or omission that is required to establish liability for an offense."); *id.* at § (c)(3) ("Circumstance element" means any characteristic or condition relating to either a conduct element or result element that is required to establish liability for an offense."). Consequently, it is necessary to incorporate these inchoate elements into an offense's "culpability

Subsection (c) provides the definition of "strict liability" applicable to subsection (a) and throughout the RCC. It establishes that strict liability means liability as to a result element or circumstance element in the absence of a culpable mental state.[18] Implicit in this understanding of strict liability is the view that the voluntary commission of an offense, while a necessary prerequisite for criminal liability under RCC § 22E-203, does not constitute a culpable mental state, as defined in RCC § 22E-205(b).[19] Nevertheless, pure strict liability offenses,[20] which require proof of voluntariness and nothing more, are possible under the RCC if explicitly specified by the legislature.

Relation to Current District Law. RCC 22E-205 fills a gap in District law, which at present does not typically enumerate all the culpable mental states that must be proven for a given offense. By requiring element analysis, RCC § 22E-205 provides the basis for clearly drafting and consistently applying criminal statutes in a manner sensitive to key distinctions in culpability between objective elements. Although the District's criminal statutes generally do not reflect this kind of element analysis, the manner in

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requirement" through the definition of "culpable mental state," so as to afford them the protections of proof beyond a reasonable doubt under section 201. *See* RCC § 22E-201(d) ("Culpability requirement" includes," *inter alia*, "[t]he culpable mental state requirement, as provided in RCC § 22E-205(a).").

[18] *See, e.g.,* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267 (1987) ("Strict liability imposes guilt without regard to whether the defendant knew or could reasonably have known some relevant feature of the situation."). As Kadish illustrates:

> The defendant did an act that, judged from his or her perspective, is blameless: she drove a car; she rented her home in another city; he presided over a pharmaceutical company that bought packaged drugs and cosmetics and reshipped them under its own label. But the facts were not as they thought. The driver could not see a stop sign at the intersection, because it was obscured by a bush. The homeowner's otherwise respectable tenants decided to throw a [party involving controlled substances]. The drugs and cosmetics the pharmaceutical company reshipped were mislabeled by the manufacturer and there was nothing the defendant officer could practically have done about it. These circumstances would surely be a defense to a charge of moral fault and usually, under the requirement of *mens rea* or the doctrine of reasonable mistake, they would be a legal defense as well. But . . . many jurisdictions would disallow the excuse of reasonable mistake because, it would be explained, these are instances of strict liability.

Id.

[19] Which is to say: requiring proof of voluntary conduct, and nothing more, is entirely consistent with strict liability. For example, consider the situation of a person who quickly reaches for a soda on the counter, when, unbeknownst to the person, a small child darts in front of the soda prior to the person's ability to reach it. If the child suffers a facial injury in the process one can say that the person's voluntary act (factually) caused bodily injury to the child. That the relevant conduct was the product of effort or determination, however, is not to say that the person was in any way blameworthy or at fault for causing the child's injury. On this view, then, a criminal offense that premised liability on the mere fact that the person's conduct was voluntary—that is, regardless of whether the person acted purposely, knowingly, recklessly, or negligently as to the relevant result and circumstance elements—is appropriately understood as a strict liability offense.

[20] "Pure" strict liability offenses, which do not require proof of a culpable mental state as to *any* of an offense's objective elements, are to be distinguished from "impure" strict liability offenses, which merely fail to require proof of a culpable mental state as to only some of an offense's objective elements. Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081-82 (1997).

which the DCCA has interpreted many criminal statutes—particularly in the past few years—accords with the most important aspects of RCC § 22E-205. District case law also recognizes the benefits of clarity and consistency to be gained from legislative adoption of element analysis.

Generally speaking, the District's criminal statutes do not reflect element analysis. Which is to say, they are not drafted in a manner that "make[s] clear what mental state (for example, strict liability, negligence, recklessness, knowledge, or purpose) is required for [each of an offense's objective elements] (for example, conduct, resulting harm, or an attendant circumstance)."[21] Instead, the District's criminal statutes most often generally state some culpable mental state requirement—whether comprised of one,[22] two,[23] three,[24] or even four[25] culpability terms—at the beginning of an offense definition, without clarifying how these culpability terms are intended to be distributed among the offense's objective elements.

The more recent of these District statutes typically employ modern culpability terms, such as purpose, knowledge, recklessness, and negligence.[26] However, many of the District's older statutes employ more ambiguous culpability terms, such as "maliciously,[27] "willfully,"[28] "wanton[ly],"[29] "reckless indifference,"[30] and "having reason to believe."[31] And some of the District's most important criminal statutes merely codify the penalty applicable to an offense, and, therefore, enumerate no culpable mental state at all.[32] In the absence of a legislative statement of offense elements, the common law definition of these offenses—typically comprised of an ambiguous culpable mental state requirement framed in terms very different from element analysis—is read in by the courts.[33]

When viewed as a whole, then, criminal statutes in the D.C. Code do not reflect the basic tenets of element analysis.

Historically, District courts have similarly refrained from using element analysis in their interpretation of criminal statutes. For a long time, the DCCA, when faced with clarifying a criminal statute's ambiguous culpability requirement, employed an approach

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[21] *Jones v. United States*, 124 A.3d 127, 130 n.3 (D.C. 2015)) (citing *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011))
[22] *E.g.,* D.C. Code § 22-303; D.C. Code § 22-3318; D.C. Code § 22-3309.
[23] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-3312.01.
[24] *E.g.,* D.C. Code § 22-404; D.C. Code § 22-1101.
[25] D.C. Code § 5-1307.
[26] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-404; D.C. Code § 22-1101; D.C. Code § 5-1307.
[27] *E.g.,* D.C. Code § 22-303; D.C. Code § 22-3318.
[28] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-3312.01.
[29] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-3312.01.
[30] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-404.01.
[31] *E.g.,* D.C. Code § 22-723; D.C. Code § 22-3214.
[32] These include assault, D.C. Code § 22-404, murder, D.C. Code § 22-2101, manslaughter, D.C. Code § 22-2105, mayhem, D.C. Code § 22-406, affrays, D.C. Code § 22-1301, and threats, D.C. Code § 22-407.
[33] *See generally Buchanan v. United States*, 32 A.3d 990, 1002 (D.C. 2011) (Ruiz, J. concurring). These statutes are to be contrasted with various strict liability offenses in the D.C. Code, where it is clear that no culpable mental state was intended to govern some or all of the offense's objective elements. For example, as the DCCA observed in *McNeely v. United States*, "[s]trict liability criminal offenses—including felonies—are not unprecedented in the District of Columbia; the Council has enacted several such statutes in the past. 874 A.2d 371, 385–86 n.20 (D.C. 2005) (collecting statutes); *see also* D.C. Code § 22-3011(a).

known as "offense analysis," analyzing the appropriate culpable mental state for an offense as a whole (rather than each of its parts). Rather than ask whether any particular objective element in an offense was subject to a culpable mental state—and if so, whether it is akin to purpose, knowledge, recklessness, or negligence—the court typically sought to determine the *mens rea* governing the crime as a whole, which it characterized as one of "general intent" or "specific intent."[34] More recently, however, the DCCA has recognized how problematic this practice is for the administration of justice, and has thus sought to shift its focus away from this common law approach.

For example, in a pair of 2011 decisions, *Perry v. United States* and *Buchanan v. United States*, the DCCA observed that the terms "general intent" or "specific intent" are little more than "rote incantations" of "dubious value,"[35] which "can be too vague or misleading to be dispositive or even helpful"[36] and can lead to "outright confusion . . . when they are included in jury instructions."[37] For this reason, the District's criminal jury instructions "avoid[s]" using the terms "general intent" and "specific intent" as the terms are "more confusing than helpful to juries."[38]

Thereafter, in the DCCA's 2013 decision in *Ortberg v. United States*, the court recognized that the problem with "these terms [is that they] fail to distinguish between elements of the crime, to which different mental states may apply."[39] The better alternative, as the court goes on to explain, is a "clear analysis" which faces the "question of the kind of culpability required to establish the commission of an offense [] separately with respect to each material element of the crime."[40]

With the foregoing insights in mind, the DCCA observed in the 2015 decision of *Jones v. United States* that "courts and legislatures" should, wherever possible, "simply make clear what mental state (for example, strict liability, negligence, recklessness, knowledge, or purpose) is required for whatever material element is at issue (for example, conduct, resulting harm, or an attendant circumstance)."[41]

Most recently, the *en banc* DCCA in *Carrell v. United States* (2017) specifically adopted both the element analysis framework[42] and accompanying culpable mental state definitions[43] developed by the Model Penal Code (and subsequently endorsed by the U.S.

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[34] *Buchanan*, 32 A.3d at 1002.
[35] *Id.* at 1001.
[36] *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011)
[37] *Id.* at 809.
[38] D.C. Crim. Jur. Instr. § 3.100 *Defendant's State of Mind—Note*.
[39] 81 A.3d 303, 307 (D.C. 2013).
[40] *Id.* (citations, quotations, and alterations omitted).
[41] 124 A.3d 127, 130 n.3 (D.C. 2015).
[42] *Carrell v. United States*, 165 A.3d 314, 320 n.13 (D.C. 2017) (*en banc*) ("We adopt these ["conduct element," "result element," and "circumstance element"] classifications from the Model Penal Code § 1.13 (9) (Am. Law Inst., Proposed Official Draft 1962).")
[43] *Id.* at 323-24 ("Following the lead of the Supreme Court . . . we likewise conclude that more precise gradations of mens rea should be employed. We have previously expressed concern about the use of 'general' and 'specific' intent. We reiterate our endorsement of more particularized and standardized categorizations of *mens rea*, and, in the absence of a statutory scheme setting forth such categorizations, we, like the Supreme Court, look to the Model Penal Code terms and their definitions.")

Supreme Court) in resolving an ongoing conflict surrounding the culpability of criminal threats.[44]

RCC § 22E-205 establishes a legislative framework that broadly accords with all of the foregoing insights. Consistent with the DCCA's recent case law, RCC § 22E-205(a) "requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[45] Consistent with the District's varied criminal statutes, RCC § 22E-205(b) establishes that the kind of culpable mental state at issue will be one of purpose, knowledge, intent, recklessness, negligence, or any other comparable mental state specified by the legislature. And consistent with both District case law and criminal statutes, RCC § 22E-205(c) acknowledges the possibility that no culpable mental state may apply to a given objective element at all.[46]

There is, however, one potential difference between the element analysis recognized by the DCCA and that specified by RCC § 22E-205, namely, the RCC approach removes conduct from the requisite analysis of culpable mental states. This variance should help resolve an issue over which there has been extensive litigation in the District: whether and how culpable mental states relate to the conduct element of an offense.

Although the DCCA appears, at times, to envision that conduct, no less than results or circumstances, is subject to a culpable mental state analysis, the court's more recent case law demonstrates the problems and confusion to which this view can lead. For example, the DCCA has frequently defined a "general intent" crime as one requiring proof of "the intent to do the act that constitutes the crime."[47] Applying this definition to simple assault, a so-called general intent crime, suggests that the government need only prove the intent to perform the acts constituting the assault.[48] But two recent cases, *Williams v. United States* and *Buchanan v. United States*, appear to reject this view of the culpable mental state requirement governing the offense, holding that the government must prove that the accused intended for that harm to occur.[49] The reason? The "intent to act" interpretation of simple assault, if taken literally, would—as one DCCA judge phrases it—"allow the prosecution of individuals for criminal assault for actions taken with a complete lack of culpability," and, therefore, is actually consistent with strict liability. [50]

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[44] *Id.* at 324 ("Applying this hierarchy of *mens rea* levels to the *actus reus* result element of the crime of threats, we hold that the government may carry its burden of proof by establishing that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat.").

[45] For a discussion of how many of the non-conforming culpable mental states in current District statutes are comparable to purpose, knowledge, intent, recklessness, or negligence, see the Commentary on RCC § 22E-206.

[46] *See McNeely*, 874 A.2d at 385.

[47] *E.g., Dauphine v. United States*, 73 A.3d 1029, 1032 (D.C. 2013).

[48] *Anthony v. United States*, 361 A.2d 202, 206 n.5; *Ray v. United States*, 575 A.2d 1196, 1198 (D.C. 1990).

[49] *Buchanan v. United States*, 32 A.3d 990 (D.C. 2011); *Williams v. United States*, 887 A.2d 1000 (D.C. 2005).

[50] *Buchanan*, 32 A.3d at 1002 (Ruiz, J. concurring). It should be noted that the culpable mental state requirement governing simple assault has continued to be a source of litigation and confusion in the District. This is reflected in *Vines v. United States* (2013), where the DCCA went out of its way to *avoid*

Whether or not a strict liability interpretation of simple assault was ever intended by the DCCA is not entirely clear.[51] What is clear, though, is that other courts have unwittingly created strict liability crimes by misconstruing an "intent to act" as amounting to something more than the voluntariness requirement, and that, more generally, the failure to distinguish between voluntary conduct and *mens rea* as to results and circumstances has produced a significant amount of confusion in the law, both inside and outside of the District.[52] Subsection (a) is intended to avoid confusion of this nature by excluding conduct—narrowly defined elsewhere in the RCC as an act or failure to act—from the requisite culpable mental state analysis.

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resolving the culpable mental state of simple assault. 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013).

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

[51] For example, neither the DCCA nor any other common law authority has explicitly taken the position that simple assault is a strict liability crime. And the DCCA has even interpreted so-called strict liability crimes to require proof of some *mens rea* beyond just voluntary conduct. *See*, *e.g.*, *McNeely*, 874 A.2d at 387. Moreover, in other contexts, the DCCA has defined a "general intent" crime as requiring the government to prove that the accused was "aware of all those facts which make [one's] conduct criminal," *Campos v. United States*, 617 A.2d 185, 188 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962))—a definition that seems to imply that a knowledge-like *mens rea* is applicable to at least some of the objective elements in an offense such as simple assault.

[52] For relevant case law from outside the District, see, for example, *State v. Sigler*, 688 P.2d 749 (Mont. 1984) *overruled by State v. Rothacher*, 901 P.2d 82 (Mont. 1995); *Van Dyken v. Day*, 165 F.3d 37 (9th Cir. 1998); *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985); *Markley v. State*, 421 N.E.2d 20 (Ind. Ct. App. 1981); *Jennings v. State*, 806 P.2d 1299 (Wyo. 1991); *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968). And for relevant commentary, see, for example, Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994); Paul H. Robinson, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 722 (1983); Eric A. Johnson, *The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1 (2007); Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 44 IND. L. REV. 1135 (2011); Larry Kupers, *Aliens Charged with Illegal Re-Entry Are Denied Due Process and, Thereby, Equal Treatment Under the Law*, 38 U.C. DAVIS L. REV. 861 (2005); J.W.C. Turner, *The Mental Element in Crime at Common Law,* 6 CAMBRIDGE L.J. 31, 34 (1936).

RCC § 22E-206. Definitions and Hierarchy of Culpable Mental States.

Explanatory Note. Section 206 establishes a culpable mental state hierarchy comprised of five terms—purposely, knowingly, intentionally, recklessly, and negligently—separately defined in relation to result and circumstance elements. These five terms are all that is necessary to "prescribe the minimal requirements" of criminal liability and "lay the basis for distinctions that may usefully be drawn" in the grading of offenses under the RCC.[1] The hierarchy these terms comprise is intended to codify, clarify, and refine the "representative modern American culpability scheme," which was originally developed by the drafters of the Model Penal Code and has subsequently been adopted by legislatures and courts around the country.[2]

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[1] Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968) (discussing the culpable mental state hierarchy developed in Model Penal Code § 2.02); *see, e.g.,* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 119 (1970) (observing that the culpability concepts incorporated into Model Penal Code § 2.02 "express the significant distinctions found by the courts, and are adequate for all the distinctions which can and should be made to accomplish the purposes of a [] criminal code.").

The rationale for carefully distinguishing between distinctions in culpable mental states has been described accordingly:

> Criminal law exhibits a well-known fixation with the defendant's mind, a fixation that we do not find in other areas of law, including areas in which the mental states of the parties matter to liability. Criminal law responds differently to defendants who are only subtly different in their psychological states; we often give large punishments to some who cause harm while giving low punishments, or even no punishments, to subtly psychologically different actors who cause the very same, or even greater, harms. The reason is that subtle differences in psychological states . . . cloak large differences in something fundamental to what it is to be a human being and a citizen of a state who owes an account of his conduct to other people and other citizens: the evaluative weight that we give to others' interests in comparison to our own . . . From subtle differences in psychology, we are able to infer the presence of large differences [in the level of disregard for the legally protected interests of others that an actor's harmful or dangerous conduct manifests on a particular occasion].

Gideon Yaffe, *The Point of Mens Rea: The Case of Willful Ignorance*, 12 CRIM. L. & PHIL. 19, 25 (2018); *see, e.g.,* Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 151 (2008) ("To publicly blame a person [is] to adjudge that, rather than being motivated in his conduct by proper regard for interests that the law seeks to safeguard, the person placed insufficient value on those interests. The attitudes for which persons are blamed range in gravity from maliciousness (e.g., 'purpose' to do harm), callousness (e.g., 'knowingly' doing harm), indifference to harm, conscious disregard of harm (i.e., 'recklessness'), and inadvertent neglect (i.e., 'negligence'). In each case, however, blame is a negative judgment of the person's motivating values.").

[2] Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 692 (1983) ("Section 2.02 [of the Model Penal Code] may appropriately be considered the representative modern American culpability scheme."); *see* Model Penal Code § 2.02(2) (defining purposely, knowingly, recklessly, and negligently); *id.* at § 2.02(5) (establishing that proof of higher mental state will satisfy the lower mental state).

The influence of Model Penal Code § 2.02 has been summarized accordingly:

Subsection (a) provides a comprehensive definition of the term "purposely," sensitive to the kind of objective element to which the term applies. Under this definition, a person acts purposely as to a result element when that person consciously desires to cause the prohibited result.[3] Likewise, a person acts purposely as to a circumstance element when that person consciously desires that the prohibited circumstance exist.[4] It is immaterial to liability under this definition that a person also possesses an ulterior motive, which goes beyond his or her conscious desire to cause a prohibited result or that a prohibited circumstance exists.[5] However, the conscious desire required by subsection (a) must be accompanied by that person's belief that it is at least possible that the prohibited result will occur or that the prohibited circumstance exists.[6]

Subsection (b) provides a comprehensive definition of the term "knowingly," sensitive to the kind of objective element to which the term applies. Under this definition, a person acts knowingly as to a result element when that person is aware that it is practically certain that conduct[7] will cause the prohibited result.[8] Likewise, a person

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> Upon initial publication, the MPC formulation of culpability was hailed by most commentators as a reasonable attempt to impose some predictable structure on a notoriously unpredictable and discordant area of the law. State legislatures were even more accepting. By 1983—just 25 years after its promulgation—36 states had largely jettisoned their criminal codes in favor of the MPC. Even in the handful of states that have not adopted it in whole or in part as legislation, the MPC has still managed to find its way into the common law of those states because judges often turn to it for guidance. The MPC is now taught in virtually every law school, with one professor calling it the principal text in criminal law teaching. Whether in actual legislation, common law, or simply norms accepted by lawyers and judges, the MPC has become a standard part of the furniture of the criminal law.

Francis X. Shen, et. al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1317–18 (2011) (internal quotations and footnote call numbers omitted).

[3] For example, if X pulls the trigger of a loaded gun with the goal of killing V, X acts "purposely" with respect to causing the death of V.

[4] For example, if X assaults V, a uniformed police officer, because of the victim's status as a police officer, X acts "purposely" with respect to assaulting *a police officer*.

[5] For example, if X throws a rock at V, consciously desiring to inflict bodily injury upon V, the fact that X's ulterior motive is to impress bystander Y with his assertive display of violence would not in any way preclude a finding that X purposely assaulted V. WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.2(d) (3d ed. Westlaw 2019) ("It may be said that, so long as the defendant has the intention required by the definition of the crime, it is immaterial that he may also have had some other intention.") (citing, e.g., *O'Neal v. United States*, 240 F.2d 700 (10th Cir. 1957); *United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016)).

[6] For example, if X throws a rock at V who is many hundreds of feet away, consciously desiring to inflict bodily injury upon V but also believing that there is no possibility that the rock will actually hit V, then X does not act purposely with respect to injuring V. *See, e.g.,* Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1, 13 n.17 (2012); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 942-43 (2000).

[7] The reference both here and throughout RCC § 22E-206 is to whether "conduct" (in general) will cause a result, and not to whether "*that person's* conduct" (in particular) will cause a result. This is because, in some situations (e.g., accomplice liability), the defendant's culpable mental state will relate to the relationship between *another person's* conduct (e.g., the principal actor) and causing a prohibited result. *See, e.g.,* RCC §§ 22E-210 & 211: Explanatory Note.

[8] Consider the following situation: child rights advocate X blows up a manufacturing facility that relies upon child labor, which in turn causes the death of on-duty night guard V. On these facts, it can be said

acts knowingly as to a circumstance element when that person is aware that it is practically certain that the prohibited circumstance exists.[9]

Subsection (c) provides a comprehensive definition of the term "intentionally," sensitive to the kind of objective element to which the term applies. The definition of intent provided in these subsections is equivalent to the definition of knowledge set forth in subsection (b).[10] There is, however, an important communicative distinction between these two terms: whereas the term knowledge implies a basic relationship between a person's subjective belief concerning a proposition and the truth of that proposition, the term intent does not entail this relationship. The definitions of knowledge and intent reflect this communicative distinction: whereas knowledge is defined in terms of "aware[ness]" as to a practical certainty in subsection (b), intent is defined in terms of "belie[f]" as to a practical certainty in subsection (c).[11] The RCC provides this definitional alternative to knowledge to facilitate the clear drafting of inchoate offenses (e.g., theft, burglary, and attempt), the hallmark of which is the imposition of liability for unrealized criminal plans.[12]

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that X "knowingly" killed V so long as X was practically certain that V would die in the blast. This is so, moreover, although X would prefer that V not be injured in the blast.

[9] Consider the following situation: X purchases a car from Y on the black market, which was previously stolen from V. On these facts, it can be said that X "knowingly" buys stolen property so long as X was practically certain that the purchased car was previously stolen. This is so, moreover, although X would prefer that the car had not been stolen.

[10] Insofar as an actor's state of mind is concerned, the subjective proof necessary to establish that X "intentionally" killed V is no different than the subjective proof necessary to establish that X "knowingly" killed V, namely, X must have been practically certain that conduct would cause the death of V. Similarly, the subjective proof necessary to establish that X "intentionally" received stolen property is no different than the subjective proof necessary to establish that X "knowingly" received stolen property, namely, X must have been practically certain that the property being received had previously been stolen.

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

[12] *See* RCC § 22E-205(b): Explanatory Note (providing overview of general and specific inchoate crimes). Given that the consummation of an actor's criminal plans is not necessary for the imposition of inchoate liability, it would be misleading to describe the core culpable mental state requirement for inchoate offenses as one of acting "with knowledge" that a result will occur or that a circumstance exists. *See* Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1032 n.330 (1998) ("Knowledge would not be the proper way to describe this mental state, because it would be odd to describe the defendant as having knowledge of a result when the result does not in fact occur."). Use of the term knowledge suggests that the actor's beliefs must be accurate, and, therefore, that the requisite result and/or circumstance modified by the phrase "with knowledge" actually needs to occur or exist. A central feature of inchoate offenses, however, is that the requisite result and/or circumstance that comprise the core culpable mental state requirement need not actually occur or exist. *E.g.,* Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 759 (2012); Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 NEW CRIM. L. REV. 542, 545 (2012). For this reason, the term intent, which does not imply the accuracy of the actor's beliefs, is more appropriate for use in the inchoate context.

To illustrate, consider a hypothetical theft offense that prohibits taking property "with knowledge of a deprivation." This language suggests that proof that the defendant's conduct actually resulted in a

The critical distinction between purpose and knowledge/intent is the presence or absence of a positive desire.[13] Whereas the knowing/intentional actor is aware/believes that a result will occur or that a circumstance exists, the purposeful actor consciously desires to cause that result or that the circumstance exists.[14] To differentiate between these two kinds of culpability in practice, the factfinder may find it useful to consider the following counterfactual test: "Would the defendant regard [him or herself] as having failed if a particular result does not occur, or circumstance does not exist?"[15] An affirmative answer to this question is indicative of a purposeful actor.[16]

Subsection (d) provides a comprehensive definition of the term "recklessly," sensitive to the type of objective element to which the term applies. Under this definition, a person acts recklessly as to a result element when, *inter alia*, that person consciously disregards a substantial risk that conduct will cause the prohibited result.[17]

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permanent deprivation is necessary for a conviction. But if, in contrast, that theft offense instead incorporated the culpable mental state of "with intent to deprive," then there would be no indication that consummation of the deprivation is necessary for a conviction. Likewise, a hypothetical receipt of stolen property offense phrased in terms of "possessing property with knowledge that it is stolen" suggests that the property must have actually been stolen to support a conviction. But if, in contrast, that offense was instead framed in terms of "possessing property with intent that it be stolen," then there would be no indication that the property must have been stolen to support a conviction.

As these examples illustrate, use of the phrase "with intent" will establish that: (1) a subjective belief concerning the likelihood that a given result will occur or that a circumstance exists will provide the basis for liability; (2) without creating the mistaken impression that the relevant result or circumstance modified by the phrase actually needs to occur or exist. *See also* RCC § 22E-205(b): Explanatory Note (discussing "with intent" in the context of the definition of "culpable mental state").

[13] This distinction rests on a simple but widely shared moral intuition: all else being equal, consciously desiring to cause a given harm is more blameworthy than being aware that it will almost surely result from one's conduct. *See, e.g.,* Fiery Cushman, Liane Young & Marc Hauser, *The Role of Conscious Reasoning and Intuition in Moral Judgment*, 17 PSYCHOL. SCI. 1082 (2006); Matthew R. Ginther et. al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327 (2014). In practice, however, this distinction "is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient." Model Penal Code § 2.02 cmt. at 234. Rather, it is only in "certain narrow classes of crimes" that the "heightened culpability" of purpose "has been thought to merit special attention" at the liability stage. *United States v. Bailey*, 444 U.S. 394, 405 (1980). This special attention is captured by the RCC definitions of accomplice, solicitation, and conspiracy, all of which require proof of purpose in order to establish threshold liability. *See* RCC §§ 22E-210(a) (accomplice liability), 302(a) (solicitation liability), and 303(a) (conspiracy liability).

[14] Note, however, that under RCC § 22E-206(f), proof of a higher culpable mental state will establish a lower one, and, therefore, the culpable mental states of knowledge and intent may be satisfied by proof of purpose. In practical effect, this means that a conscious desire constitutes an alternative to the belief states at issue in knowledge and intent.

[15] R.A. DUFF, CRIMINAL ATTEMPTS 17 (1996).

[16] The distinction between purpose and knowledge/intent might also be framed in terms of the difference between "will[ing] that the act . . . occur [and] willing to let it occur." Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 122 (1998).

[17] For example, if X speeds through a red light *aware that it is substantially possible* that X will fatally hit V, a pedestrian stepping into the crosswalk, X acts "recklessly" with respect to causing the death of V (provided that X's conscious disregard of the risk is also clearly blameworthy, see *infra* notes 22-33 and accompanying text). As the italicized language in this example illustrates, the RCC definition of recklessness as to a result requires proof that that defendant subjectively perceived both the risk and its substantiality.

Likewise, a person acts recklessly as to a circumstance element when, *inter alia*, that person consciously disregard a substantial risk that the prohibited circumstance exists.[18]

Subsection (e) provides a comprehensive definition of the term "negligently," sensitive to the kind of objective element to which the term applies. Under this definition, a person acts negligently as to a result element when, *inter alia*, that person fails to perceive a substantial risk that conduct will cause the prohibited result.[19] Likewise, a person acts negligently as to a circumstance element when, *inter alia*, that person fails to perceive a substantial risk that the prohibited circumstance exists.[20]

The RCC definitions of recklessness and negligence comprise non-intentional mental states, which extend liability to actors who disregard substantial risks of harm. Recklessness involves *conscious* risk-taking, and therefore resembles acting knowingly/intentionally, with one important distinction: the actor's requisite awareness of a risk need not rise to the level of a *practical certainty*. Rather, for recklessness, the risk consciously disregarded by the actor need only be perceived as *substantial*. Negligence, like recklessness, also involves the *disregard of a substantial risk*. For negligence, however, liability is assigned based upon the actor's *failure to perceive that risk*. In this sense, negligence constitutes an objective form of culpability (i.e., it does not require proof of a subjective desire or belief as to a result or circumstance element), which distinguishes it from every other subjective culpability term in the RCC hierarchy.[21]

The other essential component of the RCC definitions of recklessness and negligence is the clear blameworthiness standard, which the second prong of each culpable mental state incorporates in nearly identical terms.[22] Pursuant to this standard, recklessness and negligence liability each entail proof that the person's risk-taking have been "clearly blameworthy" when viewed in light of the morally salient characteristics of that person's situation. The RCC definitions of recklessness and negligence describe those features as the "nature and degree" of the "risk" that has been disregarded, the

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[18] For example, if X purchases a stolen luxury car from Y for a fraction of its market value, *aware that it is substantially possible* that the car is stolen, X acts "recklessly" with respect to whether the property being purchased is stolen (provided that X's conscious disregard of the risk is also clearly blameworthy, see *infra* notes 22-33 and accompanying text). As the italicized language in this example illustrates, the RCC definition of recklessness as to a circumstance requires proof that that defendant subjectively perceived both the risk and its substantiality.

[19] For example, if X speeds through a red light *unaware that it is substantially possible* that X will fatally hit V, a pedestrian stepping into the crosswalk, X acts "negligently" with respect to causing the death of V (provided that X's failure to perceive the risk is also clearly blameworthy, see *infra* notes 22-33 and accompanying text).

[20] For example, if X purchases a stolen luxury car from Y for a fraction of its market value, *unaware that it is substantially possible* that the car is stolen, X acts "negligently" with respect to whether the property being purchased is stolen (provided that X's failure to perceive the risk is also clearly blameworthy, see *infra* notes 22-33 and accompanying text).

[21] *See, e.g.,* LAFAVE, *supra* note 5, at 1 SUBST. CRIM. L. § 5.1(c) (observing that negligence requires "objective fault in creating an unreasonable risk; but, since the actor need not realize the risk in order to be negligent, no subjective fault is required," as is the case with other culpability terms).

[22] In the context of recklessness liability, the focus is placed on the blameworthiness of the actor's *conscious disregard of* a substantial risk—whereas, in the context of negligence liability, the focus is placed on the blameworthiness of the actor's *failure to perceive* a substantial risk.

"nature and purpose of the person's conduct," and "the circumstances known to the person."[23]

This context-sensitive culpability analysis excludes a wide range of activities that involve *justifiable* risk-taking from falling within the scope of recklessness and negligence liability under the RCC. Risk-taking is a routine and often unavoidable aspect of life, which can be necessary to further important societal interests—as reflected in, for example, performing open-heart surgery, building a skyscraper, or operating an emergency response vehicle. Where a person's risk-taking is justifiable in this conventional sense,[24] that person fails to manifest the "insensitivity to the interests of

[23] RCC §§ 206(d)(1)(B) & (2)(B); RCC §§ 206(e)(1)(B) & (2)(B).

[24] That is, because the socially beneficial "nature and purpose" of the actor's conduct outweighs the "nature and degree" of the "risk" disregarded when considered in light of the "circumstances known to the person." *See, e.g.,* Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955, 957 (2000) ("To determine justifiability . . . We determine the extent of harm risked by the conduct discounted by its likelihood of occurring and weigh that against the actor's motivation for the conduct (the perceived benefits, to the individual or others, accruing from the conduct) discounted by the probability that the risky behavior will satisfy the actor's goals.").

This justifiability evaluation is largely *objective*. For example, in weighing the severity of the harm that might have resulted from the defendant's conduct against the extent to which the defendant's conduct might potentially have proven beneficial, the factfinder should consider the value that the community places upon particular types of activities, in contrast to the value that the defendant subjectively placed on them. Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503, 506 (2006); *see, e.g.,* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. LAW 281, 334 (1981) ("To determine whether a risk is justifiable [the requisite] balance must be based on societal values, not the actor's personal gain").

That said, one aspect of the justifiability evaluation is *subjective*: the relevant probabilities must be assessed in light of the "circumstances known to the actor." Specifically, in determining the likelihood of both the harm and potential societal benefit of the defendant's conduct, the factfinder must examine "the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight." *Williams v. State*, 235 S.W.3d 742, 753 (Tex. Crim. App. 2007) (collecting cases in accord). And, in so doing, the factfinder is to exclude "mistaken beliefs—and mistaken estimates of the relevant probabilities—[from] the analysis." Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 50 (2009) (discussing the phrase "circumstances known to the actor" as employed in the Model Penal Code definitions of recklessness and negligence, § 2.02(c)-(d)).

To illustrate how this justifiability evaluation operates in practice, consider the following hypothetical: X, a construction worker, causes the death of V, a pedestrian running on a sidewalk immediately adjacent to the construction site, in the course of using dynamite to demolish a pre-existing structure to make room for a new sports arena. X failed to perceive a risk that anyone outside the confines of the construction site would be injured by the blast. If X is subsequently prosecuted for negligent homicide, the justifiability of his conduct (and thus whether the clear blameworthiness requirement is met) entails a comparative assessment of: (1) the cost of fatal risks to the physical security of pedestrians; (2) the benefit of constructing a new sports arena; (3) the likelihood that X's conduct would result in death to a pedestrian; and (4) the likelihood that X's conduct would further the goal of constructing a new arena. The weighting of the first two (normative) factors is based solely on the community's values (e.g., it would be immaterial that X subjectively believed the creation of sports arenas to be the highest form of human achievement—or thought little of the physical security of pedestrians). The weighting of the latter two (probabilistic) factors, in contrast, is based on an evaluation of the circumstances that X was aware of at the time of the blast.

To illustrate how the weighting of the latter two factors occurs, suppose that at the moment of the blast, 10:00pm on January 1: (1) a nighttime New Year's charity run was occurring immediately adjacent to the construction site; while (2) the dynamite employed routinely sends scraps of material flying beyond the

other people" upon which blameworthiness judgments rest,[25] and therefore would fail to satisfy the clear blameworthiness standard governing the RCC definitions of recklessness and negligence.

Aside from justified risk-taking, this context-sensitive culpability analysis also excludes from recklessness and negligence liability those actors whose disregard of a risk is attributable to individual or situational factors beyond their control (and thus for which they cannot fairly be blamed).[26] Because punishment "represents the moral condemnation of the community,"[27] the imposition of criminal liability can only be justified where a person's risk-taking fails to live up to the community's values—and, therefore, *deserves* to be condemned—under the circumstances.[28] What ultimately renders an actor's disregard of a risk blameworthy, then, is whether it reflects a level of concern or attention[29] for legally-protected interests that is *lower* than what a reasonable member of the community placed in the defendant's situation could be expected to

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construction site's fencing. If X was aware of both of these facts, then the probability that harm would occur would be quite high. But if, in contrast, X was unaware of both of these facts, then the likelihood of harm—again, given X's perspective—might be quite low given the situation as X perceived it.

[25] *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 502 (E.D.N.Y. 1993) (quoting Model Penal Code § 2.02 cmt. at 243); *see, e.g.,* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. LAW 281, 334 (1981) ("What makes the actor's conduct justifiable is a societal judgment that the behavior is not culpable because the balance of risks and benefits was made in a manner beneficial to society.").

[26] *See, e.g., Cordoba-Hincapie*, 825 F. Supp. at 502 ("[M]oral defects can [only] properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them.") (quoting Model Penal Code § 2.02 cmt. at 243); *Williams v. State*, 235 S.W.3d 742, 751 (Tex. Crim. App. 2007) (both recklessness and negligence depend "upon a *morally blameworthy* failure to appreciate a substantial and unjustifiable risk"); SAMUEL PILLSBURY, JUDGING EVIL 171-172 (2012) ("Where the accused did not perceive the risks involved at the time of his conduct, culpability rests on a judgment about why the person failed to perceive. Did the failure stem from a culpable lack of concern for the victim, or should we attribute it to other factors for which the individual should not be blamed?"); Model Penal Code § 210.3, cmt. at 62 ("[I]t would be morally obtuse to appraise a crime . . . without reference to these factors").

[27] *Ruffin v. United States*, 76 A.3d 845, 859 (D.C. 2013) (quoting *United States v. Bass,* 404 U.S. 336, 348 (1971)); *see, e.g.,* Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 264 (1987) ("To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood").

[28] *See, e.g,* Westen, *supra* note 1, at 151 ("To publicly blame a person is to . . . adjudge that, rather than being motivated in his conduct by proper regard for interests that the law seeks to safeguard, the person placed insufficient value on those interests."); Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 553 (2012) ("[T]he mental states of recklessness and negligence constitute culpability, are morally significant, and contribute to the morally objectionable nature of the agent's act, thanks to what they indicate about the agent's attitude towards the legally protected interests of other people."); *cf.* Joshua Kleinfeld et. al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1703 (2017) (proof of "moral blameworthiness" should be required for all crimes).

[29] As in the case of negligence, where the person has *failed to perceive* the relevant risk. *See, e.g.,* Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind,* 67 SMU L. REV. 545, 575 (2014) ("[A]n actor should be regarded as negligent if his failure to perceive a risk he is creating or imposing results from indifference to the well-being of others, or in other words, if he would have perceived a risk he was creating or imposing had he not been indifferent to the well-being of others."); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 388 (1994).

exercise.[30] Where, in contrast, an actor's risk-taking does manifest a reasonable level of concern or attention for those legally protected interests, and his or her conduct is instead attributable to excusing influences[31]—for example, intellectual deficiencies, physical impairments, immaturity, extreme emotional or mental disturbances, or external coercion[32]—then that person would likewise fail to satisfy the clear blameworthiness standard governing the RCC definitions of recklessness and negligence.[33]

To illustrate how this situation-specific culpability analysis operates in practice, consider the situation of a driver who turns into an intersection, consciously disregarding a substantial risk that she will hit an unoccupied trailer attached to a construction vehicle that is adjacent to her. If the driver ends up destroying the trailer, her unreasonable operation of her motor vehicle will almost surely subject her to civil liability, without regard to her overarching blameworthiness. But whether her conscious disregard of a

[30] In this sense, reasonableness is not a statistical measure asking the factfinder to identify what the "average" person would have done. Rather, it is an evaluative standard, which requires the factfinder to consider what a person with both (1) the defendant's limitations and shortcomings and (2) "the correct degree of care for the interests and welfare of others" would have done under the circumstances. Douglas Husak, *Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting*, 5 CRIM. L. & PHIL. 199, 206 (2011) ("[T]he reasonable person has all of the physical and psychological attributes of the particular defendant with one important exception: the reasonable person has an appropriate degree of concern for others."); *see, e.g.,* Westen, *supra* note 1, at 151 (Insofar as culpability is concerned, the relevant question to ask about reasonableness is: "What would a person, who otherwise possessed every trait of the actor but fully respected the interests that the statute at hand seeks to protect, have thought and/or felt on the occasion at issue?"); Model Penal Code § 210.3 cmt. at 63 ("[I]t is clear that personal handicaps and some external circumstances must be taken into account" (e.g., "blindness, shock from traumatic injury, and extreme grief") to determine what the reasonable would have done); *compare id.* at 64 ("[I]t is equally plain that idiosyncratic moral values" need not be considered: "An assassin who kills a political leader because he believes it is right to do so cannot ask that he be judged by the standard of a reasonable extremist. Any other result would undermine the normative message of the criminal law.").

[31] Importantly, these influences do not need to rise to the level of a complete excuse defense to be relevant to—or ultimately preclude a showing of—the clear blameworthiness standard. To take just one example, consider the situation of sorority pledge, X, who is confronted by abusive sorority sister, Y, with the choice of either: (1) dropping a rock off the sorority's one-story balcony, thereby *risking* significant bodily injury to pedestrian Z, below; or (2) immediately be punched in the face by Y. Assume that X opts to avoid the threatened assault by dropping the rock off the balcony, but that the rock causes significant bodily injury to Z. If X is thereafter prosecuted for reckless assault of Z, she would be unable to raise a "duress defense (sometimes called compulsion or coercion) to the crime in question" because it only applies where a threat of "imminent death or *serious* bodily injury" is issued (whereas, in contrast, Y's threat only entailed *significant* bodily injury). LAFAVE, *supra* note 5, at 1 SUBST. CRIM. L. § 6.8. While falling short of a complete excuse defense, however, the external coercion that X experienced would be relevant to assessing—and indeed, suggests that X likely lacks—the clear blameworthiness required by the RCC definition of recklessness.

[32] This non-exclusive list of factors is consistent with the kind of "[f]acts normally considered excusing in the criminal law." *E.g.,* Anders Kaye, *Excuses in Exile*, 48 U. MICH. J.L. REFORM 437, 442 (2015) (listing as relevant "the offender's infancy, subnormal intelligence, legal insanity, intoxication, diminished capacity, duress, entrapment, and even provocation.") (collecting authorities); *see also* Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. Rev. 161, 188 (2016) (noting that mitigation for partial or imperfect excuses is generally well established in American criminal justice policy).

[33] Whether excusing influences mitigate blame in this way is a matter of degree, contingent upon the comparative influence of individual or situational factors beyond that person's control under the circumstances.

substantial risk will subject her to criminal liability under the RCC requires further analysis, which accounts for the "nature and degree" of that risk, the "nature and purpose" of her conduct, and the "circumstances known to her."

For example, in a recklessness-based prosecution for second-degree criminal damage to property,[34] the driver's liability would hinge upon three main considerations evaluated by the factfinder in light of the driver's perception of events. The first is the severity of the risk of property damage consciously disregarded by the driver.[35] The second is the extent to which the driver's decision to enter the intersection was intended to further legitimate societal objectives.[36] And the third are any individual or situational factors beyond the driver's control that reasonably hindered her ability to exercise an adequate level of concern for the unoccupied trailer owner's property rights.[37] All else being equal, the greater the value assigned to the first consideration, and the lower the value assigned to the second and third considerations, the more likely it is that the clear blameworthiness standard incorporated into the RCC definition of recklessness has been met.

The analysis required to determine whether an actor's failure to perceive a substantial risk meets the clear blameworthiness standard incorporated into the RCC definition of negligence is nearly identical. To illustrate, consider a slightly different hypothetical: a driver turns into the intersection with her eyes fixed on her rearview mirror, failing to perceive the substantial risk that she will (and does) fatally hit a bicyclist who is adjacent to her. If the driver is thereafter prosecuted for negligent homicide,[38] the driver's guilt would again depend upon three main considerations evaluated by the factfinder in light of the driver's perception of events. The first is the severity of the risk of death that the driver *should have been aware of* under the circumstances.[39] The second is the extent to which the driver's decision to enter the intersection (without looking rightward) was intended to further legitimate societal objectives.[40] And the third are any individual or situational factors beyond the driver's

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[34] RCC § 22E-2503 ("Recklessly damages or destroys property and, in fact, the amount of damage is $25,000 or more.").

[35] That is, the "nature and degree of the risk."

[36] That is, the "purpose" of the actor's conduct." It would be relevant, for example, that the driver acted with a reasonable (even if mistaken) belief that entering the intersection would avoid a more harmful crash with an oncoming school bus or get a passenger suffering from what appeared to be a heart attack to the hospital as expeditiously as possible.

[37] That is, the "nature" of the actor's conduct. Illustrative examples of relevant factors would include: (1) an extreme emotional disturbance stemming from recent news that the driver's child was just killed in a school shooting; (2) external coercion created by a passenger who instructed the driver to step on the gas or else risk being physically beaten at the end of the trip; or (3) impairments of judgment attributable to (i) the early stages of a heart attack, (ii) the unexpected side effects of a non-narcotic medication prescribed by a physician, or (iii) the foreseeable side effects of a narcotic that had been placed in the driver's beverage without her knowledge or consent.

[38] RCC § 22E-1103(a) ("A person commits the offense of negligent homicide when that person negligently causes the death of another person.").

[39] That is, the "nature and degree of the risk."

[40] That is, the "purpose" of the actor's conduct." It would be relevant, for example, that the driver's gaze was fixed on her rearview mirror because it appeared as though a runaway truck was barreling towards her, or because the driver's small child—seated in the backseat—appeared to be choking on a small toy, which could be fatal unless immediately removed.

control that reasonably hindered her ability to exercise an adequate *level of attention* to the bicyclist's physical safety.[41] Here again it can be said that, all else being equal, the greater the value assigned to the first consideration, and the lower the value assigned to the second and third considerations, the more likely it is that the clear blameworthiness standard incorporated into the RCC definition of negligence has been met.

Subsection (f) states that proof of a higher culpable mental state will always establish a lesser culpable mental state. This establishes that: (1) negligence can be satisfied by proof of recklessness, intent, knowledge, or purpose; (2) recklessness can be satisfied by proof of intent, knowledge or purpose; (3) knowledge or intent can be satisfied by proof of purpose. These rules are a product of the view that, all else being equal, purpose is more culpable than knowledge/intent, which is more culpable than recklessness, which is more culpable than negligence. In practical effect, these rules dictate that the legislature need not state alternative mental states in the definition of an offense; rather, a statement of the lowest culpable mental state sufficient to establish a given objective element is sufficient.

Subsection (g) establishes that the culpable mental states defined in section 206 are to be afforded the same meaning when used in other parts of speech. This principle of interpretation is necessary to avoid any confusion that might otherwise result from the following conflict: although subsections (a)-(e) define the culpable mental states of "purposely," "knowingly," "intentionally," "recklessly," and "negligently," the RCC routinely employs these same terms in different parts of speech (e.g., "purpose," "knowledge" "intending," "recklessness," and "negligent") in both statutory text and accompanying commentary. Pursuant to subsection (g), these grammatical differences in the articulation of culpability terms do not have any substantive import for the interpretation and application of RCC statutes and commentary.

Relation to Current District Law. RCC § 22E-206 codifies, clarifies, fill in gaps, changes, and enhances the proportionality of the District law governing culpable mental state evaluations. The District's current approach to dealing with culpable mental states evaluations is an amalgamation of statutory and decisional law, which is often unclear, frequently inconsistent, and almost always piecemeal. In contrast, the culpable mental state definitions and hierarchy incorporated into Section 206 establishes a clear and comprehensive legislative framework for specifying the state of mind necessary to establish liability for every criminal offense in the RCC.

On a legislative level, the standard District approach to drafting the culpable mental state requirement governing an offense is to generally state one,[42] or sometimes more (e.g., two,[43] three,[44] or even four[45]), undefined culpability terms at the beginning of

[41] That is, the "nature" of the actor's conduct. Illustrative examples of relevant factors would include: (1) an extreme emotional disturbance stemming from a recent near-fatal accident the driver had suffered by a runaway truck; (2) external coercion created by a passenger who has instructed the driver to keep her eyes on the rearview mirror, or else be physically beaten at the end of the trip; or (3) impairments of judgment attributable to (i) the early stages of a heart attack, (ii) the unexpected side effects of a non-narcotic medication prescribed by a physician, or (iii) the foreseeable side effects of a narcotic that had been placed in the driver's beverage without her knowledge or consent.
[42] *E.g.,* D.C. Code § 22-303; D.C. Code § 22-3318; D.C. Code § 22-3309.
[43] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-3312.01.

an offense definition. Some of these undefined terms reflect the contemporary culpability concepts of purpose, knowledge, intent, recklessness, and negligence.[46] However, many of the District's older statutes employ more outdated (and particularly ambiguous) culpability terms, such as "maliciously,[47] "willfully,"[48] "wanton[ly],"[49] "reckless indifference,"[50] and "having reason to believe."[51] In other instances, the District's criminal statutes enumerate no culpable mental state at all, such that courts must read one in pursuant to common law interpretive principles.[52]

The legislative vagueness resulting from these drafting practices has the practical effect of delegating a portion of the D.C. Council's lawmaking authority—namely, its authority to make criminal justice policy through culpability requirements—to the District's local judiciary. [53] Yet the manner in which the District's local judiciary has carried out this delegation has been and continues to be problematic. Apart from the challenge to democratic representation that arises when unelected officials determine what the law should be (a fact well-recognized by the judiciary[54]), the judges who sit on the D.C. Superior Court and D.C. Court of Appeals have struggled to develop a body of culpability policies that are clear, consistent, or comprehensive.[55] The voluminous appellate case law surrounding the culpable mental states governing some of the District's most routinely charged offenses—for example, threats[56] and simple assault[57]—

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[44] *E.g.,* D.C. Code § 22-404; D.C. Code § 22-1101.
[45] D.C. Code § 5-1307.
[46] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-404; D.C. Code § 22-1101; D.C. Code § 5-1307.
[47] *E.g.,* D.C. Code § 22-303; D.C. Code § 22-3318.
[48] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-3312.01.
[49] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-3312.01.
[50] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-404.01.
[51] *E.g.,* D.C. Code § 22-723; D.C. Code § 22-3214.
[52] These include assault, D.C. Code § 22-404, murder, D.C. Code § 22-2101, manslaughter, D.C. Code § 22-2105, mayhem, D.C. Code § 22-406, affrays, D.C. Code § 22-1301, and threats, D.C. Code § 22-407.
[53] That is, courts must apply criminal statutes to individual cases, so when a local District prosecution calls into question a *mens rea* issue left unresolved by a criminal statute, the judges on the D.C. Superior Court and D.C. Court of Appeals have no choice but to exercise the traditionally legislative function of culpability definition and fill in the resulting gap through the process of common law decision-making. *See, e.g.,* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) (noting that legal discretion "is like the hole of a doughnut": it "does not exist except as an area left open by a surrounding belt of restriction.") In some cases, legislative history may guide the courts in their exercise of this authority; however, oftentimes the ambiguities will be so large and/or legislative intent so inscrutable, that judicial lawmaking is inevitable.
[54] *Ruffin v. United States*, 76 A.3d 845, 859 (D.C. 2013) (quoting *United States v. Bass,* 404 U.S. 336, 348 (1971)); ("Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define crimes.").
[55] *See also* Kahan, *supra* note 53, at 470 ("[J]udges frequently lack sufficient consensus to make the law uniform . . . ."); *id.* at 495 ("Frequent disagreements are inevitable when [many] judges . . . are all independently empowered to identify the best readings of ambiguous criminal statutes."); *United States v. Harriss*, 347 U.S. 612, 635 (1954) (noting that appellate courts can always change an interpretation of a criminal statute).
[56] D.C. Code § 22-407 ("Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year."); D.C. Code § 22-1810 ("Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another

and foundational theories of liability—for example, criminal attempts[58] and complicity[59]—is illustrative. Notwithstanding decades of decisional law, the culpable mental state requirements governing these offenses and theories of liability are still ambiguous and the subject of significant dispute.[60] Which, in practice, means that some of the most basic and fundamental culpability policy questions in the District remain unresolved.

What explains this state of affairs? To some extent, it's a product of the fact that older DCCA opinions, to which subsequent courts are bound, rely upon the confusing common law approach to culpability, offense analysis. Such an approach is—as the DCCA's recent opinions in *Buchanan*,[61] *Ortberg*,[62] and *Jones*[63] helpfully illustrate—a notoriously unreliable means of articulating the culpable mental state requirement governing an offense. At the same time, however, it also reflects the limitations inherent in the common law method of policymaking. Because any court is limited by the facts before it, even a definitive element analysis-based resolution of a culpable mental state issue (e.g., the DCCA's recent *en banc* opinions in *Wilson-Bey*[64] and *Carrell*[65]) can only

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person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.").

[57] *See* D.C. Code § 22-404(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[58] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished . . . .").

[59] D.C. Code § 22-1805 ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.").

[60] For a summary of the confusion surrounding the *mens rea* of threats, see Judge Schwelb's dissent in *Carrell v. United States*, 80 A.3d 163, 171 (D.C. 2013), *reh'g en banc granted, opinion vacated*, No. 12-CM-523, 2015 WL 5725539 (D.C. June 15, 2015), and *on reh'g en banc,* 165 A.3d 314 (D.C. 2017). For a summary of the confusion surrounding the *mens rea* of assault, see Judge Ruiz's concurrence in *Buchanan v. United States*, 32 A.3d 990, 1002 (D.C. 2011). For a summary of the confusion surrounding the *mens rea* of attempt, see Judge Beckwith's concurrence in *Jones v. United States*, 124 A.3d 127, 128 (D.C. 2015). And for a summary of the confusion surrounding the *mens rea* of complicity, see *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (*en banc*).

[61] *Buchanan*, 32 A.3d at 1002 (Ruiz, J. concurring) ("There is no opportunity better than the present to reiterate the dubious value of rote incantations of the traditional labels of 'general' and 'specific' intent to the different *mens rea* elements of a wide array of criminal offenses.").

[62] *Ortberg v. United States* 81 A.3d 303, 307 (D.C. 2013) (recognizing that the problem with "general intent" and "specific intent" is that they "fail to distinguish between elements of the crime, to which different mental states may apply," whereas a "clear analysis" faces the "question of the kind of culpability required to establish the commission of an offense [] separately with respect to each material element of the crime") (citations, quotations, and alterations omitted).

[63] *Jones v. United* States, 124 A.3d 127, 130 n.3 (D.C. 2015) (instead of offense analysis, "courts and legislatures" should, wherever possible, "simply make clear what mental state (for example, strict liability, negligence, recklessness, knowledge, or purpose) is required for whatever material element is at issue (for example, conduct, resulting harm, or an attendant circumstance)."

[64] *Compare, e.g., Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*) (clarifying the *mens rea* of complicity) *with Tann v. United States*, 127 A.3d 400 (D.C. 2015) (majority and dissenting opinions debating the meaning of *Wilson-Bey*).

accomplish so much. And, in any event, relying on multiple rounds of appellate litigation to define the culpable mental state requirement governing individual criminal offenses is a highly inefficient means of making basic and fundamental policy decisions.

To resolve these issues, the RCC incorporates a culpable mental state hierarchy comprised of five mental states—purposely, knowingly, intentionally, recklessly, and negligently—comprehensively defined in a manner sensitive to the form of objective element to which they apply. As a matter of substantive culpability policy, this hierarchy largely captures the central mental state concepts reflected in current District law, while improving their overall level of clarity and filling in important gaps in mental state definition in a proportionate manner. By codifying this hierarchy, the RCC provides the D.C. Council with a critical tool for clearly and comprehensively stating the culpable mental state requirement governing each and every criminal offense *by statute*, thereby ameliorating the need for the District's judiciary to promulgate culpability policy through common law decision-making.[66]

RCC §§ 22E-206(a), (b), and (c): Relation to Current District Law on Purpose, Knowledge, and Intent. Subsections (a), (b) and (c) codify, clarify, and fill gaps in District law.

The culpable mental states of "purpose," "knowledge," and "intent" appear in a variety of District statutes; however, virtually none of these statutes explicitly define them.[67] Nor, for that matter, has the DCCA clearly defined them. Based on DCCA case law, however, it is relatively clear that the desire and belief states reflected in the definitions set forth in subsections (a), (b) and (c) will satisfy the requirement of a

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[65] *Compare Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017) (*en banc*) ("Applying this hierarchy of *mens rea* levels to the *actus reus* result element of the crime of threats, we hold that the government may carry its burden of proof by establishing that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat.") *with id.* ("[D]eclin[ing] to decide whether a lesser threshold *mens rea* for the second element of the crime of threats—recklessness—would suffice," and "defer[ing] resolution of this issue for multiple reasons . . . .").

[66] By enhancing the clarity, consistency, and comprehensiveness of the District's criminal statutes in this way, RCC § 22E-206 will almost certainly provide "substantially improved analytical tools for practicing lawyers and courts to use in understanding what must be proven by the prosecution [] beyond a reasonable doubt." Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 232 (1997). In so doing, however, RCC § 22E-206 should also "increase the simplicity" of the District's criminal law, afford the District's residents a greater level of "fair notice," and "reduce litigation by reducing ambiguities in offense definitions." Robinson & Grall, *supra* note 2, at 704.

[67] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-1101; D.C. Code § 5-1307. *But see* D.C. Code § 22-2201(B) ("'[K]nowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination."); D.C. Code § 22-3101 ("'Knowingly' means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."); *but see also* D.C. Code § 22-3225.01 ("'Malice' means an intentional or deliberate infliction of injury, by furnishing or disclosing information with knowledge that the information is false, or furnishing or disclosing information with reckless disregard for a strong likelihood that the information is false and that injury will occur as a result.").

"specific intent," which is sufficient to establish liability for nearly all of the most serious offenses under District law.[68]

District authority relevant to subsections (a), (b) and (c) revolves around DCCA case law on the "heightened *mens rea*" of a specific intent, which the statutory terms of purpose, knowledge, and/or intent frequently indicate.[69] At the same time, however, the DCCA has never clearly defined the meaning of the phrase "specific intent"—indeed, as one DCCA judge has observed, the phrase itself is little more than a "rote incantation[]" of "dubious value" which obscures "the different *mens rea* elements of a wide array of criminal offenses."[70] Ambiguities aside, however, it seems relatively clear from the relevant case law that proof of any of the desire or belief states reflected in subsections (a), (b) and (c) as to a result or circumstance element should satisfy the requirement of a "specific intent," and, therefore, provide an adequate basis for capturing the culpable mental states applicable to relevant District offenses.

That one who consciously desires to cause a result or that a circumstance exists necessarily acts with the requisite "specific intent" is implicit in the fact that this kind of "purposive attitude" is, as the DCCA has recognized, the most culpable of mental states, sufficient to ground a conviction for accomplice liability.[71] This point has also been made more explicitly in the context of the District's enhanced assault offenses. With respect to assault with intent to kill, for example, the court in *Logan v. United States* observed that "[a] specific intent to kill exists when a person acts with the *purpose* . . . of causing the death of another,"[72] which in turn seems to entail a desire.[73] Likewise, with respect to assault with intent to rape, the court in *United States v. Huff* observed that the government must present proof of "an intent to persist in [sexually assaultive] force even in the face of and *for the purpose of* overcoming the victim's resistance."[74]

It's important to note that District law on the specific intent requirement seems to include more than just purposeful conduct, however. In *Logan*, for example, the DCCA notes that where the accused possesses the "conscious intention of causing the death of another," he or she also possesses the "specific intent" to kill.[75] Although the court never clarifies what this "conscious intention" entails, the court later equates the *mens rea* of "a

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[68] This is not to say, however, that the element-sensitive definition of the term intent in RCC § 22E-206(c) is the equivalent of the term intent as utilized in the phrase "specific intent" (or, for that matter, "general intent").
[69] *See, e.g., Perry v. United States*, 36 A.3d 799 (D.C. 2011).
[70] *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring).
[71] *See, e.g., Wilson-Bey v. United States*, 903 A.2d 818, 833-34 (D.C. 2006) (*en banc*).
[72] *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984).
[73] As the DCCA later observed in *Arthur v. United States*:

> The government did have to prove that Arthur had a specific intent to kill . . . There was, however, ample evidence of that intent, both in his behavior and in the comment, "I hope she's dead," which he made (twice) when he first started to leave the room before discovering that his victim was still alive.

602 A.2d 174, 179 n.7 (D.C. 1992).
[74] 442 F.2d 885, 890 (D.C. Cir. 1971).
[75] 483 A.2d at 671.

specific intent to kill" with "actually . . . fores[eeing] that death [will] result from [one's] act."[76]

Other DCCA case law concerning "specific intent" also supports that it is satisfied by proof of knowledge. For example, in *Peoples v. United States*, the DCCA sustained various convictions for malicious disfigurement in a case where "the evidence disclosed that appellant deliberately set fire to [a home], using a flammable liquid accelerant, in the early morning hours while those inside were sleeping."[77] The court deemed it "reasonable to infer that appellant *knew* that the people inside the house *would sustain grievous burn injuries* if they escaped alive," circumstances which "evidence[d] appellant's *intent* sufficiently to permit the jury to find that appellant had the requisite *specific intent* to support his convictions of malicious disfigurement."[78]

Similarly, in *Curtis v. United States*, the court upheld a malicious disfigurement conviction where the accused had "brandish[ed] a bottle of draining fluid, and hurled its contents down in his direction, dousing him on the neck and soaking his shirt."[79] Both the court and counsel for the accused deemed it obvious that *if* "appellant was *aware* that the particular fluid would cause harmful burns to human skin, proof of specific intent to disfigure the person at whom it was thrown [would exist]"—the only question was *whether* the accused indeed possessed this awareness.[80]

Another noteworthy aspect of DCCA case law is the recognition that a common indicator of a specific intent requirement—use of the phrase "with intent"—is also the marker of "an inchoate offense," which "can occur without completion of the objective."[81] So, for example, with respect to the crime of assault with intent to kill, "the government is not required to show that the accused actually wounded the victim" in order to prove that an assault was committed with the intent to kill.[82] The same is also true with respect to "[p]ossession of narcotics with intent to distribute them," which does

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[76] *Id.* (quoting *United States v. Wharton*, 433 F.2d 451, 456 (D.C. Cir. 1970)). For example, the *Logan* court's recognition that "[a] specific intent to kill exists when a person acts with the . . . conscious intention of causing [a particular result]" relies upon LaFave's *Substantive Criminal Law* treatise. *See Logan*, 483 A.2d at 671. However, that same treatise clarifies that "a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he *consciously desires* that result, whatever the likelihood of that result happening from his conduct; and (2) when he *knows* that that result is *practically certain* to follow from his conduct, whatever his desire may be as to that result." LAFAVE, *supra* note 5, at 1 SUBST. CRIM. L. § 5.2.
[77] 640 A.2d 1047, 1055-56 (D.C. 1994).
[78] *Id.*
[79] 568 A.2d 1074, 1075 (D.C. 1990).
[80] *Id.*
[81] *Owens v. United States*, 688 A.2d 399, 403 (D.C. 1996); *see, e.g., United States v. Fox*, 433 F.2d 1235, 1236 (D.C. Cir. 1970); *McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994); *Monroe v. United States*, 598 A.2d 439, 442 (D.C. 1991); *Warrick v. United States*, 528 A.2d 438, 442 (D.C. 1987); *Cash v. United States*, 700 A.2d 1208, 1212 (D.C. 1997); *Hebron v. United States*, 804 A.2d 270, 273–74 (D.C. 2002); *Price v. United States*, 985 A.2d 434, 437 (D.C. 2009).
[82] *Nixon v. United States*, 730 A.2d 145, 148-49 (D.C. 1999). For this reason, "a lethal intent can be demonstrated without showing that the assailant succeeded in wounding his intended victim." *Bedney v. United States*, 471 A.2d 1022, 1024 (D.C. 1984). Likewise, with respect to the offense of assault with intent to rob, the DCCA has held that a defendant who, after searching the victim at gunpoint, leaves the victim with his valuables can still have the requisite specific intent. *See Dowtin v. United States*, 330 A.2d 749, 750 (D.C. 1975).

not require proof that "the objective" of distribution was completed.[83] And it is likewise true with respect to "burglary," which merely requires proof that the unlawful entry was "accompanied by an intent to steal once therein"—without regard to whether "the intended theft [was] consummated."[84]

The corollary to this general recognition is that a person need not be "aware" of a circumstance to establish the specific intent requirement at issue in various inchoate crimes; instead, a mere "belief" can suffice. So, for example, the DCCA held in *Seeney v. United States* that a person acts with the "intent to commit the crime of attempted possession of a controlled substance" when that person "believes" he or she is dealing with a controlled substance.[85] Which is to say, as the DCCA further clarified in *Fields v. United States*, that proof of "the defendant's *belief* that he was dealing in controlled substances," rather than proof that the person was *aware* that the substances implicated are in fact controlled substances, will suffice to establish an attempt conviction.[86]

It's important to qualify the above analysis with a two-fold acknowledgement that: (1) the relationship between the culpable mental states of purpose, knowledge, and intent as defined in subsections (a), (b), and (c) and what is labeled a specific intent offense in District law is not absolute; and, therefore (2) a simple translation from current District case law to these RCC culpable mental states simply is not possible. To take just one example, consider that there exists both DCCA and U.S. Supreme Court precedent indicating that the culpable mental state of knowledge is actually most akin to a "general intent" standard. The DCCA's recent *en banc* decision in *Carrell v. United States* (2017) is illustrative. In one of the District's strongest statements to date regarding the need for *mens rea* modernization, seven of the DCCA's appellate judges specifically adopted both the element analysis framework[87] and accompanying culpable mental state definitions[88] of purpose and knowledge developed by the Model Penal Code (and subsequently endorsed by the U.S. Supreme Court) in resolving an ongoing conflict surrounding the culpability of criminal threats.[89] In so doing, however, the majority opinion—citing to U.S. Supreme Court case law—also indicated that knowledge may at least "loosely" correspond to a general intent standard.[90] The lack of an easy translation from the old

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[83] *Owens*, 688 A.2d at 403.

[84] *United States v. Fox*, 433 F.2d 1235, 1236 (D.C. Cir. 1970).

[85] 563 A.2d 1081, 1082 (D.C. 1989) (citing *Blackledge v. United States*, 447 A.2d 46, 48 (D.C. 1982)).

[86] 952 A.2d 859, 865 (D.C. 2008).

[87] *Carrell v. United States*, 165 A.3d 314, 320 n.13 (D.C. 2017) (*en banc*) ("We adopt these ["conduct element," "result element," and "circumstance element"] classifications from the Model Penal Code § 1.13 (9) (Am. Law Inst., Proposed Official Draft 1962).")

[88] *Id.* at 323-24 ("Following the lead of the Supreme Court . . . we likewise conclude that more precise gradations of mens rea should be employed. We have previously expressed concern about the use of 'general' and 'specific' intent. We reiterate our endorsement of more particularized and standardized categorizations of *mens rea*, and, in the absence of a statutory scheme setting forth such categorizations, we, like the Supreme Court, look to the Model Penal Code terms and their definitions.")

[89] *Id.* at 324 ("Applying this hierarchy of *mens rea* levels to the *actus reus* result element of the crime of threats, we hold that the government may carry its burden of proof by establishing that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat.").

[90] *Carrell*, 165 A.3d at 322 n.22 ("It is not entirely clear what the [*Elonis*] Court meant by this, but, read in the context of *Carter*, it appears the Court was distinguishing between "general intent" and "specific intent," [], which the Court had previously likened to "knowledge" and "purpose," respectively, *Bailey*, 444

offense analysis categories of general and specific intent to the Model Penal Code framework recognized by the DCCA only bolsters the need for legislative specification of new culpable mental states.

The definitions of purpose, knowledge, and intent contained in subsections (a), (b), and (c) provide the possibility of maintaining the culpable mental state distinctions reflected in the foregoing authorities, while also affording greater clarity and specificity to District law. Practically, these new definitions may also provide a possible means of simplifying District law, particularly in the context of inchoate offenses.

Illustrative is the District's receiving stolen property (RSP) statute, which currently employs a confusing and cumbersome approach to communicating that defendants caught in sting operations fall within the scope of the statute.[91] Specifically, the RSP statute allows for a conviction to rest upon proof that the person "knew" or had "reason to believe" he or she was possessing "stolen property."[92] Thereafter, the statute clarifies "that the term 'stolen property' includes property that is not in fact stolen,"[93] and that "[i]t shall not be a defense . . . [that] the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be." [94]

The foregoing provisions were collectively intended to make RSP an inchoate offense, applicable to actors who merely believe the property they possess to be stolen—even if the property isn't actually stolen.[95] To understand this much, however, one needs to read labyrinthine provisions of D.C. Code § 22-3232 in light of the statute's legislative history and applicable DCCA case law.[96] Under the definition of intent as to a circumstance under subsection (c)(2), in contrast, the District's current multi-pronged

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U.S. at 405, 100 S.Ct. 624 ("In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."))."

[91] The District's trafficking in stolen property (TSP) statute reflects the same issues. That statute reads, in relevant part:

> (b) A person commits the offense of trafficking in stolen property if, on 2 or more separate occasions, that person traffics in stolen property, knowing or having reason to believe that the property has been stolen.
>
> (c) It shall not be a defense to a prosecution under this section, alone or in conjunction with § 22-1803, that the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be.

D.C. Code § 22-3231.

[92] D.C. Code § 22-3232(a).

[93] D.C. Code § 22-3232(d).

[94] D.C. Code § 22-3232(b).

[95] *See Owens v. United States*, 90 A.3d 1118, 1121 (D.C. 2014). "[A]ctual knowledge," as the Council notes, is not required for an RSP conviction. D.C. COUNCIL, REPORT ON BILL 4–133 at 54 (Feb. 12, 1981). The same report also notes (with respect to the similarly worded TSP statute) that "it is intended that the offender's knowledge or belief may be inferred from the circumstances of the offense and it is not required that the offender know for a fact that the property is stolen. Rather, it is sufficient if the offender had 'reason to believe' that the property is stolen." *Id.* at 49.

[96] *See* sources cited *supra* note 91-95.

approach can be replaced with a single clause communicating the relevant point, namely, that RSP involves receiving property "with intent that the property be stolen."[97]

RCC §§ 22E-206(d) and (e): Relation to Current District Law on Recklessness and Negligence. Subsections (d) and (e) codify, clarify, and fill gaps in District law.

The culpable mental states of "recklessness" and "negligence" appear in a variety of District statutes, though no statute defines either term.[98] In the absence of a statutory definition, other District authorities—namely, DCCA case law and the D.C. Criminal Jury Instructions—have provided interpretations of identical or comparable terms in a manner that is broadly consistent with RCC §§ 22E-206(d) and (e). That said, these provisions, when viewed in light of the accompanying explanatory note, provide substantially more detail than does existing District authority. This additional detail improves the clarity, consistency, and proportionality of the RCC.

A central component of District law on recklessness is the District's cruelty to children statute, D.C. Code § 22-1101, which prohibits, *inter alia*, "recklessly . . . [m]altreat[ing] a child."[99] Notably, the statute does not define this key culpable mental state. In lieu of a statutory definition, the fourth edition of the D.C. Criminal Jury Instructions (1996) originally recommended that the term "recklessly" be interpreted in

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[97] RCC § 22E-2401 (revised RSP statute, incorporating the phrase "with intent that the property be stolen").

[98] *See, e.g.,* D.C. Code § 22-1101; D.C. Code § 22-404; D.C. Code § 5-1307.

[99] D.C. Code § 22-1101(b)(1). For earlier District authority on recklessness, see, for example, *Thompson v. United States*, 690 A.2d 479, 483 (D.C. 1997). For other District statutes employing a culpable mental state of recklessness, see, for example: D.C. Code § 22–404 (a)(2) (prescribing penalties for "[w]hoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or *recklessly* causes significant bodily injury to another" (emphasis added)); D.C. Code § 22–1006.01 (a)(5) (establishing penalties to punish "any person who knowingly or *recklessly* permits [animal fighting] . . . to be done on any premises under his or her ownership or control, or who aids or abets that act" (emphasis added)); D.C. Code § 22–1833(1) (making it "unlawful for an individual or a business to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person, knowing, or in *reckless* disregard of the fact that . . . [c]oercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act" (emphasis added)); D.C. Code § 22–1834(a) (making it unlawful to recruit or maintain by any means a person "who will be caused as a result to engage in a commercial sex act knowing or in *reckless* disregard of the fact that the person has not attained the age of 18 years" (emphasis added)); D.C. Code § 22–1314.02(a) (making it generally unlawful for a person "to willfully or *recklessly* interfere with access to or from a medical facility or to willfully or *recklessly* disrupt the normal functioning of such facility," such as by "[t]hreatening to inflict injury on the owners, agents, patients, employees, or property of the medical facility" (emphasis added)); D.C. Code § 22–1321 (a)(1) (making it unlawful, "[i]n any place open to the general public, and in the communal areas of multi-unit housing, . . . for a person to . . . [i]ntentionally or *recklessly* act in such a manner as to cause another person to be in reasonable fear that a person . . . is likely to be harmed or taken" (emphasis added)); D.C. Code 22–2803 (a)(1) (providing that a person "commits the offense of carjacking if, by any means, that person knowingly or *recklessly* by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, . . . shall take from another person immediate actual possession of a person's motor vehicle" (emphasis added)); D.C. Code § 22–3312.02 (a)(4) (making it unlawful to, *inter alia*, burn a cross or other religious symbol or to display a Nazi swastika or noose on any private premises "where it is probable that a reasonable person would perceive that the intent is . . . [t]o cause another person to fear for his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with *reckless* disregard for that probability" (emphasis added)).

general accordance with the Model Penal Code's definition of recklessness.[100] Then, in *Jones v. United States*, the DCCA had the opportunity to address the issue, determining that the required recklessness could be satisfied by proof that the accused "was aware of and disregarded the grave risk of bodily harm created by his conduct"[101]—a definition the *Jones* court deemed generally consistent with the Model Penal Code definition of "recklessly."[102]

Building on the *Jones* decision, the DCCA, in *Tarpeh v. United States*, applied a similar understanding of recklessness to interpret the requirement of "reckless indifference" in the context of the District's Criminal Neglect of a Vulnerable Adult statute, D.C. Code § 22–934.[103] Observing that "Model Penal Code § 2.02(2)(c) [] states that a 'person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustified risk that the material element exists or will result from his conduct,'" the *Tarpeh* court opted to "[a]pply th[e]se concepts to 'reckless indifference'" in a manner consistent with *Jones*.[104] Specifically, the DCCA held that "the trier of fact," to prove reckless indifference, "must show not only that the actor did not care about the consequences of his or her action, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action."[105]

Most recently, Judge Thompson, writing separately in *Carrell v. United States* (2017),[106] advocated for adopting the Model Penal Code definition of recklessness as the threshold *mens rea* for the District's criminal threats offense(s).[107] In so doing, she observes that:

> "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Dorsey v. United States*, 902 A.2d 107, 113 (D.C. 2006) (internal quotation marks omitted) (quoting *Jones v. United States*, 813 A.2d 220, 225 (D.C. 2002) (quoting Model Penal Code § 2.02 (2)(c) (Am. Law Inst. 1985))). "Recklessly means that the defendant was aware of and disregarded the grave risk . . . created by his conduct." *Jones*, 813 A.2d at 225. The Supreme Court has observed that "subjective recklessness as used in the criminal law is a familiar and workable standard[.]" *Farmer v. Brennan*, 511 U.S. 825, 839, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *see also id.* at 837, 114 S.Ct.

[100] D.C. Crim. Jur. Instr. § 4.120 cmt. (quoting Model Penal Code § 2.02(2)(c)); *see Jones v. United States*, 813 A.2d 220, 225 (D.C. 2002) (quoting and citing to *id*.).
[101] 813 A.2d at 225.
[102] *Id.* (quoting Model Penal Code § 2.02(2)(c)).
[103] 62 A.3d 1266, 1270 (D.C. 2013).
[104] *Id.*
[105] *Id.*
[106] 165 A.3d 314 (D.C. 2017) (*en banc*).
[107] *Id.* at 330 ("I write separately to explain why I believe we should hold that recklessness is enough to satisfy the *mens rea* element (at least of § 22–407, if not § 22–1810).").

> 1970 (Recklessness exists "when a person disregards a risk of harm of which he is aware." (citations omitted)).[108]

The DCCA's approach to negligence appears similar to its approach to recklessness, except awareness of the risk is not necessary. Few District statutes require this particular culpable mental state; however, the DCCA has interpreted the District's broadly worded manslaughter statute to incorporate the offense of involuntary manslaughter, which is governed by the mental state of "culpable (criminal) negligence."[109] Case law establishes that this culpable mental state, in turn, entails proof that the actor's conduct created "extreme danger to life or of serious bodily injury," which amounts to "a gross deviation from a reasonable standard of care."[110] Such requirements are to be distinguished, as the DCCA has further explained, from "simple or civil negligence," which is merely "a failure to exercise that degree of care rendered appropriate by the particular circumstances in which a man or woman of ordinary prudence in the same situation and with equal experience would not have omitted."[111] (Note, however, that the District's vehicular homicide statute, § 50-2203.01, appears to incorporate this civil negligence standard.[112])

The definition of recklessness reflected in subsections (d)(1) and (2) is intended to generally capture the above District authorities on recklessness and reckless indifference. At the same time, however, it is also intended to allow future factfinders to proceed in a clearer and more consistent fashion. For example, the extent to which a risk is grave, an actor's disregard of the risk is culpable, or whether it can be said that an actor did not care about the consequences of his or her action, necessarily hinge upon a variety of fact-specific considerations pertaining to the person's blameworthiness for engaging in it. These include, among other factors, the circumstances known to the actor, the reasons why the actor consciously disregarded the risk, and the extent to which any aspects of the actor's situation reasonably hindered the actor's ability to exercise an appropriate level of concern for the interests of others. The clear blameworthiness standard and accompanying evaluative framework stated in RCC §§ 22E-(d)(1)(B) and (2)(B) appropriately accounts for these considerations.

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[108] *Id.* at 330–31.
[109] *Faunteroy v. United States*, 413 A.2d 1294, 1298–99 (D.C. 1980).
[110] *Comber*, 584 A.2d at 48.
[111] *Faunteroy*, 413 A.2d at 1298-99.
[112] The relevant statutory provision reads:

> Any person who, by the operation of any vehicle in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, including a pedestrian in a marked crosswalk, or unmarked crosswalk at an intersection, shall be guilty of a felony, and shall be punished by imprisonment for not more than 5 years or by a fine of not more than the amount set forth in § 22-3571.01 or both.

D.C. Code § 50-2203.01. The phrase "careless, reckless, or negligent manner" has in turn been interpreted to mean operating a "vehicle without the exercise of that degree of care that a person of ordinary prudence would exercise under the same or similar circumstances . . . . It is a failure to exercise ordinary care." *Butts v. United States*, 822 A.2d 407, 416 (D.C. 2003).

The definition of negligence reflected in subsections (e)(1) and (2) is broadly consistent with the above District authority on involuntary manslaughter.[113] Consistent with the analysis of recklessness *supra*, however, this definition—when viewed in light of the clear blameworthiness standard and accompanying evaluative framework stated in RCC §§ 22E-(e)(1)(B) and (2)(B)—is also intended to provide future factfinders with the basis for identifying it in a clearer and more consistent fashion.

RCC § 22E-206(f): Relation to Current District Law on Culpable Mental State Hierarchy. Subsection (f) generally accords with District law governing the relationship between culpable mental states.

Although no District authority has squarely addressed the principle reflected in subsection (f), many of the District's more recent statutes suggest what this provision explicitly states: where knowledge/intent will suffice to establish an objective element, so will purpose; where recklessness will suffice, so will knowledge/intent or purpose; and where negligence will suffice, so will recklessness, knowledge/intent, or purpose. This is reflected in the legislature's occasional practice of noting hierarchically superior mental states alongside the lowest mental state.[114] Under the RCC, in contrast, the legislature need not state alternative mental states in the definition of an offense; rather, a codified statement of the lowest culpable mental state sufficient to establish a given objective element is sufficient.

[113] Note, however, that the reference to "*extreme* danger to life or of serious bodily injury" in the DCCA's definition of the negligence governing involuntary manslaughter is likely distinct from the mere "substantial risk" referenced in the RCC's definition of negligence under RCC §§ 22E-206(e)(1)-(2).

[114] D.C. Code § 22-404.01 (knowledge or purpose as to causing serious bodily injury); D.C. Code § 22-404 (intent, knowledge, or recklessness as to causing serious bodily injury); D.C. Code § 22-1101 (intent, knowledge, or recklessness as to causing mistreatment); D.C. Code § 5-1307 (intent, knowledge, recklessness, or negligence as to causing interference).

RCC § 22E-207. Rules of Interpretation Applicable to Culpable Mental States.

1. RCC § 22E-207(a)—Distribution of Enumerated Culpable Mental States.

Explanatory Note. Subsection (a) states the rule of interpretation governing the distribution of enumerated culpable mental states under the RCC. It establishes that any enumerated culpable mental state (including strict liability under RCC § 22E-207(b)) applies to all ensuing results and circumstances, until another culpable mental state (or strict liability) is specified, in which case the subsequently specified culpable mental state should be distributed in a similar fashion.[1]

To illustrate how this rule of interpretation operates, consider an offense that prohibits "knowingly causing bodily injury to a child." Here, the enumerated culpable mental state of knowingly *could* be interpreted as solely applying to the result element of causing bodily injury. Or it *could* be read to apply to both that result and the requisite circumstance element, namely, that the person to whom bodily injury was caused *have been a child*. Under subsection (a), the latter reading would be the correct one since both of these objective elements follow (i.e., are modified by) the culpable mental state of knowingly.[2]

Subsection (a) facilitates consistency in the law by providing a precise rule for distributing all culpable mental states among the results and circumstances of an offense. However, it also provides the legislature with an important drafting shortcut. Whenever the legislature wishes to apply the same culpability term to consecutive results and circumstances, it need only state that term once with the expectation that it will be distributed appropriately under subsection (a). There is no need for the legislature to repeat the same culpable mental state in an offense under the RCC.[3]

Relation to Current District Law. Subsection (a) fills a gap in District law. The D.C. Code lacks a fixed rule of interpretation for distributing culpability terms, or for interpreting criminal statutes more generally. In the absence of a rule of this nature, the DCCA tends to employ a highly discretionary and context sensitive approach to

[1] In so doing, this rule of interpretation clarifies the objective elements in an offense to which the legislature intends for a specified culpable mental state to apply. *See, e.g., Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) ("In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."); *Id.* at 652 ("[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with [a culpable mental state such as] the word 'knowingly' as applying that word to each element."); *United States v. X–Citement Video, Inc.,* 513 U.S. 64, 79 (1994) (Stevens, J., concurring) (describing this rule as the "normal, commonsense reading of a subsection of a criminal statute").

[2] If, however, the offense definition prohibited "knowingly causing injury to a person, negligent as to whether the person is a child," then, pursuant to subsection (a), the culpable mental state of knowledge would apply only to the result, while the culpable mental state of negligence—which is subsequently specified—would govern the requisite circumstance.

[3] As might otherwise be required to clarify the culpable mental states to which various objective elements are subject in the absence of subsection (a).

interpreting criminal statutes.[4] On at least one occasion, however, the court has deemed a rule of distribution such as that reflected in subsection (a) to reflect the "most straightforward reading of the [mental state] language" employed in a criminal statute.[5]

2. RCC § 22E-207(b)—Identification of Elements Subject to Strict Liability.

Explanatory Note. Subsection (b) states the rule of interpretation governing the identification of strict liability under the RCC. It establishes that a result or circumstance is subject to strict liability if one of two conditions is met. First, under paragraph (b)(1), a result or circumstance is subject to strict liability if it is modified by the phrase "in fact."[6] Second, under paragraph (b)(2), a result or circumstance is subject to strict liability if—notwithstanding the absence of the "in fact" modifier—another statutory provision explicitly indicates strict liability applies to that result or circumstance.

Here is an illustrative example of how each aspect of this provision operate. An offense definition that prohibits "knowingly causing bodily injury to a person who is, in fact, a child" should, pursuant to paragraph (b)(1), be understood to apply strict liability to the requisite circumstance element, namely, that the person to whom bodily injury was caused was a child.[7] In contrast, an offense definition that prohibits "knowingly causing bodily injury to a child" and thereafter explicitly states that "a defendant shall be held strictly liable with respect to whether the victim harmed was a child," should, pursuant to paragraph (b)(2), be given its intended effect.

Subsection (b) facilitates consistency in the law by providing a fixed methodology for appropriately recognizing strict liability elements. However, it also provides the legislature with important drafting shortcuts. Whenever the legislature intends to apply strict liability to a single result or circumstance, use of the phrase "in fact" is a simple and efficient means of communicating this point.

Relation to Current District Law. Subsection (b) fills a gap in, but generally coheres with, District law. The D.C. Code lacks a standard way to specify offense elements that are subject to strict liability, even though elements and offenses subject to strict liability offenses exist in the District.[8] However, the DCCA does not lightly infer

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[4] *See, e.g., In re D.F.*, 70 A.3d 240 (D.C. 2013); *Holloway v. United States*, 951 A.2d 59 (D.C. 2008); *Pelote v. Dist. of Columbia*, 21 A.3d 599 (D.C. 2011); *Luck v. Dist. of Columbia*, 617 A.2d 509, 515 (D.C. 1992).

[5] *Perry v. United States*, 36 A.3d 799, 816 (D.C. 2011).

[6] Note that two objective elements in an offense definition may be subject to strict liability by repeating the phrase "in fact." Consider, for example, an offense definition that reads: "Knowingly causing bodily injury to a person, who is, in fact, a child, with what is, in fact, a knife." Here, both circumstance elements—that the victim be a child and that the bodily injury be inflicted with a knife—are subject to strict liability under paragraph (b)(1).

[7] While an enumerated culpable mental state "skips" over an objective element modified by "in fact," it nevertheless continues to "travel" and apply to subsequent objective element under RCC § 22E-207(a). For example, an offense definition that reads: "Knowingly causing bodily injury to a person, who is, in fact, a child, with a knife. Under the rules of interpretation, the mental state of "knowingly" would apply to both the result of "causing bodily injury," and the circumstance of "with a knife."

[8] As the DCCA observed in *McNeely v. United States*, "Strict liability criminal offenses—including felonies—are not unprecedented in the District of Columbia; the Council has enacted several such statutes

the absence of a culpable mental state; rather, it must be "clear the legislature intended to create a strict liability offense."[9] And, in the absence of an "obvious [legislative] purpose" to impose strict liability, "the common law presumption in favor of imposing a *mens rea* requirement where a statute is otherwise silent" operates.[10]

3. RCC § 22E-207(c)—Determination of When Recklessness Is Implied.

Explanatory Note. Subsection (c) states a default rule, which addresses any interpretive ambiguities concerning culpable mental states that remain after consideration of the previous rules set forth in section 207.[11] Specifically, this rule establishes that an offense definition which fails to clarify the culpable mental state (or strict liability) applicable to a given result or circumstance should be interpreted as applying a default of recklessness to that element.[12]

Here are two illustrative examples of the kinds of situations where this default rule might apply. First, an offense definition might not specify any culpable mental state at all, such that the rule of distribution stated in subsection (a) is inapplicable, while, at the same time, failing to clarify that strict liability is applicable under subsection (b). Consider, for example, a hypothetical theft of government property offense that reads: "No person shall take government property without consent." Second, an offense definition might specify a culpable mental state but do so after some objective elements have already been enumerated, and which are neither governed by an explicitly specified culpable mental state nor clearly subject to strict liability. Consider, for example, a hypothetical aggravated theft of government property offense that reads: "No person shall take government property without consent and knowingly sell it to another." In each of these situations, the default rule reflected in subsection (c) establishes that the relevant objective elements are subject to a culpable mental state of recklessness.[13]

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in the past." 874 A.2d 371, 385–86 (D.C. 2005) (collecting statutes); *see also In re E.F.*, 740 A.2d 547, 550-51 (D.C. 1999) (discussing D.C. Code § 22-3011(a)).

[9] *Conley v. United States*, 79 A.3d 270, 289 n.91 (D.C. 2013) (quoting *Santos v. District of Columbia*, 940 A.2d 113, 116–17 (D.C. 2007)).

[10] *McNeely*, 874 A.2d at 379–80. "[W]here the legislature is acting in its capacity to regulate public welfare," however, mere "silence can be construed as a legislative choice to dispense with the *mens rea* requirement." *Id.* at 388.

[11] *See, e.g., Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("'[M]ere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it,'" which "rules of interpretation reflects the basic principle that 'wrongdoing must be conscious to be criminal.'") (quoting *Morissette v. United States*, 342 U.S. 246, 249 (1952)); *United States v. X–Citement Video, Inc.,* 513 U.S. 64, 79 (1994) (Stevens, J., concurring) (courts have for a long time opted to "interpret criminal statutes to include broadly applicable [*mens rea*] requirements, even where the statute by its terms does not contain them").

[12] *See, e.g.,* Model Penal Code § 2.02(3), cmt. at 127 (recklessness default rule reflects "the common law position"); Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683 (1983) ("recklessness is generally accepted as the theoretical norm" for criminal liability); *Elonis*, 135 S. Ct. at 2015 (Alito, J. concurring) (recklessness provides sound basis for punishment and offers most appropriate default rule for courts to employ "without stepping over the line that separates interpretation from amendment").

[13] Specifically, the objective elements of a "taking," that the object taken be "government property," and that the taking occur "without consent" would all be subject to recklessness.

Subsection (c) facilitates consistency in the law by providing a precise rule for determining how to resolve situations of interpretive ambiguity regarding culpable mental states. It may also provide, however, what amounts to a drafting shortcut for the legislature in those situations where the legislature intends to apply recklessness to multiple objective elements (as reflected in the two examples noted above).

Relation to Current District Law. Subsection (c) fills a gap in, but generally coheres with, District law. The D.C. Code lacks a fixed rule of interpretation for implying culpable mental state terms. In the absence of a rule of this nature, the DCCA employs "an interpretive presumption that *mens rea* is required," notwithstanding statutory silence to the contrary, so long as the implication of a culpable mental state would not be contrary to legislative intent.[14] As the DCCA has recognized, "[t]he presumption is based on the common understanding of malum in se offenses, which traditionally are 'generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand.'"[15]

[14] *Conley*, 79 A.3dat 289 (citing *Santos v. District of Columbia*, 940 A.2d 113, 116–17 (D.C. 2007)).
[15] *McNeely*, 874 A.2d at 388 (quoting *Morissette v. United States*, 342 U.S 246, 251 (1952)). For a sustained argument by one judge on the DCCA in support of a recklessness default in the context of the District's criminal threats statute, see *Carrell v. United States*, 165 A.3d 314, 330-39 (D.C. 2017) (Thompson, J., concurring in part and dissenting in part).

RCC § 22E-208. Principles of Liability Governing Accident, Mistake, and Ignorance.

Explanatory Note. Section 208 establishes general principles of liability governing issues of accident, mistake, and ignorance throughout the RCC.[1]

Subsection (a) addresses the overarching effect of accidents, mistakes, and ignorance on offense liability. It broadly clarifies that a person's accident, mistake, or ignorance as to a matter of fact or law will typically relieve that person of liability when (but only when) it precludes the person from acting with the culpable mental state applicable to a result or circumstance element.[2] This means that the relationship between the culpable mental state requirement governing an offense and accident, mistake, and ignorance is typically one of logical relevance: any accident, mistake or ignorance is relevant when (but only when) it prevents the government from meeting its affirmative burden of proof with respect to a culpable mental state applicable to a result or circumstance element.[3] In this sense, accident, mistake and ignorance do not—generally speaking[4]—constitute defenses, but rather, simply describe conditions that may preclude the government from establishing liability.

Subsection (b) clarifies the nature of the relationship between mistake and the culpable mental state requirement applicable to circumstance elements using the terminology most commonly associated with mistake claims.[5] The courts, when presented with the claim that a given mistake as to a matter of fact or law negates an offense's culpability requirement, have historically found it helpful to evaluate the

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[1] Accidents typically relate to the culpable mental state governing the result element(s) of an offense. *See* Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 504-07 (1990) ("An accident occurs when one brings about a result without desiring or foreseeing it"). In contrast, mistakes implicate the culpable mental state governing the circumstance element(s) of an offense. *See* Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 73 (1996) ("Mistakes occur in the realm of perception; they involve false beliefs"). According to this distinction, "[o]ne makes a 'mistake' as to another's age or property, the obscene nature of a publication, or other circumstance elements, but one 'accidentally' injures another, pollutes a stream, or interferes with a law enforcement officer." Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 732 (1983). Ignorance, like mistake, implicates the culpable mental state governing the circumstance element(s) of an offense, *id.*; however, whereas mistake "suggests a wrong belief about the matter," "'[i]gnorance' implies a total want of knowledge—a blank mind—regarding the matter under consideration." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.01 n.2 (6th ed. 2012).

[2] *See, e.g.,* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.6(a) (3d ed. Westlaw 2019) ("Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense."); DRESSLER, *supra* note 1, at § 12.02 ("[B]ecause of a mistake, a defendant may not possess the specific state of mind required in the definition of the crime. In such circumstances, the defendant must be acquitted because the prosecutor has failed to prove an express element of the offense.").

[3] Note, however, that RCC § 22E-208(d) addresses a particular situation where, although an actor's ignorance negates the culpable mental state of knowledge as to a particular circumstance, that culpable mental state is nevertheless imputed on policy grounds.

[4] *But see* RCC § 208(c)(2) (noting the possibility that a person's "mistake or ignorance" can "satisf[y] the requirements for a general excuse defense").

[5] *See, e.g.,* LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 5.6(a) ("No area of the substantive criminal law has traditionally been surrounded by more confusion.").

overarching reasonableness of that mistake. Consistent with this evaluation, paragraphs (b)(1) and (2) jointly clarify that any mistake—whether reasonable or unreasonable—has the capacity to negate the existence of the purpose, knowledge, or intent applicable to a circumstance element. Paragraph (b)(3) thereafter states the rule applicable to an area of mistake law where the traditional reasonableness analysis breaks down—the nature of the mistake that will negate the existence of recklessness as to a circumstance element. In this context, any reasonable mistake will preclude the government from meeting its burden of proof; however, an unreasonable mistake will only negate the requisite recklessness if the person was not reckless making the mistake.[6] Along similar lines, paragraph (b)(4) clarifies that while any reasonable mistake will also categorically negate negligence as to a circumstance element, an unreasonable mistake will only preclude the government from meeting its burden of proof if the defendant was not negligent in making the mistake.[7]

To illustrate the reciprocal nature of the relationship between mistake claims and the culpable mental state requirement governing a circumstance element, consider the situation of a person who: (1) takes a piece of property owned by someone else, motivated by a mistaken belief that the property was abandoned; and (2) is thereafter prosecuted under a statute that reads: "No person shall unlawfully use the property of another." Under these circumstances, the nature of the mistaken belief as to abandonment that will preclude the government from meeting its affirmative burden of proof is part and parcel with the culpable mental state (if any) the court deems to govern the circumstance element, "of another."

For example, if the statute is interpreted to require proof of knowledge as to whether the property was "of another," then any mistake as to the property's ownership status by the defendant will preclude the government from meeting its burden of proof under the RCC. The reason? If the defendant wholeheartedly believed—whether reasonably or unreasonably—that the property was abandoned, then he cannot, by definition, have been "practically certain" that the property was someone else's, per the RCC definition of knowledge.[8]

If, in contrast, the statute is interpreted to require proof of recklessness or negligence as to whether the property was "of another," then only a reasonable mistake as to the property's ownership status by the defendant will *categorically preclude* the government from meeting its burden of proof. This is because unreasonable conduct is at the heart of both recklessness and negligence, which, as defined under the RCC, each

[6] Which is to say, the person was either: (1) unaware of a substantial risk that the requisite circumstance existed in light of the mistake (i.e., merely negligent); or (2) was not clearly blameworthy in forming the mistaken belief. RCC § 22E-206(d)(2) (defining "recklessly" as to circumstances); *see infra* note 13 and accompanying text (providing illustration).

[7] Which is to say, the person was not "clearly blameworthy" in forming the mistaken belief under the circumstances. RCC § 22E-206(e)(2) (defining "negligently" as to circumstances); *see infra* note 14 and accompanying text (providing illustration). All the more so, reckless mistakes, which are necessarily negligent mistakes (and also clearly blameworthy), cannot negate the culpable mental state of negligence.

[8] RCC § 22E-206(b)(2). The same analysis would apply if the statute was construed to require "intent," which, like "knowledge," requires a practically certain belief as to the existence of a circumstance. *See* Commentary on RCC § 22E-206(c): Explanatory Note (explaining semantic difference between knowledge and intent under the RCC).

entail the disregard a "substantial risk" in a manner that is "clearly blameworthy" under the circumstances.[9]

With that in mind, determining whether an unreasonably mistaken belief that the property was abandoned will preclude the government from carrying its burden of proof against the defendant for either recklessness or negligence requires a more contextual analysis, which takes into account both: (1) the precise nature of the mistake; and (2) which of these two non-intentional mental states is at issue.

For example, in a recklessness prosecution, two different kinds of unreasonable mistakes regarding the ownership status of the property at issue will negate the required culpability under RCC § 22E-206(d). The first is an unreasonable mistake that is *unequivocally held*,[10] and therefore precludes the government from establishing that the defendant "consciously disregard[ed] a substantial risk" that the property was owned by someone else.[11] The second is an unreasonable mistake that—even if *equivocally* held[12]—is *insufficiently culpable* to meet the clear blameworthiness standard incorporated into the RCC definition of recklessness.[13]

In a negligence prosecution, in contrast, only the latter type of unreasonable mistake will preclude the government from meeting its burden of proof. Which is to say: an unreasonable mistake concerning the property's ownership statute can negate a requirement of negligence as to whether the property was "of another," but only if the defendant's failure to accurately assess whether the property was abandoned is *insufficiently culpable* to meet the comparable meet the comparable clear blameworthiness standard incorporated into the RCC definition of negligence.[14]

Subsection (c) addresses the general effect of a specific kind of mistake or ignorance on offense liability—a mistake or ignorance as to the illegality of one's conduct. The prefatory clause to this provision sets forth the general presumption, "familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."[15] Under "unusual circumstances," however, "that maxim" must give way

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[9] RCC § 22E-206(d); *id.* at (e).

[10] For example, if, because of the unreasonable mistake, the person was *100% confident* that the property was abandoned, then the government could not prove that the defendant "consciously disregard[ed] a substantial risk" as to the ownership status of the property, per the RCC definition of recklessness. RCC § 22E-206(d)(2)(A). But if, in contrast, the person was only *70% confident* that the property was abandoned by virtue of the mistake, then the government might still be able to prove that the defendant "consciously disregard[ed] a substantial risk" as to the ownership status of the property, per the RCC definition of recklessness. RCC § 22E-206(d)(2)(A).

[11] RCC § 22E-206(d)(2)(A).

[12] *See supra* note 10.

[13] RCC § 22E-206(d)(2)(B).

[14] RCC § 22E-206(e)(2)(B).

[15] *Conley v. United States*, 79 A.3d 270, 281 (D.C. 2013) (quoting *Barlow v. United States,* 32 U.S. (7 Pet.) 404, 411, 8 L.Ed. 728 (1833)); *see, e.g., McFadden v. United States*, 135 S. Ct. 2298, 2304, 192 L. Ed. 2d 260 (2015) ("[I]gnorance of the law is typically no defense to criminal prosecution"); *Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."). Consistent with this general principle, "a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules . . . would [] be guilty of knowingly distributing 'a controlled substance.'" *McFadden*, 135 S. Ct. at 2304. Under these circumstances, the fact that the defendant is ignorant as to the particular law setting forth the definition of

to other general culpability principles.[16] Paragraphs (c)(1) and (c)(2) respectively address two relevant sets of such circumstances.

In the first situation, addressed by paragraph (c)(1), the statute under which the defendant is being prosecuted requires proof of a culpable mental state (e.g., knowledge, intent, recklessness, or negligence) as to the illegality of one's conduct.[17] Under these

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the crime in question does not provide grounds for an excuse.

The latter situation is to be contrasted with a prosecution for an offense comprised of a circumstance element the satisfaction of which hinges upon a legal judgment extrinsic to the definition of that offense. The following trespass statute is illustrative: "No person shall knowingly enter the property of another without license or privilege." If a person is prosecuted under this statute for unlawfully entering the property of another motivated by a mistaken claim of right, the person's inaccurate assessment of his or her property rights *would* constitute a defense under the circumstances. For although that person's mistake may be rooted in his or her ignorance of the law governing access to property, it nevertheless precludes the government from proving the culpable mental state applicable to a circumstance element in the offense—namely, that the defendant *knew* that he or she was entering another person's property *without a license or privilege*. *See, e.g.,* LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 5.6(d) ("[T]he crime of larceny is not committed if the defendant, because of a mistaken understanding of the law of property, believed that the property taken belonged to him[.]").

[16] *Conley*, 79 A.3d at 281 (quoting *United States v. Wilson*, 159 F.3d 280, 293 (7th Cir.1998)(Posner, J., dissenting).

[17] To the extent culpability as to illegality is ever required by the RCC, it will typically be incorporated into an offense definition. The RCC's possession of stolen property statute is illustrative; it requires proof that the defendant "purchase[d]" or "possess[ed]" property with, *inter alia*, an "intent that the property be stolen." RCC § 22E-2401. The latter culpability requirement could presumably be negated by a mistake as to what constitutes theft under District law, such as, for example, where defendant X purchases stolen property from seller Y while operating under a mistaken belief that the manner in which the property was taken did not amount to theft in the District. Importantly, this is to be contrasted with *a mistaken belief that purchasing stolen property is not a crime* in the District, which would *not* negate the "intent that the property be stolen" culpability requirement (and therefore would not constitute a defense to possession of stolen property). *See, e.g., Liparota v. United States*, 471 U.S. 419, 425 n.9 (1985) ("In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen . . . It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal . . . It *is,* however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen."); *Morissette v. United States,* 342 U.S. 246 (1952) (holding that it is a defense to a charge of "knowingly converting" federal property that one did not know that what one was doing was a conversion).

It is also possible, however, that a culpability as to illegality element will be implied through some other general provision. For example, RCC § 22E-202(c) limits omission liability to situations where a person "is either aware that the legal duty to act exists or culpably unaware that the legal duty to act exists." According to this limitation, a defendant's reasonable ignorance as to whether he or she was obligated to engage in some act required by the criminal law—for example, exiting a vehicle that contains a firearm—could constitute a defense in a prosecution premised on omission liability. *See Conley*, 79 A.3d at 281 (striking down a District statute criminalizing unlawful presence in a motor vehicle containing a firearm on the rationale that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy.") (citing *Lambert v. People of the State of California*, 355 U.S. 225 (1957)).

Another example of an implied culpability as to illegality element is reflected in the RCC general provision governing deliberate ignorance, RCC § 22E-208(d), which authorizes the factfinder to impute knowledge as to a circumstance where the government proves beyond a reasonable doubt that: (1) the actor was at least reckless as to whether the prohibited circumstance existed; and (2) the actor avoided confirming or failed to investigate the existence of the circumstance with the purpose of avoiding criminal liability. The second prong of this general provision entails proof of knowledge as to the illegality of the

circumstances, the defendant's mistake or ignorance as to the prohibited nature of his or her conduct must be subjected to the same logical relevance analysis set forth in subsection (a), namely, did the mistake or ignorance "[n]egate[] a culpable mental state" applicable to the required circumstance element of illegality?

In the second situation, addressed by paragraph (c)(2), "[t]he person's mistake or ignorance…satisfies the requirements for a general defense under RCC § 22E-40[X]." This catch-all provision allows for the possibility that mistake or ignorance as to the illegality of one's conduct might, under limited circumstances, constitute a true justification or excuse in the sense of exculpating a defendant who otherwise satisfies the affirmative elements of an offense.[18]

Subsection (d) establishes a generally applicable principle of imputation[19] to deal with the situation of an actor who deliberately ignores a prohibited circumstance, otherwise suspected to exist, in order to avoid criminal liability.[20] If this actor is later prosecuted for a crime that requires proof of knowledge as to that circumstance under RCC § 22E-206(b)(2), the actor may be able to point to a level of ignorance sufficient to preclude the government from establishing the requisite awareness as to a practical certainty.[21] Nevertheless, under these specific conditions, that actor is—given his or her initial suspicions and later purposeful avoidance—just as blameworthy as a person who possessed a degree of awareness sufficient to satisfy the RCC definition of knowledge.[22]

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deliberately ignorant actor's conduct to the extent that such awareness of criminality is a necessary prerequisite to acting "*with the purpose of avoiding criminal liability.*" RCC § 22E-208(d)(2) (italics added).

[18] *See, e.g.,* LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 5.6(a) (While "it may be correctly said that ignorance of the law is no excuse [], there are exceptions when the defendant reasonably believes his conduct is not proscribed by law and that belief is attributable to an official statement of the law or to the failure of the state to give fair notice of the proscription."); *Bsharah v. United States*, 646 A.2d 993, 1000 (D.C. 1994) (recognizing the possibility that a general excuse defense based on mistake or ignorance as to illegality might be "available to a defendant who 'reasonably' relied on a conclusion or statement of law 'issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field'") (quoting *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976) and citing Model Penal Code § 2.04(3)(b)").

[19] *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 611 (1984) ("Typically, the set of elements defining a crime comprise what may be called the paradigm of liability for that offense: An actor is criminally liable if and only if the state proves all these elements. The paradigm of an offense, however, does not always determine criminal liability . . . . [Some] exceptions inculpate actors who do not satisfy the paradigm for the offense charged. Such inculpating exceptions may be termed instances of "imputed" elements of an offense.").

[20] Many different labels are applied to describe this problem, including connivance, willful blindness, willful ignorance, conscious avoidance, and deliberate ignorance. *See, e.g.*, ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 867 (3d ed. 1982); Rollin M. Perkins, *"Knowledge" as a Mens Rea Requirement*, 29 HASTINGS L.J. 953, 956-57 (1978). The RCC uses the phrase "deliberate ignorance" throughout for purposes of clarity and consistency.

[21] *E.g.,* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157, 159 (2d ed. 1961); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 196-97 (1990).

[22] Conversely, outside of this narrow context, an actor is unlikely to be just as blameworthy as a person who possesses a degree of awareness sufficient to satisfy the RCC definition of knowledge. For example, consider the situation of a parent driving carpool who declines to check his child's backpack after smelling what might be a controlled substance for any (or all) of the following reasons: (1) he wants to respect his child's privacy; (2) he doesn't want to lose the child's hard-earned trust; and/or (3) he simply doesn't want

In light of this moral equivalency,[23] subsection (d) authorizes the factfinder to impute knowledge as to a circumstance where the government proves beyond a reasonable doubt that: (1) the actor was at least reckless as to whether the prohibited circumstance existed; and (2) with the purpose of avoiding criminal liability, the actor avoided confirming or failed to investigate the existence of the circumstance. (Note that the defendant's purpose of avoiding criminal liability need not be the only, or even the primary, motivation for engaging in the conduct. At the very least, though, it must be a substantial motivating factor.[24])

Relation to Current District Law. RCC § 22E-208 codifies, clarifies, fill in gaps, and changes current District law.

While the D.C. Code does not address accident, mistake, or ignorance, the DCCA applies an approach to these issues that is substantively consistent with the principles reflected in subsections (a) and (b). Consistent with DCCA case law, the RCC views the overarching relevance of an accident, mistake, or ignorance to liability to be a product of whether it precludes the government from proving an offense's culpable mental state requirement beyond a reasonable doubt. Importantly, however, the RCC approach to these issues will fundamentally change District law in two significant ways. First, the RCC will, by clarifying the culpable mental state governing each objective element of every offense, practically end use of the judicially developed concepts of general intent and specific intent crimes at the heart of the DCCA case law on accident, mistake, and ignorance. Second, this clarification of culpable mental state requirements, when viewed in light of subsections (a) and (b), will ensure that it is the legislature, not the judiciary, that makes all policy decisions concerning the relevance of accident, mistake, or

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to know whether his child is, in fact, using controlled substances. Under these circumstances, where the parent's deliberate avoidance is not motivated by a desire to avoid criminal liability, it cannot be said that he is as blameworthy as one who knowingly transports controlled substances. *See United States v. Heredia*, 483 F.3d 913, 924, 928 (9th Cir. 2007) (Absent proof of a "motivation to avoid criminal responsibility," deliberate ignorance doctrine would effectively create "[a] criminal duty to investigate the wrongdoing of others to avoid wrongdoing of one's own," which is a "novelty in the criminal law." For example, "[s]hall someone who thinks his mother is carrying a stash of marijuana in her suitcase be obligated, when he helps her with it, to rummage through her things?" Or [s]hall all of us who give a ride to child's friend search her purse or his backpack?").

[23] "The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge." *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766, 131 S. Ct. 2060, 2069, 179 L. Ed. 2d 1167 (2011) (citing J. Ll. J. Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 302 (1954)). And that remains the strongest justification for the imputation of knowledge for deliberately ignorant actors today. *See, e.g.,* Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29 (1994); Alexander F. Sarch, *Willful Ignorance, Culpability, and the Criminal Law*, 88 ST. JOHN'S L. REV. 1023 (2014).

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

ignorance to liability. These departures are intended to improve the clarity, consistency, and completeness of District law.

The approach to dealing with culpability as to the criminality of one's conduct incorporated into subsection (c) is similarly in accordance with DCCA case law. This general provision codifies the presumption, well established in the District, that mistake or ignorance as to a matter of *penal* law is not a defense to criminal liability. That said, DCCA case law also recognizes that in certain limited circumstances this presumption must cede to other generally applicable principles of criminal law. Subsection (c) articulates these potential exceptions in a manner that improves the clarity, consistency, and completeness of District law.

Subsection (d) codifies a rule of imputation applicable to the situation of an actor who deliberately ignores a prohibited circumstance, which he or she otherwise suspects to exist, in order to avoid criminal liability. The D.C. Code is silent on how to deal with these situations of deliberate ignorance; however, the DCCA has generally recognized the applicability of a rule of knowledge imputation through case law. Yet reported decisions addressing this doctrine are scant, and those that do exist provide limited direction on the approach envisioned by the DCCA. Subsection (d) fills this gap in the law by providing a clear and comprehensive approach to dealing with the deliberately ignorant actor.

RCC §§ 22E-208(a) and (b): Relation to Current District Law on Accident, Mistake, and Ignorance. Subsections (a) and (b) codify, clarify, fill in gaps, and change current District law governing accident, mistake, and ignorance.

Under current District law, "[d]efenses of accident and mistake of fact (or non-penal law) have potential application to any case in which they could rebut proof of a required mental element."[25] The same approach appears to be similarly applicable to ignorance as to a matter of fact (or non-penal law), which can rebut proof of a required mental element, though it should be noted that ignorance of this nature appears to be generally assimilated into the District's law of mistake.[26]

To determine when this kind of rebuttal is possible for mistakes, the DCCA typically relies upon the distinction between specific intent crimes and general intent crimes. For specific intent crimes, the DCCA posits that any honestly held mistake as to a relevant matter of fact or law will constitute a defense to the crime charged, regardless of whether the mistake is reasonable or unreasonable.[27] For general intent crimes, however, the DCCA has repeatedly held that only an honestly held and reasonable mistake as to a relevant matter of fact or law will constitute a defense to the crime charged.[28] With respect to claims of accident, in contrast, DCCA case law seems to primarily focus on general intent crimes, to which accidents may constitute a defense.[29]

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[25] D.C. Crim. Jur. Instr. § 9.600 (collecting relevant cases). As the DCCA recently observed: "The mistake of fact doctrine shields the accused from criminal liability if his or her mistake rebuts the mental state included in the offense." *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013).
[26] *See, e.g., Simms v. District of Columbia*, 612 A.2d 215, 219 (D.C. 1992).
[27] *See, e.g., Hawkins v. United States*, 103 A.3d 199, 201 (D.C. 2014); *In re Mitrano*, 952 A.2d 901, 905 (D.C. 2008).
[28] *See, e.g., Simms v. District of Columbia*, 612 A.2d 215, 218 (D.C. 1992); *Goddard v. United States*, 557 A.2d 1315, 1316 (D.C. 1989); *Williams v. United States*, 337 A.2d 772, 774–75 (D.C. 1975).
[29] For example, the commentary to the District's criminal jury instructions states that:

It seems clear, however, that accidents also constitute a defense to specific intent crimes, which entail a higher *mens rea*.

The outward clarity and simplicity of the foregoing framework obscures a range of issues, many of which the DCCA has itself recognized. At the heart of the problem is the "venerable common law classification" system it relies upon, offense analysis, which "has been the source of a good deal of confusion."[30] The reasons for this confusion are well known: the central culpability terms that comprise the system, "general intent" and "specific intent," are little more than "rote incantations" of "dubious value,"[31] which can "be too vague or misleading to be dispositive or even helpful."[32] Each term envisions a singular "umbrella culpability requirement that applie[s] in a general way to the offense as a whole."[33] Both, therefore, "fail[] to distinguish between elements of the crime, to which different mental states may apply."[34]

The District's reliance on these ambiguous distinctions to address mistake and accident claims has brought with it the standard litany of consequences associated with offense analysis. The first three problems are primarily relevant to the District's law of mistake.

First, reliance on the distinctions between general intent and specific intent crimes in this context allows for judicial policymaking, given that there is no reliable mechanism, legislative or judicial, for consistently communicating this classification.[35]

> For offenses that have been understood to be "general intent" crimes, the Committee has settled on describing the required state of mind as the defendant having acted "voluntarily and on purpose, not by mistake or accident." When a "specific intent" is required, the Committee has described the element as the defendant "intended to" cause the required result.

D.C. Crim. Jur. Instr. § 3.100: Defendant's State of Mind—Note. *See, e.g., Ortberg*, 81 A.3d at 308; *Wheeler v. United States*, 977 A.2d 973, 993 (D.C. 2009); *Kozlovska v. United States,* 30 A.3d 799, 801 (D.C. 2011); *Carter v. United States*, 531 A.2d 956, 964 (D.C. 1987).

[30] *Ortberg*, 81 A.3d at 307 (quoting *United States v. Bailey,* 444 U.S. 394, 403 (1980)).

[31] *Buchanan v. United States*, 32 A.3d 990, 1001 (D.C. 2011) (Ruiz, J. concurring).

[32] *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011).

[33] PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 155 (2d ed. 2012).

[34] *Ortberg*, 81 A.3d at 307.

[35] To take just one example, D.C. Code § 22–3302(a)(1) provides, in relevant part:

> Any person who, without lawful authority, shall enter, or attempt to enter, any private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, . . . shall be deemed guilty of a misdemeanor.

The text of this statute clarifies that "the government must prove (1) entry that is (2) unauthorized—because it is without lawful authority and against the will of owner or lawful occupant." *Ortberg*, 81 A.3d at 309. "What is less clear," however, "is the mental state or culpable state of mind that must be proved" given that [t]he statute does not expressly address this subject." *Id.* Nor is there any "legislative history on this provision." *Id.* Nevertheless, District courts have concluded that the "only state of mind that the government must prove is appellant's general intent to be on the premises contrary to the will of the lawful owner," *Artisst v. United States,* 554 A.2d 327, 330 (D.C.1989), and, therefore, that only "a reasonable, good faith belief [as to consent] is a valid defense." *Ortberg*, 81 A.3d at 309. But this is little more than a judicial policy decision, rooted in neither statutory text nor legislative history.

Second, absent a reliable mechanism for consistently distinguishing between general intent and specific intent crimes, it can be difficult to predict, *ex ante*, how a District court will exercise its policy discretion over a mistake issue of first impression.[36]

And third, judicial reliance on binary, categorical rules concerning whether a mistake is reasonable or unreasonable precludes District judges from accounting for the different kinds of mistakes that might arise—for example, reckless versus negligent mistakes.[37]

The fourth problem has less to do with the classifications of general intent and specific intent themselves than it does with the offense-level analysis of culpability that undergirds them. It is therefore similarly applicable to the District's law of accident. Viewing claims of mistake or accident through the lens of offense analysis has, on occasion, led Superior Court judges to treat issues of mistake and accident as true defenses, when, in fact, they are simply conditions that preclude the government from meeting its burden of proof with respect to an offense's culpability requirement.[38] In practical effect, this risks improperly shifting the burden of proof concerning an element of an offense onto the accused—something the DCCA has cautioned against in the context of both accident and mistake claims.[39]

All of the foregoing problems should be remedied by subsections (a) and (b) when viewed in light of the element analysis more broadly incorporated into the RCC. Instead of relying on the ambiguous and unpredictable distinctions of general intent and specific intent crimes to address issues of mistake or accident as "defenses," District courts will only need to consider whether—consistent with RCC § 22E-208(a) and (b)—the government is able to meet its affirmative burden of proof as to the culpable mental state requirement governing each offense.

More specifically, if the accident or mistake precludes the government from meeting its burden then it is, by virtue of an offense definition, an appropriate basis for exoneration. But if, in contrast, it does not preclude the government from meeting its burden, then—again, by virtue of an offense definition—that accident or mistake is appropriately ignored. In either case, however, the ultimate policy decision will reside

[36] To that end, the commentary on the District's criminal jury instructions states that: "[N]o general pattern instruction on these defenses could adequately provide for the range of contexts in which they arise, without resorting to a confusing array of alternative selections." D.C. Crim. Jur. Instr. § 9.600: Defenses of Accident and Mistake—Note.

[37] As one commentator observes:

> A "reckless mistake" is one in which the actor does not know with a substantial certainty that the element exists, but is aware of "a substantial … risk that the … element exists." A "negligent mistake" is one in which the actor is not, but should be aware of a substantial risk that the element exists and such unawareness is "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

PAUL H. ROBINSON, 1 CRIM. L. DEF. § 62 (Westlaw 2017).

[38] The DCCA has recently observed this much, noting in the context of trespass that "the existence of a reasonable, good faith belief is a valid defense precisely because it precludes the government from proving what it must—that a defendant knew or should have known that his entry was against the will of the lawful occupant." *Ortberg*, 81 A.3d at 308–09.

[39] *See, e.g., Clark v. United States*, 593 A.2d 186, 194 (D.C. 1991); *Simms*, 612 A.2d at 219; *Carter*, 531 at 964.

with the legislature, contingent upon the legislature's decision concerning which culpable mental state, if any, to apply to each objective element of an offense.

RCC § 22E-208(c): Relation to Current District Law on Culpability as to Criminality. Subsection (c) is in accordance with District law governing the relationship between mistake or ignorance as to a matter of penal law and criminal liability.

It is well established under DCCA case law that, in general, neither ignorance nor mistake as to a matter of *penal* law is a defense.[40] As the DCCA has recently observed, "[it] is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."[41] In practice, this means that (for example) "a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules [would] be guilty of knowingly distributing 'a controlled substance.'"[42] Under these circumstances, the ignorance of the law maxim *precludes* a defendant from prevailing on a claim that his or her lack of knowledge concerning the definition of the crime in question should constitute a defense.[43]

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[40] *See, e.g., Bsharah v. United States*, 646 A.2d 993, 1000 (D.C. 1994) (quoting *Morgan v. District of Columbia*, 476 A.2d 1128, 1133 (D.C. 1984) ("It is [] solidly established that "[g]eneral intent is not negated by a mistaken belief about the applicability of a penal law."); *Abney v. United States*, 616 A.2d 856, 857-58, 863 (D.C. 1992).

[41] *Conley v. United States*, 79 A.3d 270, 281 (D.C. 2013) (quoting *Barlow v. United States,* 32 U.S. (7 Pet.) 404, 411, 8 L.Ed. 728 (1833)); *see, e.g., McFadden v. United States*, 135 S. Ct. 2298, 2304, 192 L. Ed. 2d 260 (2015) ("[I]gnorance of the law is typically no defense to criminal prosecution"); *Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

[42] *McFadden*, 135 S. Ct. at 2304.

[43] Ignorance or mistake as to a matter of *penal law* is to be contrasted with ignorance or mistake as to a matter of *non-penal law*. The latter form of mistake/ignorance arises in prosecutions for an offense comprised of a circumstance element the satisfaction of which hinges upon a legal judgment extrinsic to the definition of that offense. Consider, for example, the District's taking property without right (TPWR) offense, which applies to a person who takes and carries away the "property of another" and does so "without right to do so." D.C. Code § 22-3216. To determine whether the circumstance element, "property of another," is satisfied hinges upon a determination that the property taken does not qualify as abandoned under civil law. And to determine whether the circumstance element, "without right to do so," is satisfied hinges upon a determination that the defendant lacks a claim of right to take the property under civil law. Notwithstanding the legal nature of these circumstance elements, however, DCCA case law appears to indicate that a person who makes a reasonable mistake (or possesses reasonable ignorance) as to either—i.e., as to whether property has actually been abandoned or a claim of right actually exists—cannot be convicted of the offense because it would negate the culpable mental state requirement governing the offense. *See, e.g., Hawkins v. United States*, 103 A.3d 199, 201 (D.C. 2014) (reasonable mistake as to abandonment constitutes a defense to general intent crimes, such as taking property without right); *Simms v. D.C.,* 612 A.2d 215, 219 (D.C. 1992) (defendant may raise reasonable mistake defense "based on a defendant's belief that property was abandoned by its owner" to disprove *mens rea* of vehicular tampering, which only applies where the automobile was owned by another person"); *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013) ("[T]he requisite criminal intent for unlawful entry" cannot be established "[w]hen a person enters a place with . . . a *bona fide belief* in his or her right to enter.") (italics added) (quoting *Darab v. United States,* 623 A.2d 127, 136 (D.C.1993); *Morgan v. District of Columbia*, 476 A.2d 1128, 1133 (D.C. 1984) ("bona fide belief defense" applies to "*a reasonable mistake as to a non-penal property* law which, if not a mistake, would justify remaining on the property. . . .") (italics added).

At the same time, however, the DCCA has also recognized that under "unusual circumstances" this maxim must give way to other general legal principles.[44] Most obvious is the principle that the government must prove all offense elements beyond a reasonable doubt.[45] On rare occasion, for example, the District's criminal offenses appear to explicitly incorporate a knowledge-of-the-law requirement (i.e., apply a culpable mental state of knowingly to the illegality of one's conduct). To illustrate, consider a penalty provision in the District's campaign finance statute, which subjects to a five year (maximum) criminal penalty any person who "knowingly violates" any of the relevant prohibitions.[46] In a prosecution premised on this provision, a person's mistake or ignorance as to the scope of this criminal law presumably *would* "excuse" because: (1) the government must prove the elements of an offense beyond a reasonable doubt; (2) knowledge of the law is an element of the offense; and, therefore, (3) the person's mistake or ignorance would preclude the government from establishing the requisite knowledge.[47]

Another "bedrock principle[] of American criminal law" that may supersede the "ignorance of the law will not excuse any person" maxim has been articulated by the DCCA as follows: "It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted *was* a crime . . . ."[48] The DCCA's recent opinion in *Conley v. United States* is illustrative. In that case, the court struck down a District statute criminalizing unlawful presence in a motor vehicle containing a firearm[49] on the basis that it "criminalize[d] entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle[]—without requiring the government to prove that the defendant had notice of any legal duty to behave otherwise."[50] The *Conley* decision rested upon the court's reading of the U.S. Supreme Court's opinion in *Lambert v. California*, which, in the view of the DCCA, stands for the proposition that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy."[51] In practical effect,

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[44] *Conley*, 79 A.3d at 281.

[45] *See, e.g., Conley v. United States*, 79 A.3d 270, 278 (D.C. 2013) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)); *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987).

[46] *See, e.g.,* D.C. Code § 1-1163.35(c) ("Any person who knowingly violates any of the provisions of Parts A through E of this subchapter shall be subject to criminal prosecution and, upon conviction, shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not longer than 5 years, or both."); *see also Trice v. United States*, 525 A.2d 176, 179 (D.C. 1987). ("The crime of bail jumping, under D.C. Code § 23-1327(a)[], has four elements. The trier of fact must find (1) that the defendant was released pending trial or sentencing, (2) that he was required to appear in court on a specified date or at a specified time, (3) that he failed to appear, and (4) *that his failure was willful.*") (italics added); *Jenkins v. United States*, 415 A.2d 545, 547 (D.C. 1980) (holding that where there was testimony that "certain words had been said to appellant which could have given rise to a good faith and reasonable belief that his case had been dismissed[,]" that story, "if believed by the jury, would constitute a valid defense to a charge of 'willfully' failing to appear").

[47] *Conley*, 79 A.3d at 278 (quoting *Patterson*, 432 U.S. at 210 (1977)); *Rose*, 535 A.2d at 852.

[48] *Conley*, 79 A.3d at 281 (quoting *United States v. Wilson*, 159 F.3d 280, 293 (7th Cir.1998)(Posner, J., dissenting).

[49] D.C. Code § 22-2511 (Repealed).

[50] 79 A.3d at 273.

[51] *Id*. at 273.

then, the *Conley* decision amounts to an implicit constitutional requirement of negligence as to illegality in cases of omission liability.

Beyond mere negation of (exceedingly rare) culpability as to illegality requirements, District law appears to recognize the possibility that a person's mistake or ignorance as to a matter of penal law can excuse in the traditional sense—i.e., where the government meets the affirmative requirements of liability—under certain narrow sets of circumstances. The DCCA's decision in *Bsharah v. United States* is illustrative.[52] In that case, the DCCA recognized that a more conventional excuse for a mistake or ignorance as to illegality might be "available to a defendant who 'reasonably' relied on a [mistaken] conclusion or statement of law 'issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field.'"[53] The details of the case illustrate the basis for, and potential contours of, this kind of narrow excuse defense.

At trial, the defendants, White and Bsharah, argued that their convictions for carrying a pistol without a license, possession of an unregistered firearm, and possession of unregistered ammunition should be vacated because, *inter alia*, "they had been advised by the station manager at the Virginia Square subway station that they could lawfully carry their guns in the District of Columbia."[54] "The trial judge, however, refused to allow them to argue this point to the jury and refused to give an instruction on mistake of law as a defense to the charges."[55] Thereafter, on appeal, White and Bsharah asked the DCCA to carve out a narrow exception to the general ignorance of the law will not excuse maxim on the basis that "they reasonably relied upon the advice of the Metro station manager."[56]

In resolving their argument, the DCCA observed the substantial precedent supporting this kind of exception. Not only had "[t]he defense advanced by White and Bsharah" been recognized by the U.S. Court of Appeals for the D.C. Circuit in 1976,[57] but, preceding that decision, had "originated in two Supreme Court cases."[58] Specifically:

> In *Raley v. Ohio,* 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), the defendants were convicted of contempt for refusing to answer certain questions put to them by a state investigating commission, even though they had relied on prior assurances by the chairman of the same commission that they were entitled to assert their Fifth Amendment privilege against self-incrimination. Unknown to the chairman, his advice was contrary to state law. Nevertheless, the Supreme Court reversed the convictions because of the chairman's erroneous assurance to the defendants that they could lawfully refuse to answer . . . A few years later,

[52] 646 A.2d 993, 1000 (D.C. 1994).
[53] *Id.* at 1000 (quoting *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976) and citing Model Penal Code § 2.04(3)(b).)
[54] *Id.* at 999.
[55] *Id.*
[56] *Id.* at 1000.
[57] *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976)
[58] *Bsharah*, 646 A.2d at 1000.

> in *Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), the Court reversed the convictions of a group of picketers who had been demonstrating across the street from a courthouse, contrary to state law, because the local chief of police had given them permission to picket at that location . . . .[59]

Ultimately, however, the DCCA concluded that the defendants were not entitled to any relief, having deemed the "instant case" distinguishable from existing authorities in two key ways: (1) "the Metro station manager had no authority, real or apparent, to give these appellants any advice whatever about the District of Columbia firearms laws"; and (2) "appellants' reliance on the station manager's advice was inherently unreasonable."[60] Nevertheless, the clear import of the *Bsharah* decision is that had the defendants' claims been *indistinguishable* from the relevant authorities, then their mistake of penal law defense could have provided the basis for avoiding liability.

In accordance with the above case law, RCC § 22E-208(c) both codifies and synthesizes District law relevant to culpability as to criminality as follows. The prefatory clause in subsection (c) articulates the general ignorance of the law will not excuse maxim through a presumption that "[a] person may be held liable for an offense although he or she is mistaken or ignorant as to the illegality of his or her conduct." The balance of the provision thereafter recognizes the possibility of two different kinds of exceptions to this general presumption.

The first exception, addressed in paragraph (c)(1), is where defendant is being prosecuted under a statute that requires proof of a culpable mental state (e.g., knowledge, intent, recklessness, or negligence) as to the illegality of one's conduct.[61] In these circumstances, the defendant's mistake or ignorance as to the prohibited nature of his or her conduct must be subjected to the same logical relevance analysis set forth in RCC § 22E-208(a), namely, did the mistake or ignorance "negate[] th[e] culpable mental state" applicable to the required circumstance of illegality?

The second exception, addressed in paragraph (c)(2), is where "[t]he person's mistake or ignorance satisfies the requirements for a general excuse defense."[62] This catch-all provision allows for the possibility that mistake or ignorance as to the illegality of one's conduct might, under limited circumstances, constitute a true "excuse" in the sense of exculpating a defendant who otherwise satisfies the affirmative elements of an offense.

RCC § 22E-208(d): Relation to Current District Law on Deliberate Ignorance. Subsection (d) is generally in accordance with, but fills a gap in, District law governing deliberate ignorance.

The DCCA has only issued one opinion directly addressing the issue of deliberate ignorance, *Owens v. United States*, and it is a case that is primarily concerned with the

[59] *Id.*
[60] *Id.* at 1001.
[61] RCC § 22E-208(c)(1).
[62] RCC § 22E-208(c)(2).

culpability requirement governing the District's RSP statute.[63] That statute penalizes a person who "buys, receives, possesses, or obtains control of stolen property, knowing or *having reason to believe* that the property was stolen."[64]

At issue in *Owens* was whether the italicized "having reason to believe" language embodies an objective, negligence-like standard, or, alternatively, a subjective standard akin to knowledge. The DCCA ultimately concluded that "the mental state for RSP is a subjective one" akin to knowledge[65]; however, the *Owens* court also recognized—quoting from the U.S. Court of Appeals for the D.C. Circuit's (CADC) decision in *United States v. Gallo*[66]—that although "[g]uilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of the defendant," it may nevertheless "be satisfied by proof that the defendant deliberately closed his eyes to what otherwise would have been obvious to him."[67]

"Following these principles," the DCCA went on to explain that when the government proceeds, not "on a theory of actual knowledge," but rather on the basis that "the defendant had 'reason to believe' the property was stolen," Superior Court judges should provide an instruction that incorporates the above-quoted language on deliberate ignorance from *Gallo*.[68]

No other DCCA case expressly applies the doctrine of deliberate ignorance; however, the Court of Appeals has, over the years, made a variety of passing observations—in both the criminal[69] and civil[70] contexts—which generally suggest that deliberate ignorance doctrine is indeed a generally applicable principle in the District.

Section (d) fills in the foregoing gap in District law in a manner that is broadly consistent with the *Owens* decision.[71]

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[63] 90 A.3d 1118, 1122-23 (D.C. 2014).
[64] D.C. Code § 22-3232(a).
[65] *Owens*, 90 A.3d at 1121.
[66] 543 F.2d 361, 369 n.6 (D.C. Cir. 1976).
[67] *Owens*, 90 A.3d at 1122.
[68] *Id.* More specifically, Superior Court judges are supposed to provide an instruction that reads, in relevant part:

> [RSP] requires that the defendant either knew or had reason to believe that the property was stolen. This state of mind is a subjective one, focusing on the defendant's actual state of mind, and not simply on what a reasonable person might have thought. In determining whether the government has met its burden of proving the defendant's subjective state of mind, you may consider what a reasonable person would have believed under the facts and circumstances as you find them. But guilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of the defendant. It may, nonetheless, be satisfied by proof beyond a reasonable doubt that the defendant deliberately closed his eyes to what otherwise would have been obvious to him.

Id.
[69] *See Santos v. District of Columbia*, 940 A.2d 113, 117 n.21 (D.C. 2007).
[70] *See In re Cater*, 887 A.2d 1, 26 (D.C. 2005); *In re Owusu*, 886 A.2d 536, 542 (D.C. 2005).
[71] *See also, e.g., United States v. Alston-Graves*, 435 F.3d 331, 341 (D.C. Cir. 2006) (willful blindness instruction should not be given unless there is evidence that the defendant "purposely contrived to avoid learning all the facts *in order to have a defense in the event of a subsequent prosecution*.") (quoting *United States v. Espinoza,* 244 F.3d 1234, 1242 (10th Cir. 2001) (quoting *United States v. Hanzlicek,* 187 F.3d

1228, 1233 (10th Cir. 1999)) (internal quotation mark omitted); *accord United States v. Heredia,* 429 F.3d 820, 824 (9th Cir. 2005); *United States v. Puche,* 350 F.3d 1137, 1149 (11th Cir. 2003); *United States v. Willis,* 277 F.3d 1026, 1032 (8th Cir. 2002).

RCC § 22E-209. Principles of Liability Governing Intoxication.

Explanatory Note. RCC § 22E-209 establishes general principles of liability governing the relationship between intoxication and the culpable mental state requirement applicable to individual offenses under the RCC.[1]

Subsection (a) states the general effect of intoxication—defined in paragraph (d)(1) as a disturbance of mental or physical capacities resulting from the introduction of substances into one's body[2]—on offense liability. It broadly clarifies that a person's intoxicated state will relieve that person of liability when (but only when) it precludes the person from acting with the culpable mental state applicable to a result or circumstance element.[3] This means that the relationship between the culpable mental state requirement governing an offense and intoxication is typically one of logical relevance: intoxication is relevant when (but only when) it prevents the government from meeting its affirmative burden of proof with respect to a culpable mental state applicable to a result or circumstance element.[4] In this sense, intoxication does not—generally speaking[5]—constitute a defense, but rather, simply describes conditions that may preclude the government from establishing liability.[6]

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[1] This relationship is to be distinguished from the relationship between intoxication and the availability of an affirmative defense akin to insanity, which would be raised by a claim that "although [the defendant] had the requisite *mens rea* to commit the offense and was conscious when he was acting, the intoxicants rendered him temporarily insane." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 24.01[D] (6th ed. 2012). Section 209 is not intended to have any impact on the resolution of general defense claims of this nature.

Nor is section 209 intended to have any impact on the meaning, interpretation, or application of intoxication as an *objective element*. For example, some criminal offenses prohibit engaging in certain forms of conduct while in an intoxicated state. *See, e.g.,* D.C. Code § 50-2206.11 ("No person shall operate or be in physical control of any vehicle in the District: (1) While the person is *intoxicated*; or (2) While the person is under the *influence of alcohol or any drug or any combination thereof*.") (italics added). The general culpability principles stated in section 209 should not be construed as altering the government's burden of proof for the intoxication-related objective element(s) that comprise these offense definitions. *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5(a) (3d ed. Westlaw 2019) ("One who is charged with having committed a crime may claim in his defense that, at the time, he was intoxicated[] and so is not guilty. If the crime in question is that of driving while intoxicated, or of being drunk in a public place, he will not get very far with the defense, for with such crimes intoxication, far from being a defense, is an element of the crime.").

[2] RCC § 22E-209(d)(1); *see, e.g.,* Model Penal Code § 2.08(5)(a) (defining intoxication).

[3] *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 9.5(a) n.7 ("Intoxication is a defense to crime if it negatives a required element of the crime; and this is so whether the intoxication is voluntary or involuntary.").

[4] Note, however, that RCC § 22E-209(c) addresses a particular situation where, although an actor's intoxication negates the culpable mental state of recklessness, that culpable mental state is nevertheless imputed on policy grounds.

[5] *But see* DRESSLER, *supra* note 1, at § 24.01[D] ("[U]nder very limited circumstances an intoxication [] defense is recognized when an actor becomes 'temporarily insane' as the result of the introduction of drugs, alcohol, or other foreign substances into the body."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 9.5(a) ("Where the intoxication was 'involuntary,' it may be a defense in the same circumstances as would insanity.")

[6] *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 65 (Westlaw 2019) ("[W]hen an actor's intoxication negates a culpable state of mind required by an offense definition," this raises "a 'failure of proof' defense

Subsection (b) clarifies the nature of the relationship between intoxication and culpable mental states under the RCC. It provides a set of general rules that may serve as a useful guide for the courts in determining when intoxication is capable of negating the existence of a culpable mental state. First, these rules generally establish that intoxication negates the existence of any subjective culpable mental state—namely, purpose, knowledge, intent, and the conscious disregard component of recklessness[7]—when, due to a person's intoxicated state, that person does not act with the necessary desire or level of awareness that must be proven as to a given result or circumstance element.[8] Second, these rules further clarify that intoxication may also negate the objective component of recklessness and the objective culpable mental state of negligence when, due to a person's intoxicated state, that person's disregard of a risk is not clearly blameworthy under the circumstances proscribed by the RCC definitions of recklessness and negligence.[9]

One critical circumstance, for purposes of evaluating the relationship between intoxication and a person's blameworthiness under this context-sensitive culpability analysis, is the origin of a person's intoxicated state.[10] The most important distinction to be made relates to whether intoxication is "self-induced," which is defined in paragraph (d)(2) as the knowing consumption of a substance that one knows (or should know) to be intoxicating in the absence of a justification or excuse.[11] In general, *self-induced*

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where the defendant has a defense because the prosecution is unable to prove all the required elements of the offense.").

[7] RCC §§ 22E-206(a), (b), (c), (d)(1)(A), and (d)(2)(A).

[8] *See* RCC §§ 22E-209(b)(1), (2), and (3)(A). In general, there are two basic categories of intoxication under the RCC framework: intoxication that is self-induced, and intoxication that is non self-induced (i.e., involuntary intoxication). *See* RCC § 22E-209(d)(2) (defining self-induced intoxication). The difference between these two forms of intoxication is immaterial for purposes of evaluating the culpable mental states of purpose, knowledge, and intent. However, the distinction matters for purposes of evaluating the conscious disregard component of the RCC definition of recklessness. *See* RCC §§ 22E-206(d)(1)(A) and (2)(A) (requiring proof that the accused "consciously disregards a substantial risk"). Whereas a person's non self-induced state of intoxication necessarily negates recklessness when it precludes that person from acting with the requisite awareness of a substantial risk, a person's self-induced state of intoxication can provide the basis for imputing the requisite awareness of a substantial risk to a person who otherwise lacks it under the conditions specified in subsection (c). *See* RCC § 22E-209(b)(3) ("Except as otherwise provided in subsection (c)," which recognizes imputation of recklessness for self-induced intoxication).

[9] That is, the "nature and degree" of the risk, the "nature and purpose of the person's conduct," and the "circumstances known to the person." RCC §§ 206(d)(1)(B), (d)(2)(B), (e)(1)(B), (e)(2)(B), and accompanying Explanatory Note.

[10] Which is to say, the nature of a person's intoxicated state is part and parcel with the "nature [] of the person's conduct" under RCC §§ 206(d)(1)(B), (d)(2)(B), (e)(1)(B), and (e)(2)(B).

[11] RCC § 22E-209(d)(2)(A)-(B); *see, e.g.,* Model Penal Code § 2.08(5)(a) ("'[S]elf-induced intoxication' means intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know . . . ."). Note, however, that a person who knowingly consumes an intoxicating substance "pursuant to medical advice from a licensed health professional" falls outside the scope of the RCC definition of self-induced intoxication. RCC § 22E-209(d)(2)(C); *see, e.g.,* Model Penal Code § 2.08(5)(a) (excluding from definition of self-induced intoxication person who "introduces [intoxicating substances] pursuant to medical advice from a licensed health professional"); ROBINSON, *supra* note 6, at 2 CRIM. L. DEF. § 176 ("[T]hough a patient may voluntarily take prescription drugs, intoxication as a result of such use may be involuntary so long as it is done pursuant to medical advice."). In contrast, where "medically prescribed drugs" are *not* "taken according to prescription," then any intoxication resulting from their knowing consumption *could* be

intoxication *will not* have the tendency to negate a person's blameworthiness under the RCC, and in many instances will serve to establish it.[12] In contrast, intoxication that is *not self-induced* generally *will* have the tendency to negate a person's blameworthiness.[13] Ultimately, though, these are only general presumptions, each of which is subject to possible exception based upon the facts of a given case.[14]

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considered "self-induced" for purposes of RCC § 22E-209. *E.g., State v. Gardner*, 230 Wis. 2d 32, 41–42 (Wis. Ct. App. 1999) (for this reason involuntary intoxication defense unavailable "where a patient knowingly takes more than the prescribed dosage, [] or mixes a prescription medication with alcohol or other controlled substances") (collecting cases).

The RCC uses the phrase "self-induced intoxication," rather than "voluntary intoxication," to avoid any confusion with the voluntariness requirement proscribed in RCC § 22E-203.

[12] Illustrative is the situation of X, who knowingly drinks a significant amount of alcohol at a rowdy fraternity party, and thereafter, in a highly inebriated state, walks onto the patio, grabs a golf club, and begins hitting golf balls out of the yard, which repeatedly shatter the windows of nearby homes and ultimately causes $30,000 dollars in damage. If X is subsequently charged with recklessly damaging property, X's self-induced state of intoxication at the moment he began hitting golf balls only bolsters a finding that X's conduct manifests a culpable failure to afford the homeowners' property interests a reasonable level of concern. Therefore, X's disregard of the risk—when viewed in light of the circumstances, including his intoxication—*would* satisfy the clear blameworthiness standard governing the RCC definition of recklessness.

[13] Illustrative is the situation of X, who is unknowingly drugged by someone at house party, thereafter leaves in her vehicle, and then subsequently falls asleep at the wheel, thereby fatally crashing into another driver, V. If X is charged with negligent homicide, X's involuntary state of intoxication strongly suggests that her failure to perceive a substantial risk of death to V does not, in fact, manifest a culpable failure to attend to V's personal safety under the circumstances. Instead, X's conduct appears to be entirely attributable to the influence of sleep inducing drugs, the consumption of which X bears no responsibility. Therefore, X's disregard of the risk—when viewed in light of the circumstances, including her intoxication—*would not* meet the clear blameworthiness standard applicable to the RCC definition of negligence.

[14] For example, in rare situations it is possible for a person's self-induced intoxication to negate his or her blameworthiness. This is perhaps clearest where a person's self-induced intoxication is pathological—i.e., "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." Model Penal Code § 2.08(5)(c). The following hypothetical is illustrative. X consumes a single alcoholic beverage at an office holiday party, and immediately thereafter departs to the metro. While waiting for the train, X begins to experience an extremely high level of intoxication—unbeknownst to X, the drink has interacted with an allergy medication she is taking, thereby producing a level of intoxication ten times greater than what X normally experiences from that amount of alcohol. As a result, X has a difficult time standing straight, and ends up stumbling in another train-goer, V, who X fatally knocks onto the tracks just as the train is approaching.

If X is subsequently charged with either reckless manslaughter or negligent homicide on these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances—suggests that the clear blameworthiness standard governing the RCC definitions of recklessness and negligence is not satisfied. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for recklessly or negligently killing V under the RCC if X's conduct manifested a culpable disregard for V's personal safety. And given that X's minimally-culpable decision to consume a single alcoholic beverage while on her allergy medication is the sole reason X fatally stumbled into V, it simply cannot be said that blameworthiness of this nature (i.e., that necessary to support a homicide conviction) exists under the facts presented.

It is also possible, under narrow circumstances, for a person's self-induced intoxication to negate his or her blameworthiness even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces

Subsection (c) establishes a principle of imputation to deal with the culpability issues that self-induced intoxication raises for proof of the subjective component of recklessness. A person who becomes intoxicated in this manner and then goes on to commit a crime of recklessness may argue that, due to that person's intoxicated state, he or she did not "*consciously disregard*[] a substantial risk" that a prohibited result would occur or that a prohibited circumstance existed.[15] Nevertheless, given the commonly known risks associated with intoxicants, as well as the fact that the person has in effect culpably created the conditions of his or her own defense, it would be inappropriate to allow for intoxication to exonerate under these circumstances.[16] Consistent with these

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that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death.

If X is subsequently charged with either reckless manslaughter or negligent homicide on these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances—suggests that the clear blameworthiness standard governing the RCC definitions of recklessness and negligence is not satisfied. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for recklessly or negligently killing V under the RCC if X's conduct manifested a culpable disregard for V's personal safety. And given that X's minimally-culpable decision to consume a large amount of alcohol in the safety of her own home is the sole reason X fatally stumbled into V, it simply cannot be said that blameworthiness of this nature (i.e., that necessary to support a homicide conviction) exists under the facts presented.

Finally, it is important to note that while non self-induced intoxication will typically negate a person's blameworthiness, this is not a categorical rule—and thus, it is certainly possible for a person to be convicted of a crime of recklessness and negligence while under its influence. The reason? A person's intoxicated state (whatever its origin) may simply have no bearing on why that person failed to exercise an adequate level of concern or attention for the legally protected interests of others. To illustrate, consider the situation of X, who has a regular practice of texting while driving in school zones, and is also mis-prescribed a slightly intoxicating medication for daily use. One morning, while driving under the influence of that medication, X fatally strikes V, a student-pedestrian walking through a crosswalk. At the time of the accident, X was entirely unaware of V's presence because X was reading a text message on his phone (rather than looking in front of himself).

If X is subsequently charged with negligent homicide on these facts, X's non self-induced state of intoxication would not preclude a conviction. So long as D's failure to perceive the substantial risk of death to V is attributable to his lack of concern for the safety and wellbeing of student-pedestrians like V (in contrast to the influence of the mis-prescribed medication), then D's conduct would be sufficiently blameworthy to satisfy the RCC definition of negligence.

[15] RCC § 22E-206(d)(1)(A) & (2)(A). It should be noted, however, that it is entirely possible for an actor to be under the influence of self-induced intoxication, yet consciously disregard a substantial risk, in which case it would *not* be necessary to rely upon subsection (c) to establish the first prong of the RCC definition of recklessness.

[16] To illustrate, consider again the situation of X, who knowingly drinks a significant amount of alcohol at a rowdy fraternity party, and thereafter, in a highly inebriated state, walks onto the patio, grabs a golf club, and begins hitting golf balls out of the yard, which repeatedly shatter the windows of nearby homes and ultimately causes $30,000 dollars in damage. *See supra* note 12 (analyzing same hypothetical). Assume that X, due to his intoxicated state, was completely unaware that—at the moment he began hitting golf balls—there was a substantial risk that property damage would result from his conduct. If X is subsequently prosecuted for second-degree criminal damage to property on these facts, X's lack of awareness could, as a matter of logical relevance, preclude the government from securing a conviction under a recklessness theory of liability. *See* RCC § 22E-2503 ("Recklessly damages or destroys property and, in fact, the amount of damage is $25,000 or more."). But this would be problematic as a matter of policy/fairness: if the reason why X lacks the requisite awareness is because of his prior culpable decision to get recklessly drunk at the fraternity party, then X's self-induced state of intoxication offers an inappropriate basis for exculpation. *See, e.g.,* Gideon Yaffe, *Intoxication, Recklessness, and Negligence,* 9

policy considerations, subsection (c) authorizes the factfinder to impute the requisite recklessness as to a result or circumstance element where the government proves beyond a reasonable doubt that: (1) but for the person's intoxicated state he or she would have been aware of a substantial risk as to that result or circumstance; (2) the person's intoxicated state is self-induced; and (3) the person acted at least negligently as to the requisite result or circumstance.[17]

Relation to Current District Law. RCC § 22E-208 codifies, clarifies, fills in gaps, changes, and enhances the proportionality of the District law governing the relationship between intoxication and the culpable mental state requirement governing an individual offense.

OHIO ST. J. CRIM. L. 545, 573 (2012) ("[I]f the defendant's act of becoming intoxicated is unjustified . . . and the defendant is aware of the relevant risked harms when he chooses to become intoxicated, then his act of becoming intoxicated is itself reckless."); Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 31 (1985) ("Where the actor is not only culpable as to causing the defense conditions, but also has a culpable state of mind *as to causing himself to engage in the conduct constituting the offense*, the state should be punish him for causing the ultimate justified or excused conduct.") (italics added).

[17] According to the same logic, the general provisions governing the relationship between intoxication and the culpable mental states of purpose, knowledge, and intent (i.e., RCC § 22E-209(b)(1) and (2)) should be construed to preserve liability in situations involving a person's self-induced intoxication, which is intended to create the conditions for an absent-element defense. If, under these circumstances, the actor possesses the statutorily-required purpose, knowledge, or intent at the point in which he or she begins consuming intoxicating substances, then the fact that he or she subsequently lacks the requisite desire or state of awareness at the precise moment the conduct constituting the offense is completed should not preclude a finding that the person satisfied the offense's culpable mental state requirement. *See* Robinson, *supra* note 16, at 35 (Observing that, in these kinds of situations, "[t]he actor's liability for the offense may be based on his conduct at the time he becomes voluntary intoxicated and his accompanying state of mind as to the elements of the subsequent offense.").

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

On these facts, X's lack of awareness concerning the non-consensual, forceful nature of the intercourse at the moment it occurred should *not* preclude a finding of guilt, provided the prosecution can establish that X was practically certain that—at the moment he became intoxicated—the forceful sexual act he intended to facilitate would be non-consensual. *See* Robinson, *supra* note 16, at 51 ("If an actor's intoxication negates a required culpability element at the time of the offense, such element is nonetheless established if the actor satisfied such element immediately preceding or during the time that he was becoming intoxicated or at any time thereafter until commission of the offense, and the harm or evil he intended, contemplated, or risked is brought about by the actor's subsequent conduct during intoxication.").

As a legislative matter, the D.C. Code is almost entirely silent[18] on when an actor's intoxicated state can or should preclude the government from being able to establish that he or she possessed the state of mind necessary for a conviction.[19] The absence of relevant intoxication legislation has effectively delegated this critical and frequently occurring liability issue to the District's judiciary. However, the judges on the D.C. Superior Court and D.C. Court of Appeals have relied on the ambiguous and confusing distinction between general and specific intent crimes to address the relationship between intoxication and the government's affirmative burden of proof. This has resulted in a body of common law intoxication policies that are frequently confusing, often inconsistent, and almost always piecemeal (as is the case in every other jurisdiction that has relied on offense analysis to develop its law of intoxication).[20] RCC § 22E-209 replaces this judicially created, offense analysis-based approach with a clear and consistent legislative framework for analyzing the relationship between intoxication and culpable mental states on an element-by-element basis.

Under District case law, "a person may not voluntarily become intoxicated and use that condition, generally, as a defense to criminal behavior."[21] Rather, an actor's voluntary intoxication, to the extent it is legally relevant, must create a "reasonable doubt about whether [the defendant] could or did form the intent to [commit the charged crime]."[22] To be entitled to a jury instruction on voluntary intoxication as a defense, the evidence "must reveal such a degree of complete drunkenness that a person is incapable of forming the necessary intent essential to the commission of the crime charged."[23]

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[18] One noteworthy example is the District's medical marijuana statute, D.C. Code § 7-1671.03, which establishes that "[t]he use of medical marijuana as authorized by this chapter and the rules issued pursuant to § 7-1671.13 does not create a defense to any crime and does not negate the mens rea element for any crime except to the extent of the voluntary-intoxication defense recognized in District of Columbia law."

[19] This issue, which lies at the intersection of intoxication and the culpable mental state requirement governing individual offenses, is to be distinguished from the relationship between intoxication and affirmative defenses (e.g., insanity), which is not addressed by RCC § 22E-209. *See generally, e.g.*, *McNeil v. United States*, 933 A.2d 354 (D.C. 2007); *Bethea v. United States*, 365 A.2d 64, 72 (D.C. 1976).

[20] *See generally, e.g.,* DRESSLER, *supra* note 1, at § 24.03; Miguel Angel Mendez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407 (1995); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 65 (Westlaw 2019); Model Penal Code § 2.08 cmt. at 354-59; NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970) (hereinafter "Working Papers").

[21] *McNeil*, 933 A.2d at 363. The case law discussed in this section generally refers to voluntary (or self-induced) intoxication without saying much about involuntary intoxication. In *Easter v. District of Columbia*, the CADC observed: "Where the accused becomes intoxicated without his consent, through force or fraud of another person, his condition is that of involuntary drunkenness and a criminal act committed by him while in such state may be defended by whatever the circumstances justify." 209 A.2d 625, 627 (D.C. 1965) (citing *Choate v. State*, 197 P. 1060 (Okl. 1921)). And in *Salzman v. United States*, the CADC observed that "where a person has been involuntarily made intoxicated by the actions of others" he or she "may raise involuntariness as a defense to criminal prosecution." 405 F.2d 358, 364 (D.C. Cir. 1968).

[22] D.C. Crim. Jur. Instr. § 9.404; *see, e.g., Harris v. United States*, 375 A.2d 505, 508 (D.C. 1977).

[23] *Bell v. United States*, 950 A.2d 56, 65 (D.C. 2008) (quotations and citations omitted); *see, e.g.*, *Wilson-Bey v. United States*, 903 A.2d 818, 844-45 (D.C. 2006) (*en banc*); *Smith v. United States*, 309 A.2d 58, 59 (D.C. 1973); *Jones v. Holt*, 893 F. Supp. 2d 185, 198 (D.D.C. 2012). In other words, a jury may only be instructed on the issue of voluntary intoxication upon "evidence that the defendant has reached a point of

However, evidence of a defendant's intoxicated state may still be introduced even when it falls short of the standard for a voluntary intoxication jury instruction so long as it negates intent.[24]

To determine when voluntary intoxication can effectively negate intent, District courts typically distinguish between "general intent" crimes, which do not require "an intent that is susceptible to negation through a showing of voluntary intoxication"[25] and "specific intent" crimes, which are susceptible to this kind of negation.[26] According to this dichotomy, an intoxication defense may be raised where a specific intent crime is charged, as reflected in DCCA case law on the availability of an intoxication defense for crimes such as attempted burglary,[27] first degree murder,[28] robbery,[29] and assault with intent to kill.[30] But an intoxication defense is not available where a general intent crime is charged, as reflected in DCCA case law rejecting the viability of an intoxication defense to crimes such as second-degree murder,[31] manslaughter,[32] MDP,[33] assault,[34] and first-degree sex abuse.[35]

The outward clarity and simplicity of this intoxication framework obscures a range of issues, many of which the DCCA has itself generally recognized. At the heart of the problem is the "venerable common law classification" system it relies upon, offense analysis, which "has been the source of a good deal of confusion."[36] The reasons for this confusion are well known: the central culpability terms that comprise the system, "general intent" and "specific intent," are little more than "rote incantations" of "dubious value,"[37] which can "be too vague or misleading to be dispositive or even helpful."[38] Each term envisions a singular "umbrella culpability requirement that applie[s] in a general way to the offense as a whole."[39] Both, therefore, "fail[] to distinguish between elements of the crime, to which different mental states may apply."[40]

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incapacitating intoxication." *Washington v. United States*, 689 A.2d 568, 573 (D.C. 1997); *see Heideman v. United States*, 259 F.2d 943, 946 (D.C. Cir. 1958).

[24] *See, e.g., Bell*, 950 A.2d at 65 n.5; *Washington*, 689 A.2d at 574; *Riddick v. United States*, 806 A.2d 631, 640–41 (D.C. 2002). Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 959, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

[25] *Parker*, 359 F.2d at 1012-13; *see, e.g., Washington*, 689 A.2d at 573.

[26] *Kyle v. United States*, 759 A.2d 192, 199-200 (D.C. 2000). In other words, "[i]ntoxication . . . is material only to negate specific intent." *Id.* (citing *Parker*, 359 F.2d at 1012).

[27] *See Hebble v. United States*, 257 A.2d 483 (D.C. 1969).

[28] *See Harris*, 375 A.2d at 505.

[29] *See Bell*, 950 A.2d at 74.

[30] *See Washington*, 689 A.2d at 573.

[31] *See Wheeler*, 832 A.2d at 1273.

[32] *See Bishop v. United States*, 107 F.2d 297, 301 (D.C. Cir. 1939).

[33] *See Carter*, 531 A.2d at 961.

[34] *See Parker*, 359 F.2d at 1013.

[35] *See Kyle*, 759 A.2d at 200.

[36] *Ortberg*, 81 A.3d at 307 (quoting *United States v. Bailey,* 444 U.S. 394, 403 (1980)).

[37] *Buchanan v. United States*, 32 A.3d 990, 1001 (D.C. 2011) (Ruiz, J. concurring).

[38] *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011).

[39] PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 155 (2d ed. 2012).

[40] *Ortberg*, 81 A.3d at 307.

The District's reliance on these ambiguous distinctions between general and specific intent to address the relationship between intoxication and the culpable mental state requirement applicable to individual offenses has brought with it the standard litany of problems associated with offense analysis.

First, reliance on the distinction between general intent and specific intent crimes to address issues of intoxication allows for judicial policymaking, given that there is no reliable mechanism, legislative or judicial, for consistently communicating this classification.[41]

Second, absent a reliable mechanism for consistently distinguishing between general intent and specific intent crimes, it can be difficult to predict, *ex ante*, how a District court will exercise its policy discretion over an intoxication issue of first impression.[42]

Third, judicial reliance on binary, categorical rules concerning whether intoxication constitutes a defense precludes District judges from accounting for those offenses subject to different culpable mental states, some (but not all) of which might be negated by voluntary intoxication.[43]

Fourth, judicial reliance on the general intent-specific intent dichotomy for resolving intoxication issues may have the pernicious effect of lowering the *mens rea* for criminal offenses *in general* so as to avoid the availability of an intoxication defense for particular offenses.[44]

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[41] Though some courts have at times spoken as though there exists some intrinsic meaning to the terms general and specific intent, in reality they are little more than "shorthand devices best and most precisely invoked to contrast offenses that, as a matter of policy, may be punished despite the actor's voluntary intoxication . . . with offenses that, also as a matter of policy, may not be punished in light of such intoxication." *People v. Whitfield*, 7 Cal. 4th 437, 463 (1994) (Mosk, J., concurring in part and dissenting in part); *see supra* nos. 32-36 and accompanying text. For illustrative examples of this form of judicial policymaking in the District, see, for example, *Parker*, 359 F.2d at 1013; *Carter*, 531 A.2d at 961.

[42] Relatedly, even when the DCCA has already determined whether a particular offense is one of specific intent or general intent, a new ruling on the culpability requirement governing that offense outside the intoxication context—even if intended to merely clarify, rather than make new law—has the tendency to reopen litigation over that classification within the intoxication context. *See Wheeler v. United States*, 832 A.2d 1271, 1274 (D.C. 2003) (discussing *Comber v. United States,* 584 A.2d 26 (D.C. 1990) (*en banc*)).

[43] An illustrative example of this kind of offense is the District's current murder of a police officer (MPO) statute, D.C. Code § 22-2106. The conduct prohibited by MPO includes a result element, *killing*, and a circumstance element, the victim's status as *a police officer*. However, the statute applies a different culpable mental state to each of these objective elements. Roughly speaking, the result element of killing appears to be subject to a mental state of purpose—"deliberate and premeditated malice"—while the circumstance element regarding the victim's status as a police officer appears to be subject to a mental state of negligence—"reason to know." D.C. Code § 22-2106. As a result, evidence of an actor's voluntary intoxication is plausibly relevant to disproving the existence of the subjective culpability requirement governing the former result element, while such evidence likely cannot disprove the existence of the objective culpability requirement governing the latter circumstance element.

[44] Here's how this phenomenon operates. Initially, courts may deem an offense to be one of "general intent" so as to preclude a voluntary intoxication defense. However, because "theory appears to dictate that intoxication is relevant to negate any subjective mental element," judges feel compelled, for consistency's sake, to "strip the statute defining an defining an offense of subjective mental elements." Eric A. Johnson, *The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1, 44 (2007). The ongoing confusion surrounding the *mens rea* of assault under District law provides an

Fifth, judicial reliance on the general intent classification as the basis for excluding evidence of voluntary intoxication leads to inherent contradictions in the case law for so-called general intent offenses that require proof of knowledge as to one or more objective elements.[45]

Sixth, and perhaps most problematic of all, the categorical bar on a voluntary intoxication defense for general intent crimes risks convicting those who are not clearly blameworthy of very serious offenses (e.g., murder).[46]

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illustrative example of this phenomenon—as recognized by Judge Ruiz's concurrence in *Buchanan v. United States*, 32 A.3d 990, 997 (D.C. 2011).

That confusion seems to be rooted in an oft-cited U.S. Court of Appeals for the D.C. Circuit (CADC) decision, *Parker v. United States* (1966), addressing whether voluntary intoxication is a defense to assault with a dangerous weapon ("ADW"). 359 F.2d at 1009. The *Parker* court ultimately determined that this District statute does not "require[] an intent that is susceptible to negation through a showing of voluntary intoxication," *Id.* at 1013, a conclusion that, as Judge Ruiz observes, "appears to rest upon the unstated premise that simple assault is a 'general intent' crime." *Buchanan*, 32 A.3d at 997. In order to justify this result in a principled fashion, however, the CADC seems to have been led to hold that ADW simply cannot require proof of subjective culpability. *Id.* at 1012. The CADC's interpretation of the *mens rea* (or lack thereof) applicable to ADW has thereafter been applied by District courts outside of the ADW context to the offense of simple assault. Relying upon "what [was] arguably an over-extension of [the CADC's] opinion in *Parker*," *Buchanan*, 32 A.3d at 1001 n.7, these cases held that because assault is a general intent crime, "there need be no subjective intention to bring about an injury." *Anthony v. United States*, 361 A.2d 202, 206 n.5 (D.C. 1976). In contrast, more recent DCCA cases indicate that the government is requirement to prove that the defendant not only intended to do the acts constituting the assault—akin to a strict liability standard—but also intended to cause (i.e., purposely or knowingly caused) the resulting bodily injury. *See, e.g., Williams v. United States*, 887 A.2d 1000, 1003 (D.C. 2005); *Buchanan*, 32 A.3d at 992.

[45] To determine when voluntary intoxication can negate the culpable mental state requirement governing a given offense, District courts typically ask whether that offense is a "general intent" crime, which does not require "an intent that is susceptible to negation through a showing of voluntary intoxication." *Parker*, 359 F.2d at 1012-13; *see, e.g., Washington*, 689 A.2d at 573. However, at times the DCCA has labeled crimes that require proof of knowledge—a culpable mental state that clearly can be negated by voluntary intoxication—as implicating a "general intent." Consider the crime of carrying a pistol without a license, D.C. Code § 22-4504(a) ("No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon."). Whereas the DCCA "ha[s] repeatedly held [this to be] a general intent crime," *Bieder v. United States*, 707 A.2d 781, 783 (D.C. 1998), it is also well-established by the DCCA that "a person cannot have the requisite intent to . . . carry[] a pistol without a license . . . unless he or she *knows* that the object he or she is carrying is, in fact, a pistol." *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992). Possessing knowledge of the nature of an object, no less than intending to cause harm, is a form of subjective culpability that an actor's voluntary intoxication can certainly negate. *See generally* RCC § 22E-209(b)(2) and accompanying Explanatory Note.

For other so-called general intent crimes, which the DCCA has interpreted to require proof of knowledge as to a circumstance include distribution of narcotics, see *Lampkins v. United States*, 973 A.2d 171, 174 (D.C. 2009), and UUV, see *Carter*, 531 A.2d at 964 n.13.

[46] The intersection between the District's voluntary intoxication principles and the District's depraved heart form of second-degree murder is illustrative. *See* D.C. Code § 22-2103 ("Whoever with malice aforethought . . . kills another, is guilty of murder in the second degree."); *see also* D.C. Code § 22-2104 (second degree murder subject to possible life in prison). Although this version of second-degree murder requires proof that "the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury," *Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (*en banc*), the DCCA has deemed depraved heart murder to be a general intent crime, to which an intoxication defense may not be raised. *Wheeler v. United States*, 832 A.2d 1271 (D.C. 2003); *see Davidson v. United States*,

The intoxication framework in RCC § 22E-209 addresses the above problems through a clear and comprehensive policy framework that is broadly consistent with the DCCA's determinations as to the availability of an intoxication defense. The RCC, like District law, views the overarching relevance of intoxication to be a product of whether it precludes the government from proving an offense's culpable mental state requirements beyond a reasonable doubt.[47] At the same time, however, the RCC—again consistent with District law—recognizes a policy-based exception to this principle.[48] Under DCCA case law, this exception depends upon whether a crime is one of general intent, in which case an intoxication defense may not be raised.[49] Under the RCC, in contrast, the

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137 A.3d 973 (D.C. 2016) (no intoxication defense available for depraved heart version of voluntary manslaughter either); *see also King v. United States,* 372 F.2d 383, 388 (D.C. Cir. 1967) ("[T]he rule that negatives voluntary intoxication as a defense to crimes . . . like manslaughter in effect holds men responsible for their fateful drinking, without regard to the extent of control at the moment of homicide.") (quoted in *Davidson*, 137 A.3d at 975). This categorical denial of an intoxication defense seems to create a material risk that a minimally culpable actor could be convicted of second-degree murder.

To illustrate, consider the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story District home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death. Under these circumstances, X seems to be minimally culpable (if culpable at all). For if—as this hypothetical assumes—the sole reason X fatally stumbled into V is because of her earlier decision to consume a large amount of alcohol in the safety of her own home, then X's conduct simply does not manifest any lack of concern for the personal safety of V (or anyone else, for that matter).

And yet, should X find herself in D.C. Superior Court charged with depraved heart murder, she might have a difficult time mounting a meaningful defense given that—as appears to be the case under current District law—evidence of her voluntary intoxication could *not* be presented to negate the "general intent" at issue in this crime. *Compare Carter v. United States*, 531 A.2d 956, 959, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996). For example, the government's affirmative case might focus on the fact that an ordinary, reasonable (presumably sober) person in X's position would have possessed the subjective awareness required to establish depraved heart murder—whereas X might have difficulty persuading the factfinder that she lacked this subjective awareness without being able to point to her voluntarily intoxicated state. *See, e.g.,* Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 200 (1996) (arguing that such an approach, in effect, creates a permissive, but unrebuttable presumption of *mens rea* in situations of self-induced intoxication); Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 955 (1999) (arguing that "retain[ing] a *mens rea* requirement in the definition of the crime, but keep[ing] the defendant from introducing evidence to rebut its presence would, in effect, "rid[] the law of a culpability requirement").

[47] As the District's criminal jury instructions phrase the question facing the fact-finder:

> If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .

D.C. Crim. Jur. Instr. § 9.404.

[48] *See, e.g., Davidson v. United States*, 137 A.3d 973 (D.C. 2016); *Carter*, 531 A.2d at 959.

[49] *See* sources cited *supra* notes 10 and 16-20.

subjective awareness required for the culpable mental state of recklessness may be imputed based upon the self-induced intoxication of the actor.

Substantively, there is significant overlap between these two frameworks. Subsections (a), (b), and (c) collectively establish that evidence of self-induced (or any other form of) intoxication may be adduced to disprove purpose or knowledge, but generally may not be adduced to disprove recklessness or negligence.[50] This roughly corresponds with the common law framework currently employed by the DCCA: the DCCA *typically* associates specific intent crimes—to which an intoxication defense may be raised—with offenses requiring proof of purpose or knowledge,[51] while *typically* associating general intent crimes—to which an intoxication defense may not be raised—with offenses requiring proof of recklessness or negligence.[52]

Importantly, however, this overlap is by no means complete. For example, there are at least a few non-conforming offenses, which do not reflect the above pattern: namely, those offenses that the DCCA has classified as "general intent" crimes, yet also has interpreted to require proof of one or more purpose or knowledge-like mental states.[53] For these non-conforming offenses, adoption of RCC § 22E-209 *could*—but would not *necessarily*—change the availability of an intoxication defense as it currently exists under District law.[54]

In addition, the RCC approach leaves open the possibility that a person's self-induced intoxication[55] could, under narrow circumstances, be relevant to defending against a recklessness or negligence charge.[56] The rationale is that when, due to a person's self-induced state of intoxication, that person's disregard of a risk is not clearly blameworthy, then it would be disproportionate to impose a criminal conviction for a recklessness or negligence crime.[57] The fact that current District law appears to impose a

[50] Note, however, that intoxication that is not self-induced may negate the culpable mental state of recklessness under RCC § 22E-209(a). *See* RCC § 22E-209(b)(3).

[51] *See, e.g.*, *McNeil*, 933 A.2d at 363 (quoting *Proctor v. United States,* 85 U.S.App. D.C. 341, 342 (1949)); *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984); *Jones v. United States*, 124 A.3d 127, 130 (D.C. 2015).

[52] *See, e.g., Carter*, 531 A.2d at 962; *Wheeler*, 832 A.2d at 1275; *Ortberg v. United States*, 81 A.3d 303, 306 (D.C. 2013).

[53] Potential non-conforming offenses include: (1) D.C. Code § 22-3215, Unlawful Use of Motor Vehicles, see *Carter*, 531 A.2d at 962 n.13; (2) D.C. Code § 22-3216, Taking Property Without Right, see *Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995); and (3) D.C. Code § 48-904.01(a)(1) Drug Distribution, see *Lampkins v. United States*, 973 A.2d 171, 174 (D.C. 2009).

[54] For example, this outcome can be avoided by applying a mental state of recklessly to the revised version of any non-conforming offense in lieu of the purpose or knowledge-like mental state applicable under current law to that offense. Alternatively, offense-specific exceptions to the principles set forth in RCC § 22E-209 could be made through an individual offense definition. Either way, the effect of this general intoxication provision depends on how each specific offense is revised.

[55] The phrase "self-induced intoxication," employed in the RCC, mirrors the phrase "voluntary intoxication," as employed in current District law.

[56] *See* RCC § 22E-209(c)-(d) and accompanying Explanatory Note.

[57] As the Commentary accompanying the RCC definitions of recklessness and negligence observe:

> Because punishment represents the moral condemnation of the community, the imposition of criminal liability can only be justified where a person's risk-taking fails to live up to the community's values—and, therefore, *deserves* to be condemned—under the circumstances. What ultimately renders an actor's disregard of a risk blameworthy, then,

categorical bar on the presentation of evidence of self-induced intoxication to disprove the existence of comparable mental states, in contrast, creates a risk of imposing liability for serious crimes on minimally culpable (or even non-culpable) actors.[58] RCC § 22E-209 effectively removes this categorical bar in the interests of proportionality.

Adoption of RCC § 22E-209 would also change District law in two other general ways. First, it would effectively resolve many unsettled questions of law. For example, there are hundreds of offenses in the D.C. Code that the DCCA has not classified as either "general intent" or "specific intent" crimes for purposes of the District's law of intoxication (or otherwise).[59] Absent a general intoxication provision, the availability of an intoxication defense for each of these offenses will remain unknown and uncertain, left to the DCCA for resolution on an *ad hoc* basis. Under RCC § 22E-209, in contrast, these issues will be resolved for every offense incorporated into the RCC.

Second, RCC § 22E-209 requires courts to assess the relationship between intoxication and liability on an element-by-element basis. This is in contrast to current District law, which approaches the relationship between intoxication and liability on an offense-by-offense basis—as shown in the DCCA's offense-specific general intent and specific intent rules. Supplanting this offense-level analysis of intoxication issues with an element-level analysis would constitute a break with the DCCA's *method* of determining liability in cases of intoxication—substantive outcomes aside.

Thus, to address the availability of an intoxication defense under the RCC, it will no longer be necessary to rely on the ambiguous and unpredictable distinctions made by District courts over the past century as to whether certain offenses are general intent or specific intent crimes. Instead, District courts will only need to consider whether the government is able to meet its affirmative burden of proof as to the culpable mental state requirement governing each offense based upon the standard rules of liability set forth in RCC § 22E-206, or, alternatively, based upon the rule of recklessness imputation set forth in RCC § 22E-209(c). In either case, the ultimate policy decision as to the effect of intoxication will be a legislative decision that is consistently applied and clearly communicated for each revised offense.[60]

> is whether it reflects a level of concern or attention for legally-protected interests that is *lower* than what a reasonable member of the community placed in the defendant's situation could be expected to exercise.

RCC §§ 22E-206(d)-(e): Explanatory Note (internal quotations and footnote call numbers omitted). For illustrations of situations where an actor's self-induced intoxication can negate blameworthiness, see *supra* note 14.

[58] For an illustration of how this could occur, see *supra* note 46.

[59] CCRC staff analysis has identified over 700 criminal statutes scattered throughout the D.C. Code, the majority of which have never been charged in recent years and are of a quasi-regulatory nature. While there are dozens of DCCA opinions determining whether particular offenses are general or specific intent, these judicial determinations address only a small fraction of District crimes.

[60] RCC § 22E-209(d) defines two important terms in the RCC's intoxication framework, "intoxication," *id.* at § (d)(1), and "self-induced intoxication," *id.* at § (d)(2). These definitions fill gaps in District law, which does not appear to have developed definitions—either through legislation or case law—for these terms in the culpability context.

Current District law has defined "intoxication" and related terminology in contexts where a person's intoxicated state constitutes an objective element of an offense. *See, e.g.,* D.C. Code § 50-2206.01 (defining intoxication and other related terms for traffic offenses); D.C. Code § 50-2206.11 ("No person

shall operate or be in physical control of any vehicle in the District: (1) While the person is *intoxicated*; or (2) While the person is under the *influence of alcohol or any drug or any combination thereof*.") (italics added). However, this terminology serves materially distinct functions in these latter contexts, and, therefore, does not provide an appropriate foundation for general culpability definitions.

Conversely, the intoxication-related general culpability definitions incorporated into RCC § 22E-209 should not influence these latter contexts, where a person's intoxicated state constitutes an objective element of an offense. For this reason, the accompanying Explanatory Note clearly states that these RCC definitions are not intended to have any effect on the meaning of the same or comparable terms when they arise as an objective element in an offense definition.

RCC § 22E-210. Accomplice Liability.

Explanatory Note. RCC § 22E-210 establishes general principles of accomplice liability applicable throughout the RCC.

The prefatory clause of subsection (a) establishes that accomplice liability is a means of holding one person liable for "the commission of an offense by another." This clarifies that accomplice liability is derivative in nature.[1] That is, a person is not guilty of an independent offense of "aiding and abetting" under the RCC.[2] Rather, an accomplice's liability is derived from the liability of the principal actor.[3]

The derivative nature of accomplice liability has two main implications. First, an accomplice may only be held criminally responsible under RCC § 22E-210 upon proof that the principal actor in fact committed "an offense."[4] This reference to "an offense" includes general inchoate crimes, such as a criminal attempt, solicitation, or conspiracy,

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[1] *E.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.02 (A)(2) (6th ed. 2012); GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 8.5 (2000); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 337 (1985).

[2] It should be noted, however, that the same conduct and accompanying state of mind which support derivative liability under section 210 may also provide the basis for non-derivative liability under some other provision in the RCC. The relationship between accomplice liability and the general inchoate crime of conspiracy is illustrative. If A purposely agrees to aid P in the commission of a robbery, and that agreement to aid either materializes or simply solidifies P's resolve to commit the robbery (even in the absence of such assistance), then A is responsible for P's robbery under section 210. On these same facts, however, A also appears to satisfy the requirements for the general inchoate crime of conspiracy (to commit robbery) under section 303. *See* RCC § 22E-303(a) ("A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person: (1) Purposely agree to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense; and (2) One of the parties to the agreement engages in an overt act in furtherance of the agreement.").

[3] Throughout this commentary, reference is made to "accomplices" and "principals." These labels are primarily employed for explanatory purposes. That is, they provide a useful means of distinguishing between: (1) legal actors who culpably commit the physical acts that constitute an offense (principals); and (2) legal actors who culpably aid or encourage those physical acts (accomplices). *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.2 (3d ed. Westlaw 2019). For the most part, the difference between an accomplice and the principal will be immaterial for liability purposes under the RCC. *But see* RCC § 22E-210(b) (rule of culpable mental state elevation governing circumstance elements of target offense). And in any event, because section 210 authorizes a defendant to be convicted of an offense based on conduct committed by another person, the RCC effectively eliminates the "obscure and technical distinctions between principals and accessories," which historically "derail[ed] prosecutions for reasons unrelated to the merits" at common law. *Brooks v. United States*, 599 A.2d 1094, 1098–99 (D.C. 1991) ("If the defendant were charged as a principal [at common law], he could not be convicted upon proof that he was an accessory. Likewise, one charged only as an accessory could not be convicted if the evidence established that he was instead a principal."); *see, e.g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.1 (Under the "modern approach" to accomplice liability, "a person guilty by accountability is guilty of the substantive crime itself and punishable accordingly."); *compare* D.C. Code § 22-1805 ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.").

[4] This point is also explicitly stated in subsection (d), which establishes that "[a]n accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein[.]" *See infra* notes 31-33 and accompanying text.

all of which may serve as the basis for accomplice liability.[5] Second, an accomplice may be both prosecuted and—contingent upon such proof—punished under § 22E-210 as if he or she were the principal offender.[6]

The prefatory clause of subsection (a) also clarifies that accomplice liability necessarily incorporates "the culpability required for [the target] offense."[7] Pursuant to this principle, a defendant may not be held liable as an accomplice under § 22E-210 absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any other broader aspect of culpability[8]—required to establish that offense.[9]

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[5] In practice, this means that accomplice liability can be based on purposely assisting or encouraging an unsuccessful principal who makes enough progress towards his or her criminal objective to satisfy the requirements of an attempt, solicitation, or conspiracy. The following situation is illustrative. A purposely assists P with the planning of a bank robbery that P is to commit by himself, while also volunteering to serve as P's get away driver. However, as P enters the bank (with A waiting in the parking lot), the police—who have been alerted to the plan by a third party—intervene, arresting P just as he begins to remove a weapon from his coat. On these facts, P satisfies the requirements of liability for the general inchoate crime of attempted robbery. *See* RCC § 22E-301(a) (attempt liability based on intent to commit target offense and dangerous proximity to completion). For this reason, A is—given his purposeful assistance—also liable for attempted robbery on a complicity theory of liability.

This outcome, which involves *aiding an attempt*, is to be distinguished from the outcome in situations that involve *attempts to aid*. Under the RCC, an unsuccessful accomplice who tries, but ultimately fails, to provide the principal with *any aid or encouragement at all* is not subject to liability under section 210, regardless of the principal's ultimate success (and concomitant criminal liability). *See infra* notes 17-18 and accompanying text (addressing treatment of unsuccessful accomplices under the RCC).

[6] This is not to say that sentencing courts *ought* to impose the same sentences upon accomplices and principals as a matter of judicial sentencing discretion. Accomplices are often materially less blameworthy than principals, and, where this is the case, there exists strong support for imposing proportionately less severe sentences that account for relevant distinctions in culpability. *See, e.g.,* Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1222 & n.108 (2017) (highlighting "continuous, graduated judgments of relative blameworthiness expressed in both public opinion surveys and scholarly literature" on the punishment of accomplices); *see also* D.C. VOLUNTARY SENTENCING GUIDELINES § 5.2.3(4) (listing, as a mitigating factor, that "[t]he offense was principally accomplished by another, and the defendant manifested extreme caution or sincere concern for the safety and well-being of a victim").

[7] *See, e.g.,* DRESSLER, *supra* note 1, at § 30.05(A)(1) (It is well-established that "to be an accomplice, a person 'must not only have the purpose that someone else engage in the conduct which constitutes the particular crime charged, *but the accomplice must also share in the same intent which is required for commission of the substantive offense*.") (quoting *State v. Williams*, 718 A.2d 721, 723 (N.J. Super. Ct. Law Div. 1998)) (italics added); LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2(c) ("The prevailing view is that the accomplice must also have the mental state required for the crime of which he is to be convicted on an accomplice theory.").

[8] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(d) (culpability requirement defined). For example, if the offense aided or abetted requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, accomplice liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(d)(1) (voluntariness requirement also part of culpability requirement). For additional principles governing the culpable mental state requirement of accomplice liability, see *infra* notes 19–32 and accompanying text.

Paragraphs (a)(1) and (a)(2) establish two alternative means of satisfying the conduct requirement of accomplice liability: by rendering assistance and by offering encouragement.[10] The assistance prong extends to both direct participation in the commission of a crime and any support rendered in the earlier, planning stages.[11] Typically, the assistance prong will be satisfied by conduct of an affirmative nature[12];

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[9] This derivative culpable mental state requirement, which is drawn from the target offense, is to be distinguished from the independent culpable mental state requirement governing the assistance or encouragement at issue in all complicity prosecutions. *See infra* notes 19-24 and accompanying text. Generally speaking, accomplice liability entails proof that the accused: (1) "intended" to assist or encourage conduct planned to culminate in an offense; and (2) "intended," through that assistance or encouragement, to bring about any result elements or circumstance elements that comprise the target offense. *See, e.g.,* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994); Kadish, *supra* note 1, at 349. The following scenario illustrates how these "dual intent" requirements fit together. DRESSLER, supra note 1, at § 30.05.

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

For example, if A was blocking the entrance to the building because she accidentally dropped her packages, then neither requirement is met: A did not intentionally assist the conduct of P which, in fact, resulted in the death of a police officer; nor did A act with the intent that, through her assistance, a police officer be killed.

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

Lastly, if A was blocking the entrance to the building because P had approached her with an opportunity to seek retribution against the same officer responsible for disrupting a drug conspiracy A was involved with years ago, then A fulfills both requirements: A acted with both the intent to facilitate P's conduct and the intent that, through her assistance, a police officer be killed. (Note, however, that if A intended to kill V but lacked awareness that V was still a police officer, then the second intent requirement would not be met: although A intended to kill V, A did not intend to kill a *police officer*.) *See generally* Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 135–36 (2015) (developing similar hypothetical and comparable analysis).

[10] The categories of assistance and encouragement frequently overlap since knowledge that aid will be given can influence the principal's decision to go forward. Kadish, *supra* note 1, at 342-43. However, there remains an important analytic difference between the two: whereas assistance is subject to criminal liability because of the accomplice's *material contribution* to the principal's *execution* of a crime, encouragement is subject to criminal liability because of the accomplice's *psychological contribution* to the principal's *decision* to commit a crime. *Id.*

[11] *E.g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 1, at § 30.04.

[12] Illustrative examples of affirmative acts of assistance in support of a bank robbery include: (1) furnishing the principal with the means of committing a bank robbery (e.g., by providing guns, money, supplies or other instrumentalities); or (2) helping the principal with the preparation or execution of the crime (e.g., planning out the details, serving as a lookout, driving the getaway car, signaling the approach of the

however, an omission to act also provides a viable basis for accomplice liability, provided that the defendant is under a legal duty to act[13] and the other requirements of liability are met.[14] The encouragement prong speaks to the promotion of an offense by psychological influence.[15] It extends to various forms of influence, including (but not limited to) the rational or emotional support afforded by a command, request, or agreement, advice or counsel, and instigation, incitement, or provocation.[16]

To satisfy the conduct requirement of accomplice liability under paragraphs (a)(1) and (a)(2), it is not necessary that the principal actor have been subjectively aware of the effect of the accomplice's assistance or encouragement. However, the accomplice's conduct must have actually assisted or encouraged the principal in some non-trivial way.[17] This means that an unsuccessful accomplice—i.e., one who *attempts* to aid or

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security guard, or preventing a warning from reaching the security guard). *E,g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 1, at § 30.04.

[13] *See generally* RCC § 22E-202(c) (proscribing general principles of omission liability).

[14] For example, if A, a corrupt police officer, purposely fails to stop a bank robbery committed by P, based upon P's promise to provide A with a portion of the proceeds, A may be deemed an accomplice to the robbery. Similarly, if A, a parent, purposely fails to prevent the sexual assault of her young child by P, A's boyfriend, based upon P's promise to marry A for allowing it to happen, A may be deemed an accomplice to the sexual assault. *E,g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 1, at § 30.04.

[15] The following example is illustrative. V personally insults P. P is predisposed to let the insult slide, but A persuades P over the phone that P must respond with lethal violence to protect P's reputation. In providing this encouragement, A consciously desires to bring about the death of V, who A also has an outstanding beef with due to a prior perceived slight that V lodged against A a few days earlier. If P proceeds to kill V, A is guilty of murder as P's accomplice under section 210 based on A's purposeful encouragement.

[16] These pathways of influence may, in turn, be communicated directly or by an intermediary, through words or gestures, via threats or promises, and occur either before or at the actual time the crime is being committed. It is therefore, immaterial, for purposes of accomplice liability, whether the encouragement is communicated orally, in writing, or through other means of expression. *E,g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 1, at § 30.04.

[17] *See, e.g.,* Eric A. Johnson, *Criminal Liability for Loss of A Chance*, 91 IOWA L. REV. 59, 110–11 (2005) (The "words used to define the scope of accomplice liability"—namely, assistance and encouragement—"contain an implicit requirement that the defendant's words or actions contribute somehow to the criminal venture."). However, an accomplice's contribution to a criminal venture need not be substantial or even causally necessary to satisfy the assistance or encouragement prongs under RCC § 22E-210(a). *See, e.g.,* DRESSLER, *supra* note 1, at § 30.06 ("The prosecution is not required to establish that the crime would not have occurred but for the accessory or that the accomplice contributed a substantial amount of assistance.").

To appreciate the import of this actual assistance or encouragement requirement, consider (again) the relationship between accomplice liability and the general inchoate crime of conspiracy. *See supra* note 2. A's purposeful agreement to aid P in the commission of a crime provides the basis for a conspiracy conviction even where the promise to help goes unfulfilled, provided that P "engages in an overt act in furtherance of the agreement," RCC § 22E-303(a), and A does not meet the relatively stringent requirements for a renunciation defense under RCC § 22E-305. In contrast, that same unfulfilled agreement to aid will only provide the basis for holding A responsible for P's conduct as an accomplice if its formation bolstered P's criminal resolve, and, therefore, *actually encouraged* P to commit the target offense under RCC § 22E-210(a)(2). *Compare* DRESSLER, *supra* note 1, at § 30.09(B)(1)(d) ("In most cases, [A]'s agreement to aid in the commission of an offense serves as encouragement to P and, therefore, functions as a basis for common law accomplice liability."), *with* Model Penal Code § 2.06(3) (a)(ii) (accomplice liability applies to one who "*agrees* . . . to aid [an]other person in planning or committing of an offense").

encourage the principal but fails to promote or facilitate the target offense in any way—is not subject to liability under §22E-210.[18]

Paragraphs (a)(1) and (a)(2) also clarify that the requisite assistance or encouragement must be accompanied by a purpose to facilitate or promote the principal's criminal conduct.[19] This "purposive attitude" constitutes the foundation of the culpability requirement governing accomplice liability.[20] It can be said to exist when a person, in rendering assistance or encouragement, *consciously desires* to facilitate or promote another person's criminal conduct.[21]

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[18] For example, where A attempts to assist P by opening a window to allow P to enter a dwelling unlawfully, but P (unaware of the open window) enters through a door, A is *not* an accomplice to P's trespass. Likewise, if A utters words of encouragement to P who fails to hear them, but nevertheless proceeds to enter the dwelling unlawfully anyways, A is *not* an accomplice to P's trespass. *Compare* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 (1983) ("At common law, an unsuccessful attempt to aid, one that was unknown to the perpetrator and that neither encouraged nor assisted him, would not support accomplice liability."), *with* Model Penal Code § 2.06(3) (a)(ii) (accomplice liability applies to one who "*attempts* to aid [an]other person in planning or committing of an offense") (italics added).

[19] *But see* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2(c) ("This is not to suggest, however, that an accomplice can escape liability by showing he did not [*desire*] to aid a crime in the sense that he was unaware that the criminal law covered the conduct of the person he aided. Such is not the case, for here as well the general principle that ignorance of the law is no excuse prevails.").

[20] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*) ("[T]hroughout centuries of common law," the definitions of complicity "have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; . . . . [T]hey all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, "abet"-carry an implication of purposive attitude towards it.") (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.)); *see, e.g., Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014) (quoting *Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949)).

[21] *See generally* RCC § 22E-206(a) (purposely defined). The following scenario is illustrative. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature. Having been informed of this, P offers to purchase A's car for market value. A rejects the offer, but counters with an arrangement wherein A will give P his car in return for a ten percent stake in the profits. P agrees to this arrangement, and, subsequently completes the bank robbery with P's vehicle. However, the next day, both P and A are arrested by the police, who access security camera footage of both P and A's vehicle in the bank's parking lot. On these facts, A can be held liable for robbery as an accomplice to P's crime because, *inter alia*, A consciously desired to facilitate and promote P's criminal conduct.

That an accomplice must have the purpose to facilitate or promote the principal's criminal conduct does not preclude convictions for recklessness and negligence-based theories of liability concerning the result elements of the target offense, provided that the defendant acts with both the requisite purpose and the "culpability required by [the target] offense," RCC § 22E-210(a) (prefatory clause). The following example is illustrative. Passenger A tells driver P to exceed the legal speed limit so that they can both get to a party on time, notwithstanding the fact that they're currently driving through a school zone in the middle of the day. P is responsive to the request and quickly steps on the gas. Soon thereafter, P loses control of his car and fatally crashes into V, a nearby child leaving school for the day. Under these circumstances, P can be convicted of reckless homicide provided that: (1) P was aware of a substantial risk of death to a pedestrian; and (2) that P's disregard of that risk was clearly blameworthy. Along similar lines, A could be also be convicted of reckless homicide on a complicity theory provided that: (1) A consciously desired to encourage P to speed through the school zone; (2) A was aware that speeding through the school zone created a substantial risk of death to a pedestrian; and that (3) A's disregard of that risk was clearly blameworthy. *See* RCC § 22E-206(d)(1) (definition of recklessness as to result elements).

The corollary to this purpose requirement is that accomplice liability is not supported under § 22E-210 if the defendant's primary motive was to achieve some other, non-criminal objective (e.g., "conduct[ing] an otherwise lawful business in a profitable manner").[22] And this is so even if the would-be accomplice knew that his or her aid or encouragement was likely to promote or facilitate that criminal scheme.[23] Neither awareness of, nor indifference towards, the success of another person's criminal plans is sufficient to satisfy the purpose requirement incorporated into paragraphs (a)(1) and (a)(2).[24]

A comparable analysis would govern a negligent homicide charge brought against A under a complicity theory. The only difference is that the government would not need to prove that A was actually aware of a substantial risk of death to a pedestrian; instead, proof that A *should* have been aware of such a risk would suffice. *See* RCC § 22E-206(e)(1) (definition of negligence as to result elements).

[22] *See, e.g., United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940) (Hand, J.) ("[T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner" because this would "seriously undermin[e] lawful commerce."); Kadish, *supra* note 1, at 353 (absent purpose requirement, complicity would "cast a pall on ordinary activity" by giving us reason to "fear criminal liability for what others might do simply because our actions made their acts more probable"); Model Penal Code § 2.06 cmt. at 312 & n.42, 314-19 (purpose requirement appropriate because, *inter alia*, "there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent").

[23] It has been observed that:

> Often, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motivation. But there are many and important cases where this is the central question in determining liability. A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in commission of a crime. A doctor counsels against an abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist. A utility provides telephone or telegraph service, knowing it is used for bookmaking. An employee puts through a shipment in the course of his employment though he knows the shipment is illegal. A farm boy clears the ground for setting up a still, knowing that the venture is illicit.

Model Penal Code § 2.06 cmt. at 316. In each of these situations, "the person furnishing goods or services is aware of the customer's criminal intentions, but may not care whether the crime is committed." DRESSLER, *supra* note 1, at § 27.07. However, in the absence of a purposive attitude towards the customer's criminal objective, the seller's mere awareness of probable illegal activity will not suffice for accomplice liability. *Id.*; *see, e.g.,* Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236 (2000) (purpose requirement reflects majority approach).

[24] To illustrate, consider the following modified version of the scenario presented *supra* note 21. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature. Having been informed of this, P offers to purchase A's car for market value. A accepts the offer to sell his car for market value because A was already planning to sell the vehicle, so accepting P's offer will save A the effort of having to list it on his own. However, A thinks the bank robbery is a stupid idea, and tells P this much. P ignores A's advice and soon thereafter proceeds to carry out the bank robbery with P's vehicle. The next day, both P and A are arrested by the police, who access security camera footage of both P and A's vehicle in the bank's parking lot. On these facts, A cannot be held liable for robbery as an accomplice to P's crime because, *inter alia*, A did not consciously desire to facilitate or promote P's criminal conduct. (Instead, A's purpose was to save himself the hassle of having to list and sell the vehicle on his own.) That A knew the sale of his car to P would facilitate the bank robbery, and was arguably indifferent as to P's criminal conduct, would not support liability under section 210.

Subsection (b) provides additional clarity concerning the relationship between accomplice liability and the culpability requirement governing the target offense. Whereas the prefatory clause of subsection (a) broadly clarifies that accomplice liability entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the "defendant must intend for any circumstances required by that offense to exist." The latter requirement incorporates a principle of culpable mental state elevation applicable whenever the target offense is comprised of a circumstance element that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[25] To satisfy this threshold culpable mental state requirement, the government must prove that the defendant's assistance or encouragement was accompanied by a *practically certain belief* that the circumstance elements incorporated into the target offense existed, or, alternatively, that the defendant *consciously desired* for the requisite circumstances to exist.[26]

Subsection (c) addresses the appropriate disposition of complicity prosecutions involving the commission of an offense that is graded by distinctions in culpability as to result elements.[27] In this situation (most common in homicide prosecutions), an

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[25] *See, e.g. Rosemond v. United States*, 134 S. Ct. 1240, 1242 (2014) ("[A]iding and abetting requires intent extending to the whole crime . . . . That requirement is satisfied when a person actively participates in a criminal venture with *full knowledge of the circumstances* constituting the charged offense."); *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 589 (1st Cir. 2015) ("[U]nder *Rosemond*, an aider and abettor of [the crime of producing child pornography] must have *known* the victim was a minor" although the victim's age is a matter of strict liability for the target offense). For those target offenses that already require proof of intent, knowledge, or purpose as to a circumstance element, subsection (b) does not elevate the applicable culpable mental state.

[26] *See generally* RCC §§ 22E-206(a)(2) and (c)(2) (defining purposely and intentionally as to circumstance elements). The following scenario involving two thirty year-old males, A and P, is illustrative. A lets P borrow his bedroom to engage in consensual sex with V, a fourteen year-old minor, who P mistakenly believes to be twenty-one and, crucially, who A has never met. Thereafter, P and V have sex in A's room. If P is subsequently prosecuted for a strict liability sexual abuse offense applicable to fourteen year-old victims, P can be convicted notwithstanding his mistake of fact. However, the same mistake of fact would exonerate A under subsection (b) notwithstanding the strict liability nature of the target offense. Although A purposely assisted P with his sexual rendezvous with V, A lacked the *intent* to facilitate sex with *a fourteen year old*, which would be required by the principle of culpable mental state elevation codified by subsection (b).

[27] The requirement in subsection (c) that the target "offense" be "graded by distinctions in culpability as to result elements" should be broadly construed to support convictions for greater and lesser-included versions of the same substantive offense. This should be done, moreover, even where the relevant criminal statutes are neither (1) formally described in the RCC as distinct degrees of the same offense, nor (2) codified in the same statutory provision. To illustrate, consider the overlapping, hierarchically related offenses of first-degree murder, second-degree manslaughter, and negligent homicide. These three offenses are *not* formally described as distinct degrees of the same offense (e.g., homicide) under the RCC, and each is codified in a different section of the code. *See generally* RCC §§ 22E-1101, 1102, and 1103. However, because all three of these homicide statutes are graded by distinctions in culpability as to the same result element (death), RCC § 22E-210(c) would authorize the imposition of liability for (among other possibilities) the following in a three person criminal scheme: (1) first-degree murder upon P; (2) second-degree manslaughter on A1; and (3) negligent homicide on A2. *See, e.g.,* DRESSLER, *supra* note 1, at § 30.6 ("It is fair to say [] that when P commits the 'offense' of criminal homicide, this 'crime' is imputed to [A], whose own liability for the homicide should be predicated on his own level of *mens rea*, whether it is

accomplice is liable for any grade for which he or she has the required culpability, although the person who committed the offense acted with a different kind of culpability.[28] Consequently, an accomplice may be convicted of a grade of an offense that is either higher[29] or lower[30] than that committed by the principal actor based upon distinctions between the two (or more) actors' states of mind.

Subsection (d) addresses the relationship between the prosecution of the accomplice and the treatment of the principal actor's criminal conduct.[31] It establishes two main principles. First, accomplice liability entails proof that the defendant assisted or encouraged the commission of an offense that was, in fact, committed by another person.[32] Second, assuming the government can meet this standard of proof, the legal disposition of the principal actor's situation is generally immaterial to that of the accomplice.[33] This includes the fact that the principal actor: (1) has not been prosecuted or convicted; (2) has been convicted of a different offense or degree of offense; or (3) has been acquitted.

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greater or less than that of the primary party."); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 386–87 (1997) (same).

[28] This means that (for example):

> To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation. And, because a killing in a heat of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder. Likewise, it is equally possible that the killer is guilty only of manslaughter because of his heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2(c).

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

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

[31] *See, e.g.,* Model Penal Code § 2.06(7) ("An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.").

[32] *See supra* notes 2-6 and accompanying text.

[33] *See, e.g., Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 & 1256 (D.C. 1995) (citing, *inter alia*, *Standefer v. United States*, 447 U.S. 10, 14–20 (1980) and *Branch v. United States,* 382 A.2d 1033, 1035 (D.C. 1978)); Model Penal Code § 2.06(7) cmt. at 327-28.

RCC § 22E-210 has been drafted in light of, and should be construed in accordance with, prevailing free speech principles. Given the centrality of speech to encouragement, accomplice liability directly implicates a criminal defendant's First Amendment rights.[34] And while the U.S. Supreme Court recently clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,"[35] it also reaffirmed the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[36] The RCC respects this distinction by requiring that the defendant encourage the principal actor to engage in "*specific* conduct" constituting an offense under paragraph (a)(2).[37] To meet this requirement, it is not necessary that the defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. At the very least, though, it must be proven that the defendant's communication, when viewed in the context of the knowledge and position of the intended recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.[38]

RCC § 22E-210 is intended to preserve existing District law relevant to accomplice liability to the extent it is consistent with the RCC's statutory text and accompanying commentary.[39] Subsections (a), (b), (c), and (d) therefore incorporate existing District legal authorities whenever appropriate.[40]

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[34] *See, e.g.,* DRESSLER, *supra* note 1, at § 28.01 (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

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

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

[37] *See, e.g.,* Model Penal Code § 2.06(3)(a)(i) ("A person is an accomplice of another person in the commission of an offense if," *inter alia*, he or she "*solicits* such other person to commit it[.]") (italics added); Model Penal Code § 5.02(1) ("A person is guilty of solicitation to commit a crime if," *inter alia*, he or she "*encourages* . . . another person to engage in *specific conduct* that would constitute such crime . . .") (italics added).

[38] *E.g.,* Model Penal Code § 5.02 cmt. at 376; LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 11.1. So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to satisfy the encouragement prong of accomplice liability. Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor would a general exhortation to "go out and revolt." *State v. Johnson*, 202 Or. App. 478, 483 (2005); *see generally Williams*, 553 U.S. at 300 (distinguishing statements such as "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography" with the recommendation of a particular piece of purported child pornography).

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

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

Relation to Current District Law. RCC § 22E-210 codifies, clarifies, and fills gaps reflected in District law on the culpable mental state requirement and conduct requirement for accomplice liability, as well as the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense.

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

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.[41]

This statute "was enacted by Congress in 1901, eight years before its federal analogue."[42] It was the product of a "reform movement," the purpose of which was to enact complicity legislation "abolish[ing] the distinction between principals and accessories and render[ing] them all principals."[43] While the general purpose sought to

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

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

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

[42] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*); *see also Hackney v. United States*, 389 A.2d 1336, 1342 (D.C. 1978) ("Our aiding and abetting statute does not differ substantially from its federal counterpart."). The original federal aiding and abetting federal statute, initially codified in 18 U.S.C. § 550, provided that "[w]hoever directly commits an act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." The current federal statute, 18 U.S.C. § 2, states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

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

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

be achieved by this statute are clear, its precise contours are more ambiguous. The District's general complicity statute—like its federal analogue—does not define any of the relevant statutory terms it employs. This statutory silence has effectively delegated to District courts the responsibility to establish the elements of accomplice liability.

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

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

RCC § 22E-210(a): Relation to Current District Law on Conduct Requirement. RCC § 22E-210(a) codifies, clarifies, and fills gaps in District law relevant to the conduct requirement of accomplice liability.

It is well established in the District that *merely intending* to promote or facilitate an offense perpetrated by another is an insufficient basis for accomplice liability; rather, to be held liable as an accomplice, one must have engaged in conduct that in some way contributed to the commission of that offense.[44] At the same time, the essential characteristics of this required contribution are described in a variety of ways.

For example, the District's general complicity statute utilizes a number of terms to express the conduct requirement of complicity: "*advising*, *inciting*, or *conniving* at the offense, or *aiding* or *abetting* the principal offender."[45] The first three terms in this formulation—"advising," "inciting," and "conniving" rarely show up in the case law.[46] Nevertheless, their meaning, when viewed in historical context, is clear enough: they

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

[44] *Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016) ("Acting with the intent that a knife be used unlawfully does not in and of itself automatically satisfy the requirement that the accomplice himself do something to further the carrying of the knife by the principal. The accomplice may mentally intend for the knife to be used but may not do anything to assist the principal with the carrying and use of the knife."); D.C. Crim. Jur. Instr. § 3.200 ("For [^] [name of defendant] to be guilty of aiding and abetting the offense of [^] [insert possessory firearm offense], the government must prove beyond a reasonable doubt [both that s/he aided and abetted the commission of [^] [insert name of crime of violence or dangerous crime] and also] that s/he aided and abetted the possession of a firearm. To aid and abet the possession of a firearm, [^] [name of defendant] must have engaged in some affirmative conduct to assist or facilitate the principal's possession of a firearm.]"); *see, e.g., Walker v. United States*, 167 A.3d 1191, 1202 (D.C. 2017) (analyzing whether defendant "encouraged or aided the commission of [the victim's] murder with malice aforethought").

[45] D.C. Code § 22-1805.

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

indicate that one may become an accomplice without being "personally present at the commission" of a crime.[47] Instead, as many modern criminal codes phrase it, "solicitation of the crime is enough."[48]

More typical under District law is judicial reliance on the statute's "aiding" or "abetting" language.[49] The standard formulation for accomplice liability, endorsed by the DCCA's *en banc* opinion in *Wilson Bey* and captured in the Redbook jury instructions, requires proof that the defendant "knowingly associated [himself or herself] with the commission of the crime, that [he or she] participated in the crime as something [he or she] wished to bring about, and that [he or she] intended by [his or her] actions to make it succeed."[50] Textually speaking, this formulation intertwines the culpable mental state requirement and conduct requirement of accomplice liability together; it is, therefore, not a model of clarity.

More helpful, then, is the DCCA's repeated observation that "one can be found guilty of aiding and abetting by merely encouraging or facilitating a crime."[51] This statement articulates the widely endorsed principle—reflected both inside and outside the District—that aider and abettor liability encapsulates two independently sufficient categories of conduct: *physical assistance* and *psychological encouragement*.[52]

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

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

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

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

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

[52] *See Walker v. United States*, 167 A.3d 1191, 1201–02 (D.C. 2017) (noting the alternative requirements of "encouragement or aid"); *Tann*, 127 A.3d at 499 n.11 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage

The following cases are illustrative of the breadth of these alternative requirements under current District law.[53] In *Price v. United States*, the DCCA upheld a conviction for theft premised on a complicity theory where the defendant took an item off the shelf at a hardware store, and thereafter carted it over to the principal—located within the store—who then tried to make a fraudulent return.[54]

In *Wesley v. United States*, the DCCA upheld a conviction for armed robbery premised on a complicity theory where the defendant merely engaged in a conversation with a bystander that enabled the principal to "slip into the barbershop" that was ultimately robbed, and perhaps also "serv[ed] as a lookout" for the principal.[55]

And in *Creek v. United States*, the DCCA upheld a conviction for armed robbery premised on a complicity theory based on the mere fact that the defendant was with the robber immediately before the robbery, retraced his steps back to the victim's home, stationed himself by her front gate while his companion seized her purse, and fled with the thief with whom he remained until caught by the police.[56]

One issue relevant to the conduct requirement of accomplice liability upon which District law appears to be silent is whether assistance by omission can, under appropriate circumstances, suffice for liability. For example, may a corrupt police officer who fails to stop a crime with the intent to aid the perpetrators be deemed an accomplice to that crime? There does not appear to be any DCCA case law directly on point.[57]

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

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

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

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

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

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

> The court may wish to modify the instruction where an omission might constitute an attempt to commit a crime. For example, if the government alleges that the defendant did

Nevertheless, general District authority on omission liability would seem to support imposing liability under these circumstances.[58] So too does the fact that the DCCA has held on multiple occasions that "failure to disassociate" oneself from a criminal scheme alongside "tacit approval" to the offenses perpetrated by the principal will suffice to satisfy the conduct requirement of accomplice liability.[59]

Subsection (a) codifies the above District authorities applicable to the conduct requirement of accomplice liability. More specifically, subsections (a)(1) and (a)(2) establish two alternative means of being an accomplice: by rendering assistance and by offering encouragement.[60] The first prong will most frequently be established by proof of physical assistance rendered by affirmative conduct; however, an omission to act may also provide a viable basis for establishing the assistance prong, provided that the defendant is under a legal duty to act (and the other requirements of liability are met).[61] The encouragement prong, in contrast, encompasses promotion of an offense by psychological influence. It includes various forms of influence, including (but not limited to) the encouragement afforded by a command, request, or agreement, as well as advice, counsel, instigation, incitement, and provocation.

> not activate the store's alarm system as part of a robbery attempt, the court might wish to modify the instruction that the "defendant omitted to do an act . . . ."

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

[58] *See* Commentary to RCC § 22E-202(c): Relation to Current District Law.

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

[60] Whether assistance or encouragement is at issue, there is no requirement that the principal actor have *actually* been aware of the effect of the defendant's conduct. However, the defendant's conduct *must have, in fact,* assisted or encouraged the principle actor in some way (i.e., an unsuccessful accomplice is not subject to criminal liability under RCC § 22E-210).

[61] *See generally* RCC § 22E-202(c) (setting forth the requirements of omission liability under the RCC).

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

The DCCA has addressed the culpable mental state requirement of accomplice liability on numerous occasions. Generally speaking, it is well established by such case law that "[t]here is a dual mental state requirement for accomplice liability." [62] The first requirement speaks to the relationship between the accomplice's state of mind and the promotion or facilitation of the requisite criminal conduct committed by the principal. The second requirement, in contrast, speaks to the relationship between the accomplice's state of mind and the results and/or circumstances brought about by the principal (and which are prohibited by the target offense).

As it relates to the first of these two culpable mental state requirements, DCCA case law establishes that the defendant must have acted with the *purpose* of promoting or facilitating criminal conduct. The basis for this requirement is the DCCA's *en banc* decision in *United States v. Wilson-Bey*, which holds that, "[t]o establish a defendant's criminal liability as an aider and abettor, [] the government must prove . . . that the accomplice . . . *wished to bring about* [the criminal venture], and [] *sought by his action to make it succeed*."[63]

This requirement of a "purposive attitude" is, as the *Wilson-Bey* court explained, drawn from Judge Hand's well-known decision in *United States v. Peoni*.[64] As the DCCA observed:

> Although *Peoni* was decided sixty-eight years ago, it remains the prevailing authority defining accomplice liability. In 1949 the Supreme Court explicitly adopted *Peoni's* purpose-based formulation. *Nye & Nissen v. United States,* 336 U.S. 613, 618, 69 S.Ct. 766, 93 L.Ed. 919 (1949). This court has likewise followed *Peoni, see, e.g.,* [*Reginald B.*] *Brooks v. United States,* 599 A.2d 1094, 1099 (D.C.1991); *Hackney,* 389 A.2d at 1342, and we have held that an accomplice "must be concerned in the commission of *the specific crime with which the principal defendant is charged* [;] he must be an associate in guilt of *that crime.*" *Roy v. United States,* 652 A.2d 1098, 1104 (D.C. 1995) (emphasis in original).

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

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

[64] 100 F.2d 401 (2d Cir. 1938). After considering an array of common law authorities, Judge Hand concluded that:

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

Id.

> Every United States Circuit Court of Appeals has adopted *Peoni's* requirement that the accomplice be shown to have intended that the principal succeed in committing the charged offense, and the federal appellate courts have thus rejected, explicitly or implicitly, a standard that would permit the conviction of an accomplice without the requisite showing of intent. The majority of state courts have also adopted a purpose-based standard. *See also* LaFave § 13.2(d), at 349 & n. 97. Federal and state model jury instructions are also generally consistent with *Peoni,* and require proof that the accomplice intended to help the principal to commit the charged offense.[65]

Since *Wilson-Bey*, *Peoni's* purpose-based standard has been incorporated into the District's jury instructions,[66] and reaffirmed in numerous DCCA cases.[67] At the same time, this standard is not a model of clarity, and has led to subsequent litigation.[68]

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

[66] D.C. Crim. Jur. Instr. § 3.200.

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

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

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

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

A partial dissenting opinion written by Judge Glickman reached an opposite conclusion, determining that a person "can[not] be found guilty as an aider and abettor under the law of the District of Columbia without proof that he intended to assist or encourage the principal offender." *Id.* at 499. This is not to say that "the accomplice always must know the identity of the principal offender." *Id.* Indeed, "it is

Nevertheless, this much appears to be clear from the relevant District authorities: in order to be held liable as an accomplice, the defendant must, at minimum, have "designedly encouraged or facilitated" the commission of criminal conduct by another.[69]

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

Most fundamentally, the government must prove that the defendant acted with, at minimum, "the culpable mental state required for the underlying crime committed by the principal."[70] Practically speaking, this means that a defendant may never be held criminally responsible for the conduct of another as an accomplice absent proof that the defendant acted with the culpable mental states governing the results and circumstances that comprise the offense committed by the principal.[71]

So, for example, the DCCA in *Wilson Bey* held that, with respect to results, an accomplice to first-degree murder must, like the principal, "be shown to have specifically intended the decedent's death and to have acted with premeditation and deliberation."[72] And, as for circumstances, the DCCA held in *Robinson v. United States* that, "[i]f the principal offender must know he is armed when he is committing a violent or dangerous

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possible in some circumstances to be an aider and abettor—to help or induce another person to commit a crime, and to do so knowingly and intentionally—without knowing who that other person is." *Id.* ("A typical example is the person who knowingly attaches himself to a large group, such as a lynch mob, a criminal gang, or a vigilante body, that is engaged in or bent on breaking the law.") *Id.* Even still, "one cannot be liable as an aider and abettor without having the intent to assist or encourage a principal actor at all." *Id.* That is, "[o]ne cannot be an inadvertent accomplice." *Id.*

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

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

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

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

crime in order to be subject to the 'while armed' enhancement of § 22–4502, then the aider and abettor . . . also must know the principal is armed for the enhancement to be applicable to her as well." [73]

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

For example, in *Coleman v. United States*, the DCCA held that an accomplice to depraved heart murder must (but need only) possess the extreme recklessness as to death required of the principal of a depraved heart murder.[74] And in *Perry v. United States*, the DCCA held that an accomplice to aggravated assault must (but need only) possess the extreme recklessness as to serious bodily required of the principal of an aggravated assault.[75]

As for circumstances, DCCA case law is more ambiguous. Generally speaking, the government is required to show in all cases in which accomplice liability is charged that the defendant's "participation was with guilty knowledge."[76] In practice, this appears to amount to a principle of culpable mental state elevation, under which proof of awareness or belief as to the target offense's circumstance elements is necessary to secure a conviction based on accomplice liability.

The clearest statement of this approach is reflected in the DCCA's decision in *Robinson v. United States*, which specifically held that "[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved."[77] The basis for such a determination is, as the *Robinson* court explains, the more general idea that, in order for an accomplice to be deemed "guilty of a crime"—for example, "an offense committed while armed"—the defendant "must, *inter alia,* intend to facilitate the *entire offense*."[78]

This effective principle of culpable mental state elevation is, as the *Robinson* court proceeds to explain, both rooted in the DCCA's *en banc* opinion in *Wilson-Bey*, as well as the U.S. Supreme Court's recent decision in *Rosemond v. United States*, which held that "an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime."[79] (Which is to say, as the *Rosemond* Court explained, "[t]he intent must go to the specific and entire

[73] *Robinson v. United States*, 100 A.3d 95, 105 (D.C. 2014).
[74] *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008); *see Tann*, 127 A.3d at 430-31 ("Because he was convicted of second-degree murder for aiding and abetting Cooper's shooting of Terrence Jones, the government was required to prove that Tann had, at a minimum, a "depraved heart" with regard to Terrence Jones's death.").
[75] *Perry v. United States,* 36 A.3d 799, 817–18 (D.C. 2011); *see also Story v. United States*, 16 F.2d 342, 344 (D.C. Cir. 1926) (upholding accomplice liability based on "criminal negligence" as to causing death).
[76] *Tyree v. United States*, 942 A.2d 629, 636 (D.C. 2008); *see, e.g., Evans v. United States*, 160 A.3d 1155, 1162 (D.C. 2017); *Tann*, 127 A.3d at 434; *Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016); *Wheeler v. United States*, 977 A.2d 973, 986 (D.C. 2009), *reh'g granted, opinion modified*, 987 A.2d 431 (D.C. 2010).
[77] *Robinson*, 100 A.3d at 105–06.
[78] *Robinson*, 100 A.3d at 106 and n.17 (citing *Wilson–Bey*, 903 A.2d at 831).
[79] *Robinson*, 100 A.3d at 105–06 (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)).

crime charged," such as "predicate crime plus gun use."[80]) Since *Robinson* was handed down, this rationale has been reaffirmed by the DCCA on multiple occasions.[81]

There exists one additional principle governing the culpable mental state of accomplice liability under District law that bears notice. While an accomplice may never be convicted of an offense absent proof of a culpable mental state that satisfies the requirements of the offense charged,[82] "the principal and the aider and abettor(s) need not have the same *mens rea* as each other if an offense can be committed with an alternate *mens rea*." [83] Rather, where an offense is divided into degrees based upon distinctions in culpability (e.g., homicide), "each participant's responsibility [turns] on his or her individual intent or *mens rea*."[84]

Consistent with this principle, the DCCA in *Mayfield v. United States* deemed the defendant's conviction for premeditated first-degree murder while armed to be appropriate under an aiding and abetting theory, although the principal who had fired fatal shot was convicted of second-degree murder.[85] Likewise, in at least two other decisions, the DCCA has—again, in accordance with this principle—deemed it appropriate to hold a secondary party liable for second-degree murder, although the principal party committed a premeditated first-degree murder.[86]

Viewed collectively, the above analysis of District law supports four propositions. First, an accomplice must act with the purpose of assisting or encouraging the criminal

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[80] *See Rosemond*, 134 S. Ct. at 1249.

[81] *See, e.g., Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016); *Tann*, 127 A.3d at 434; *see also Evans v. United States*, 160 A.3d 1155, 1162 (D.C. 2017) ("Evans was found guilty of the charges relating to weapons via the aiding and abetting theory and accordingly, the government was required to prove Evans's guilty knowledge.").

[82] *Kitt v. United States*, 904 A.2d 348, 356 (D.C. 2006).

[83] Commentary on D.C. Crim. Jur. Instr. § 3.200.

[84] *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008) (quoting *Wilson–Bey v. United States,* 903 A.2d 818 (D.C. 2006) (*en banc*)).

[85] 659 A.2d 1249, 1254 (D.C. 1995). The U.S. Court of Appeals for the D.C. Circuit, discussing District case law on this point, observes that "[t]here is nothing unfair about [such an outcome]." *United States v. Edmond*, 924 F.2d 261, 267 (D.C. Cir. 1991).

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

Id.

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

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

RCC § 22E-210 codifies these propositions as follows. The prefatory clause of subsection (a) establishes that the culpability requirement applicable to accomplice liability necessarily incorporates "the culpability required for [the target] offense." Subparagraphs (a)(1) and (2) thereafter establish that a requirement of purpose is applicable to both the assistance/encouragement as well as to the conduct sought to be brought about by that assistance/encouragement. Next, subsection (b) incorporates a principle of culpable mental state elevation under which proof of intent on behalf of the accomplice is required—regardless of whether the target offense is comprised of a circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). Finally, subsection (c) clarifies where an offense "is divided into degrees based upon distinctions in culpability as to results," an accomplice may be held "liable for any grade for which he or she possesses the required culpability."

<u>RCC § 22E-210(d): Relation to Current District Law on Relationship Between Accomplice and Principal</u>. Subsection (d) both codifies and clarifies current District law concerning the nature of the relationship between an accomplice and the principal.

It is well established, both inside and outside of the District, that complicity is not a separate crime; rather, it delineates a theory of liability through which one person can be held legally responsible for one or more crimes committed by another person.[87] This is clearly reflected in the District's complicity statute, which establishes that "all persons advising, inciting, or conniving at the offense, or aiding and abetting the principal offender, shall be charged as principals and not as accessories."[88]

One important implication of this aspect of complicity is that liability for "aiding and abetting is predicated upon a proper demonstration of all of the necessary elements of the underlying criminal act."[89] Which is to say, as the District's criminal jury instructions phrase the point: "[f]or a defendant to be convicted as an aider and abettor, the government must prove beyond a reasonable doubt all of the elements of the underlying crime, including commission of the crime by someone other than the accused."[90]

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[87] *See, e.g., Hawthorne v. United States*, 829 A.2d 948, 952–53 (D.C. 2003); *Payton v. United States*, 305 A.2d 512, 513 (D.C. 1973).
[88] D.C. Code § 22-1805.
[89] *Matter of J. W. Y.*, 363 A.2d 674, 677 (D.C. 1976); *see, e.g., United States v. Wiley*, 492 F.2d 547, 551 (D.C. Cir. 1973); *Hawthorne,* 829 A.2d at 952; *Gray v. United States,* 260 F.2d 483, 484 (D.C. Cir. 1958); *see also* D.C. Crim. Jur. Instr. § 3.200 ("[It is not necessary that all the people who committed the crime be caught or identified. It is sufficient if you find beyond a reasonable doubt that the crime was committed by someone and that the defendant knowingly and intentionally aided and abetted in committing the crime.]").
[90] D.C. Crim. Jur. Instr. § 3.200.

A good illustration of this basic requirement is the DCCA case law on the intersection of complicity and the District offense of carrying a pistol without a license (CPWL). Where a CPWL charge is in play, it is well-established that a "defendant cannot be convicted . . . on an aiding and abetting theory where there is no proof that the person in actual possession of the pistol did not have a license to carry it."[91] Relying on this legal proposition, the DCCA has, in turn, overturned complicity-based convictions for CPWL premised upon proof that the defendant him or herself, rather than the principal, lacked the requisite license.[92]

District case law also provides additional clarity on four important aspects of this basic requirement. First, while proof that a criminal offense was committed is a necessary component of accomplice liability, that offense need not be a *completed* offense. Rather, a person may be held liable for aiding and abetting an *attempt* to commit an offense, so long as it is shown that the principal him or herself committed that attempt.[93] Second, "[a]n aider and abettor may be convicted of an offense even though the principal has not been convicted."[94] Third, an aider and abettor may be convicted of an offense even though the principal has been acquitted.[95] And fourth, an "aider and abettor may be convicted of a lesser or greater offense than the principal."[96]

Consistent with the above analysis of District law, subsection (d) addresses the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense as follows. Subsection (d) first establishes that "[a]n accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein." This clarifies that accomplice liability entails proof of the defendant's complicity in the commission of an offense that was in fact, committed by another person. Thereafter, subsection (d) identifies various ways in

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

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

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

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

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

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

which the legal disposition of the principal's situation is immaterial to that of the accomplice, namely, it is not a defense to a prosecution premised on a theory of aiding and abetting that "the other person claimed to have committed the offense: (1) has not been prosecuted or convicted; (2) has been convicted of a different offense or degree of an offense; or (3) has been acquitted."

RCC § 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person.

Explanatory Note. RCC § 22E-211 establishes general principles of legal accountability based on causing crime by an innocent or irresponsible person.[1]

The theory of liability codified in this section provide a causal mechanism for holding one party, P, criminally liable for the acts of another party, X, under circumstances where X is innocent or irresponsible, and, therefore, cannot him or herself be held criminally liable.[2] Where, as in these situations, P has effectively used X as a means of achieving a criminal objective, it is appropriate to view X's conduct as an extension of P's for analytical purposes.[3] § 22E-211 authorizes this form of legal accountability[4] upon proof of three basic requirements.

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[1] That "one is no less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent" is a "universally acknowledged" principle of common law origin. Model Penal Code § 2.06 cmt. at 300; *see, e.g., Morrisey v. State*, 620 A.2d 207, 211 (Del. 1993) ("It is well-established at common law that an individual is criminally culpable for causing an intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime."); Commentary on Ky. Rev. Stat. Ann. § 502.010 ("That an individual may incur criminal liability by procuring a prohibited harm through an act of an innocent or irresponsible agent is a principle of long standing."); *see also, e.g., United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966) ("[This] doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as *Regina v. Saunders*, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per alium facit per se*, at least as early as the 14th century"); F.B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930).

[2] Ordinarily, one party cannot be held criminally liable for the conduct of a second party unless the second party actually commits a crime. *E.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.1 (3d ed. Westlaw 2019). However, where the second party is an innocent or irresponsible agent who has been manipulated by the first party to commit what would be a crime if the second party were not legally excused, then the first party "is considered the perpetrator of the offense, the 'principal in the first degree' in traditional common law parlance, based on the 'innocent instrumentality' doctrine." *E.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.03 (6th ed. 2012).

The following hypothetical is illustrative. P, a drug dealer, asks X, his sister, to pick up a package for him at the post office. P credibly tells X—who is unaware of her brother's means of employment—that the package is filled with cooking spices. However, the package is actually filled with heroin. Soon after picking up the package from the post office, X is arrested in transit. On these facts, X cannot be convicted of possession of narcotics because she lacks the required culpable mental state (i.e., knowledge) as to the nature of the substance possessed. And because X cannot be convicted for directly possessing the heroin, P cannot be convicted for possessing the heroin as X's accomplice under section 210, which requires "proof of the commission of the offense" by another person. RCC § 22E-210(d); *see also id.* at § (a) ("A person is an accomplice in the commission of an offense by another . . . ."). P can, however, be held criminally responsible for possession as a *principal* under section 211 upon proof that: (1) P caused X to possess the heroin; (2) P acted with the culpable mental state for drug possession; and (3) X lacked the culpable mental state for drug possession.

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

[4] Accomplice liability and causing crime by an innocent or irresponsible person constitute distinct bases of legal accountability (that is, ways of holding one person criminally responsible for the conduct of another person). To illustrate the different roles these theories play, consider the difference between: (1) aiding and abetting a theft via a solicitation; and (2) causing an innocent person to commit a theft via a solicitation.

The first requirement is that the intermediary must qualify as "an innocent or irresponsible person" under subsection (a). This phrase, as further clarified in subsection (b), envisions two different types of actors.[5] Pursuant to paragraph (b)(1), there are those who, having engaged in conduct that satisfies the objective elements of an offense, lack the culpable mental state required for that offense.[6] Pursuant to paragraph (b)(2), there are those who, having engaged in conduct that satisfies the objective elements of an offense, meet the requirements for a general excuse defense,[7] such as insanity,[8] immaturity,[9] duress,[10] or a reasonable mistake as to justification.[11]

The second requirement is one of causation, namely, the defendant must *cause* the (innocent or irresponsible) intermediary to engage in conduct constituting an offense.[12]

In the first scenario, P says the following to X: "V just bought a really expensive television, and I have his house keys. How about I give them to you, you grab the television while V is away, and then I'll sell the TV and we can split the profits?" If X agrees to the plan and the scheme is successful, X is the perpetrator of the offense and P is an accomplice to the theft based upon the solicitation under RCC § 22E-210.

In the second scenario, P lies to X: "My new television set is at V's house. I let V borrow it, but V no longer needs it and has asked me to pick it up/given me his keys. Would you do me a favor, X, and retrieve the TV for me while V is at school?" If X believes P's false representations and retrieves V's property, P would not be X's accomplice since X did not actually commit theft. (That is, although X took V's property, X did not possess the intent to steal, and, therefore, X cannot be convicted of theft.) P can, however, be convicted of directly perpetrating the theft himself under section 211 based on his having caused innocent person X to satisfy the objective elements of theft with the intent to steal.

See generally DRESSLER, *supra* note 2, at § 28.01 (employing similar illustration).

[5] The definition of "innocent or irresponsible person" in subsection (b) is not necessarily limited, however, to these two different types of actors. *See* RCC § 22E-211(b) (use of "includes," rather than "means," in prefatory clause). This non-exclusive definition leaves open the possibility that an intermediary who is justified, or possesses some other defense other than an excuse, may also qualify as an "innocent or irresponsible person" within the meaning of subsection (a). *See, e.g.,* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 372-85 (1985) (discussing conceptual difficulties relevant to who qualifies as innocent or irresponsible person); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 82 (Westlaw 2019) (same); *see also, e.g.,* Ky. Rev. Stat. Ann. § 502.010(2) (use of "includes" in comparable statutory definition of innocent or irresponsible person); Ala. § 13A-2-22(2)(b) (same).

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

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

[8] This would apply, for example, in the situation of P, who induces a mentally ill individual, X, to kill another person on P's behalf.

[9] This would apply, for example, in the situation of P, who commands his young child, X, to kill another person on P's behalf.

[10] This would apply, for example, in the situation of P, who compels one victim, X, to perform sexual acts upon another victim at gunpoint.

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

[12] RCC § 22E-211(a) ("the person causes an innocent or irresponsible person to engage in conduct constituting an offense"). The phrase "conduct constituting an offense," as employed in this subsection, refers to "the conduct under the circumstances and causing the results proscribed by the offense definition." Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code*

To meet this requirement, the nexus between the conduct of the defendant and that of the intermediary must be sufficiently close to satisfy the principles of factual and legal causation set forth in RCC § 22E-204.[13] In this context, the principle of factual causation entails proof that the defendant did something to manipulate or otherwise impact the innocent or irresponsible person, so that it may be said that, but for the defendant's actions, the intermediary would not have engaged in the prohibited conduct.[14] Even where this empirical prerequisite is met, however, the principle of legal causation precludes liability if the nexus between the conduct of the defendant and that of the intermediary is too remote or attenuated to fairly allow for a conviction.[15] Specifically, it must be proven under this section that the defendant's commission of the target offense through the intermediary's conduct was not "too unforeseeable in its manner of occurrence . . . to have a just bearing on the defendant's liability."[16]

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and Beyond, 35 STAN. L. REV. 681, 733 (1983) ("The objective elements for causing crime by an innocent are relatively straightforward. The defendant need not satisfy the objective elements of the substantive offense; the point of the provision is to hold him legally accountable when he engages in conduct that causes an innocent or irresponsible person to satisfy the objective requirements."); *compare* Model Penal Code § 2.06(2)(a) ("A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person *to engage in such conduct*.") (italics added).

[13] *See* RCC § 22E-204(a) ("No person may be convicted of an offense that contains a result element unless the person's conduct was the factual cause and legal cause of the result."). Section 211 is both based on, but also departs from, normal principles of causation. Typically, "[a]ctions are seen not as caused happenings, but as the product of the actor's self-determined choices, so that it is the actor who is the cause of what he does, not one who set the stage for his action." Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 391 (1985); *see, e.g.,* JOHN KAPLAN ET AL., CRIMINAL LAW 261 (6th ed. 2008) ("Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions."). Where, however, one party induces another party to engage in generally prohibited conduct that is legally excused, the analysis materially changes. This is because, "[f]or purposes of causation doctrine, excusable and justifiable actions are not seen as completely freely chosen." *Id.* at 370. Under these conditions, "the defendant is seen as causing the other's act in the same way he would be seen to cause a physical event" (i.e., "[t]he primary actor becomes 'merely an instrument' of the secondary actor"). *Id.*

[14] DRESSLER, *supra* note 2, at § 30.03; *see* RCC § 22E-204(b) ("A person's conduct is the factual cause of a result if: (1) The result would not have occurred but for the person's conduct; or (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result."). For example, where P gives X, an irresponsible agent known to have a penchant for mad driving, the keys to P's car, P is the factual cause of any injuries X subsequently inflicts on the road. If, however, P merely helps X back out of the driveway while X is driving his own car, P would not be a factual cause of any injuries X subsequently inflicts on the road (provided, of course, that P's assistance is not a necessary condition to X's drive).

[15] *See* RCC § 22E-204(c) ("A person's conduct is the legal cause of a result if the result is not too unforeseeable in its manner of occurrence, and not too dependent upon another's volitional conduct, to have a just bearing on the person's liability."). For example, if a parent leaves a loaded firearm in his toddler's outdoor play area, and the parent's own toddler find it, and subsequently uses it to injure a playmate at the parent's house, that parent is the legal cause of the subsequent harm caused by the toddler. If, in contrast, the parent leaves the loaded firearm in his toddler's outdoor play area, and an unknown third party thereafter moves the weapon to a park on the other side of the city, the parent would not be the legal cause of any harm caused by another toddler finding the weapon and injuring a playmate at the park.

[16] Note that this articulation of legal causation excludes part of the standard codified in RCC § 22E-204(c), which reads in full: "A person's conduct is the legal cause of a result if the result is not too unforeseeable in

The third requirement is that the defendant must act with the "the culpability required for [the target] offense."[17] This requirement entails proof that the defendant caused an innocent or irresponsible person to engage in conduct constituting an offense with the state of mind—purpose, knowledge, intent, recklessness, negligence, or none at all (i.e., strict liability)—applicable to each of the objective elements that comprise the offense.[18] In practical effect, this means that a defendant *may* be held criminally liable for a crime of recklessness or negligence under § 22E-211, provided that he or she caused the conduct of an innocent or irresponsible person with the requisite non-intentional culpable mental state.[19] Under no circumstances, however, should § 22E-211 be

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its manner of occurrence, *and not too dependent upon another's volitional conduct*, to have a just bearing on the person's liability." The italicized language, which focuses on causal dependence on another person's volitional conduct, is not incorporated into the above formulation because an innocent or irresponsible person's conduct is—virtually by definition—*not volitional*, and therefore, would be unable to break the chain of legal causation under RCC § 22E-204(c). *Compare* RCC § 22E-204(c), Explanatory Note ("The second category [of legal causation] relates to human volition; the focus here is on the extent to which a given result can be attributed to the free, deliberate, and informed conduct of a third party or the victim."), *with* RCC § 22E-211(b), Explanatory Note (describing an "innocent or irresponsible person" in terms incommensurate with free, deliberate, and informed conduct). That said, it is theoretically possible that a prosecution under RCC § 22E-211 *could* involve the causal influence of both an innocent or irresponsible agent *and* some other volitional actor, in which case it would be necessary for the factfinder to evaluate both the foreseeability and dependence prongs of RCC § 22E-204(c).

[17] RCC § 22E-211(a). The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(d) (culpability requirement defined). For example, if the defendant causes an innocent or irresponsible person to engage in conduct constituting an offense, and that offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability (as to the defendant) to secure a conviction. *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, the imposition of liability for causing crime by an innocent under section 211 is subject to the same voluntariness requirement (again, as to the defendant) governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(d)(1) (voluntariness requirement also part of culpability requirement).

[18] To illustrate, consider the burden of proof with respect to culpability in a rape case brought under section 211 in conjunction with a sexual abuse statute, which prohibits: (1) *knowingly* engaging in sexual intercourse; (2) with *negligence* as to the absence of consent. If P coerces irresponsible agent X to engage in non-consensual sexual intercourse with V, P's guilt will require proof that: (1) P was *practically certain* that his conduct would cause X to engage in sexual intercourse with V, see RCC § 22E-206(b) (definition of knowledge as to a result element); (2) P did so *failing to perceive a substantial risk* that V would not consent to the sexual intercourse, see RCC § 22E-206(e)(2)(A) (prong one of definition of negligence as to a circumstance element); and (3) P's failure to perceive the risk was clearly blameworthy under the circumstances, see RCC § 22E-206(e)(2)(B) (prong two of definition of negligence as to a circumstance element). *See, e.g.,* Model Penal Code § 2.06 cmt. at 303; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.1.

[19] The following situation is illustrative. P leaves his car keys out around X, an irresponsible agent known to have a penchant for mad driving. X subsequently finds P's keys, takes P's car out, drives in a dangerously erratic manner, and ends up killing pedestrian V. If P is later prosecuted for recklessly killing V (i.e., manslaughter) based on X's conduct, P's guilt will require proof that: (1) P *consciously disregarded a substantial risk* that, by leaving his keys out, X would take P's car out and kill someone by driving in a dangerous erratic manner, see RCC § 22E-206(d)(1)(A) (prong one of definition of recklessness as to a result element); and (2) P's disregard of that risk was clearly blameworthy under the circumstances, see RCC § 22E-206(d)(1)(B) (prong two of definition of recklessness as to a result element). *See, e.g.,* Model Penal Code § 2.06 cmt. at 303; Commentary on Ky. Rev. Stat. Ann. § 502.010.

construed to allow for a conviction upon proof of a lesser form of culpability than that required by the target offense.[20]

Subsection (c) establishes that the legal accountability arising under subsection (a) from satisfaction of these three requirements provides the basis for holding the defendant guilty of the target offense.[21]

Relation to Current District Law. RCC § 22E-211 codifies, clarifies, and fill in gaps reflected in District law relevant to legal accountability based on causing crime by an innocent or irresponsible person.

There is little District authority on this form of legal accountability. Nevertheless, that which does exist supports the "universally acknowledged principle" that "one is no less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent."[22]

For example, more than a century ago, District courts recognized that criminal liability may attach for an offense committed indirectly, including through unwitting agents, such as, for example, "where one procures poison to be administered by an innocent agent to a third person."[23] And this also remains true today: while there exists

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[20] For example, if obtaining property by false pretenses is a crime only if the false pretenses are made purposely, P does not commit it by negligently causing his lawyer, X, to make statements that are false. Instead, P must do so purposely. *See, e.g.,* Model Penal Code § 2.06 cmt. at 303; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.1. According to the same logic, where an offense is graded by distinctions in culpability as to result elements, the principal's "liability shall extend only as far as his mental state will permit." Commentary on Ala. Code § 13A-2-22. For example, if P recklessly causes his child, X, to intentionally kill V, X is guilty of reckless manslaughter but not murder (i.e., X's intent to kill may not be imputed to P, while P's lack of intent precludes murder liability). *See, e.g.,* Model Penal Code § 2.06 cmt. at 302-03; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.1.

[21] RCC § 22E-211(c) ("A person is guilty of an offense if it is committed by the conduct of another person for which he or she is legally accountable under subsection (a)."); *compare* RCC § 22E-210(d) ("An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein . . . ."). Viewed collectively, then, section 211 "determine[s] liability by the culpability and state of mind of the defendant, coupled with his own overt conduct and the conduct in which he has caused another to engage." Model Penal Code § 2.06 cmt. at 303.

In accordance with this logic, section 211 should be construed to allow for the imputation of *some* of an offense's objective elements, which the defendant causes an innocent or irresponsible person to perpetrate, provided that the defendant him or herself satisfies the rest of them. For example, if P, holding a firearm, coerces irresponsible agent X (who is unarmed) to rape V, P can be convicted of armed sexual abuse (of V) under section 211 based on: (1) P's having caused X to sexually penetrate V; and (2) P's own personal possession of a weapon. *See Morrisey v. State*, 620 A.2d 207, 210 (Del. 1993) ("Consequently, in this case, although the innocent persons who [the defendant] forced to engage in sexual intercourse were unarmed, the aggravating element of displaying what appeared to be a deadly weapon was provided by [the defendant's] own conduct.") (quoting Model Penal Code § 2.06 cmt. at 303).

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

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

> It is the known and familiar principle of criminal jurisprudence, that he who commands or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots employed to administer poison. The proof of the command or procurement may be direct or indirect, positive or

ongoing disagreement at the DCCA over whether it is ever appropriate to hold one person criminally responsible for causing a *culpable* actor to engage in prohibited conduct (separate and apart from aider and abettor liability),[24] there seems to be agreement that a causal theory of criminal liability is appropriate where "A uses B as an innocent instrumentality."[25]

Illustrative is the DCCA's decision in *Blaize v. United States*.[26] At issue in *Blaize* was the defendant's conviction for voluntary manslaughter, which was based on the following facts: D fires shots at V, sending V running; the noise of the shots also startles X, an illegally parked driver; in response to the shots, X speeds away at a rate of approximately 90 mph; X thereafter hits and kills V.[27] On appeal, the DCCA upheld the conviction applying a causal analysis, premised on the proposition that because "[X's] attempt[] to flee quickly, and without careful attention to pedestrian safety, w[as] entirely predictable," there was no problem with holding D responsible for the death of V although the immediate cause was X's conduct.[28]

This sparse case law is accompanied by a Redbook jury instruction entitled "willfully causing an act to be done."[29] Premised on the federal statute, 18 U.S.C. § 2(b), that instruction reads:

> You may find [name of defendant] guilty of the crime charged in the indictment without finding that s/he personally committed each of the acts constituting the offense or was personally present at the commission of the offense. A defendant is responsible for an act which s/he willfully causes to be done if the act would be criminal if performed by him/her directly or by another. To "cause" an act to be done means to bring it about. You may convict [name of defendant] of the offense charged if you

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> circumstantial; but this is matter for the consideration of the jury, and not of legal competency." *United States* v. *Gooding*, 12 Wheat. 460, 469, 6 L. ed. 693, 696. *See also* 1 Bishop, Crim. Law, secs. 649, 651, 652; *People* v. *Adams*, 3 Denio, 190, 207, 45 Am. Dec. 468; *Seifert* v. *State*, 160 Ind. 464, 467, 98 Am. St. Rep. 340, 67 N. E. 100. Those authorities fully sustain the general principle of law declared by the court, that one may be convicted as a principal, though acting in the commission of the crime through an innocent agent.

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

[24] This is reflected in the litigation over the gun battle theory of liability. *See generally Fleming v. United States*, 148 A.3d 1175, (D.C. 2016), *reh'g en banc granted, opinion vacated*, 164 A.3d 72 (D.C. 2017). *Compare Roy v. United States*, 871 A.2d 498, 502 (D.C. 2005) (upholding jury instruction that permitted the jury to find that the defendant, by engaging in a gun battle in a public space, was responsible for causing the death of an innocent bystander killed by a stray bullet even if it was not the defendant who fired the fatal round, provided that the death was reasonably foreseeable) *with Fleming*, 148 A.3d at 1177 ("[E]ven assuming arming oneself with a gun and firing it could satisfy the direct causation requirement, the volitional, felonious act of someone else then shooting and killing the decedent is an 'intervening cause' that breaks this chain of criminal causation.") (Easterly, J., dissenting).

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

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

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

[28] *Id.* at 83.

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

> find that the government has proved beyond a reasonable doubt each element of the offense and that [name of defendant] willfully caused such an act to be done, with the intent to commit the crime.[30]

This instruction is thereafter accompanied by a brief commentary collecting federal cases, which support the proposition that "an individual can be criminally culpable for causing an intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime."[31]

RCC § 22E-211 is substantively consistent with the above District authorities, while, at the same time, providing a clearer and more comprehensive approach to liability for causing crime by an innocent or irresponsible person. Subsections (a) and (c) collectively establish that a defendant may be held criminally liable for the acts of an innocent or irresponsible person provided that: (1) the principal actor causes the innocent or irresponsible person to engage in conduct constituting an offense; and (2) the principal actor does so with the culpability requirement applicable to that offense. And subsection (b) clarifies the primary bases for viewing a human intermediary as "innocent or irresponsible," namely, (1) lacking the culpable mental state requirement for an offense; or (2) acting under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to justification.

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[30] *Id.*

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

RCC § 22E-212. Exclusions from Liability for Conduct of Another Person.

Explanatory Note. RCC § 22E-212 establishes two exclusions from liability[1] under the general principles of legal accountability set forth in RCC § 22E-210, Accomplice Liability; and RCC § 22E-211, Liability for Causing Crime by an Innocent or Irresponsible Person.[2]

First, this provision excludes the victim of an offense from being held legally accountable as an accomplice in the commission of that offense under § 22E-210 or for causing an innocent or irresponsible to commit that offense under § 22E-211.[3] For example, a minor who pursues and agrees to engage in sex with an adult may technically satisfy the requirements of accomplice liability in the sense of having purposefully assisted and encouraged that adult to perpetrate statutory rape against the minor.[4] Nevertheless, the exclusion precludes holding the minor criminally liable for the statutory rape as an accomplice in the minor's own victimization under section 210.[5] The outcome would not be any different if the adult involved in the relationship suffered from a mental disability sufficient to rise to the level of a complete defense. While it might be said that the minor caused the adult to perpetrate a statutory rape under these circumstances,[6] the

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[1] *Under RCC § 22E-201(b), if there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of all elements of the exclusion from liability beyond a reasonable doubt.*

[2] *See, e.g.,* WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 13.3 (2d ed., Westlaw 2018) ("[O]ne is not an accomplice to a crime if (a) he is a victim of the crime; [or] (b) the offense is defined so as to make his conduct inevitably incident thereto . . ."); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (Westlaw 2019) (same); *see also United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (noting these are "exceptions to the general rule that aiding and abetting goes hand-in-glove with the commission of a substantive crime").

[3] *See, e.g.,* Model Penal Code § 2.06(6)(a) ("Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if . . . he is a victim of that offense[.]"). This rule effectively *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of the offense perpetrated against themselves. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 ("[T]he victim of the crime may not be held as an accomplice even though his conduct in a significant sense has assisted in the commission of the crime."); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (same).

[4] *See* RCC § 22E-210(a) ("A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person: (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or (2) Purposely encourages another person to engage in specific conduct constituting that offense.").

[5] *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09(d) (6th ed. 2012) ("A [minor] may not be convicted as an accomplice in her own victimization"); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (same). The same can also be said about "[t]he businessman who yields to the extortion of a racketeer," or "the parent who pays ransom to the kidnapper." Model Penal Code § 2.06(6) cmt. at 324. Although those "who pay extortion, blackmail, or ransom monies" can be understood to have "significantly assisted in the commission of the crime," the fact they are the "victim of a crime" means that they "may not be indicted as an aider or abettor." *Southard*, 700 F.2d at 19.

[6] *See* RCC § 22E-211(a) ("A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense."); *id.* at (b)(2) ("An 'innocent or irresponsible person' within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense . . . . Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.").

exclusion precludes holding the minor legally accountable for the irresponsible person's conduct under § 22E-211 where the minor was also victimized by it.[7]

Second, the provision excludes actors who engage in conduct inevitably incident to commission of an offense—as defined by statute[8]—from being held legally accountable as an accomplice in the commission of that offense under § 22E-210 or for causing an innocent or irresponsible person to commit that offense under § 22E-211.[9] For example, the purchaser in a drug transaction may technically satisfy the requirements of accomplice liability in the sense of having purposefully assisted and encouraged the seller to perpetrate the distribution of a controlled substance.[10] Nevertheless, the

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[7] *See* Ala. Code § 13A-2-24(1) (victim exception equally applicable to accomplice liability and causing crime by an innocent); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (There exists "little justification for providing or barring these special exemption defenses to one theory of liability for the conduct of another, but not to the other.").

[8] That a person's conduct must be inevitably incident to commission of an offense *as defined by statute* clarifies that paragraph (a)(2) only applies when the offense could not have been committed without the defendant's participation under any set of facts. This is to be distinguished from the situation of a defendant whose participation was merely useful or conducive to the commission of a crime *as charged in a particular case*. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (In applying the conduct inevitably incident exception, "the question is whether the crime charged is so defined that the crime could not have been committed without a third party's involvement, not whether the crime 'as charged actually involved a third party whose 'conduct was useful or conducive to' the crime.") (quoting *State v. Duffy*, 8 S.W.3d 197, 201-202 (Mo. App. 1999)).

So, for example, the role of a doorman in protecting a particular drug house from being robbed or ripped off may inextricably be part of the main business of that home, the sale and purchase of controlled substances. Nevertheless, because, as a general matter, it is entirely possible to distribute drugs without the assistance of a doorman, the doorman's conduct—as contrasted with that of the purchaser—is *not* "inevitably incidental" to the commission of the crime of drug distribution. Therefore, subsection (a)(2) would not preclude holding a doorman who assists a drug dealer liable for aiding the distribution of controlled substances. *Wagers v. State*, 810 P.2d 172, 175-76 (Alaska Ct. App. 1991) ("[B]ecause [defendant's] role as a doorman/guard was not 'inevitably incidental' to the commission of the crime of possession with intent to deliver, [he] is not exempt from accomplice liability under AS 11.16.120(b)(2).").

For another example, consider a prospective bribery scheme involving bribe offeror, B, go-between G, and public official, P. B gives G $20,000 in cash with instructions to approach P and propose a transaction whereby P will receive the money in return for providing B with a government license to which B is not otherwise entitled. If G agrees with B to participate in this scheme and approaches P, paragraph (a)(2) would *not* preclude holding G liable for aiding the crime of bribe offering. Although G's agreed-upon role as middleman might be useful and conducive to the crime of bribe offering *as perpetrated on these facts*, it is not strictly necessary to commit the crime of bribe offering, which can be completed without a go-between. *See, e.g., Commonwealth v. Jennings*, 490 S.W.3d 339, 345 (Ky. 2016) (holding that, "as a matter of law," defendant's facilitative conduct was not "inevitably incident" to the crime of assault because that offense "does not as defined require one person to identify the victim and another to strike the blow").

[9] *See, e.g.,* Model Penal Code § 2.06(6)(b) ("Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if . . . the offense is so defined that his conduct is inevitably incident to its commission[.]"). This rule effectively *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of an offense for which their participation was logically required as a matter of law. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (accomplice liability does not apply "where the crime is so defined that participation by another is inevitably incident to its commission"); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (same).

[10] *See* RCC § 22E-210(a) ("A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person: (1) Purposely assists another person with

exclusion precludes holding the purchaser criminally liable for the seller's distribution as an accomplice under RCC § 22E-210.[11] The outcome would not be any different if the seller suffered from a mental disability sufficient to rise to the level of a complete defense. While it might be said that the purchaser caused the seller to distribute drugs under these circumstances,[12] § 22E-212 precludes holding the purchaser legally accountable for the irresponsible person's conduct under RCC § 22E-211.[13]

The prefatory clause "Unless otherwise expressly specified by statute" establishes an important limitation on exclusions from liability, namely, that they do not apply when criminal liability is expressly provided for by an individual offense. This clarifies that RCC § 22E-212 is only a *default* bar on criminal liability for victims or those who engage in conduct inevitably incident to commission of an offense.[14] It merely establishes that such actors are excluded from the general principles of legal accountability set forth in RCC §§ 22E-210 and 211.[15] As such, the legislature is free to impose criminal liability upon these general categories of protected actors on an offense-specific basis.[16] In that

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the planning or commission of conduct constituting that offense; or (2) Purposely encourages another person to engage in specific conduct constituting that offense.").

[11] That is, because the distribution of narcotics necessarily requires two parties, a seller and a purchaser, the purchaser may not be held criminally responsible as an accomplice to that distribution under the conduct inevitably incident exception. *See, e.g., State v. Pinson,* 895 P.2d 274, 277 (N.M. Ct. App. 1995) ("When an illegal drug sale is completed, there are two separate crimes committed, trafficking by the seller and possession by the purchaser. Each conduct is necessarily incident to the other crime."); *Wheeler v. State,* 691 P.2d 599, 602 (Wyo. 1984) ("The purchaser of controlled substances commits the crime of 'possession' and not 'delivery,' and, thus, is not an accomplice to a defendant charged with unlawful distribution.").

[12] *See* RCC § 22E-211(a) ("A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense."); *id.* at § (b)(2) ("An 'innocent or irresponsible person' within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense . . . . Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.").

[13] *See* Ala. Code § 13A-2-24(2) (conduct inevitably incident exception equally applicable to accomplice liability and causing crime by an innocent); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (There exists "little justification for providing or barring these special exemption defenses to one theory of liability for the conduct of another, but not to the other.").

[14] *See, e.g.,* Model Penal Code § 2.06(6) cmt. at 323-24 ("If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to conduct 'inevitably incident to' the commission of the crime, the problem inescapably presents itself in defining the crime.").

[15] This reflects the fact that both the victim and conduct inevitably exceptions to legal accountability are justified on the basis of legislative intent. *See, e.g., United States v. Blankenship*, No. 2:15-CR-00241, 2016 WL 4030943, at *6–7 (S.D.W. Va. July 26, 2016) ("Where the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose accomplice liability upon such a person.") (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3); *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (observing that the standard rationale for the conduct inevitably incident exception is "that the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by the others in the offense as a crime.") (citing LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

[16] *See, e.g.,* ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 ("The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is

case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.[17]

Relation to Current District Law. *RCC § 22E-212 codifies and fills in gaps in current District law to improve the clarity and proportionality of the revised statutes.*

There is no current District law directly addressing whether, as a general principle of criminal law, a victim can be held legally accountable for the commission of a crime perpetrated against him or herself. That said, this exception is consistent with the legislative intent underlying some current statutory offenses enacted by the D.C. Council. And it also has been explicitly recognized by two century-old judicial decisions from the District interpreting congressionally enacted statutes that have since been repealed.

No current District criminal statute explicitly exempts victims from the scope of general accomplice liability. However, an analysis of the child sex abuse statutes contained in the D.C. Code illustrates why this exception is consistent with legislative intent. For example, the District's first-degree child sex abuse offense subjects to potential life imprisonment a person who, "being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."[18] And the District's second-degree child sex abuse offense subjects to ten years of imprisonment a person who, "being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."[19] These current offenses exist specifically for the *protection* of minor-victims.[20]

At the same time, the normal principles of aider and abettor liability derived from the District's general complicity statute, D.C. Code § 22-1805,[21] would appear to authorize treating a minor-victim legally accountable as an accomplice in the perpetration

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generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction.").

[17] The following situation is illustrative: X, the bribe giver in a two-person corruption scheme involving public official Y, agrees to give Y $20,000 in cash in return for a government license to which X is not otherwise entitled. On these facts, X *cannot* be held liable as an *accomplice* in the commission of the crime of bribe *receiving* under RCC § 22E-212 since X's conduct is inevitably incident to Y's perpetration of that crime. X can, however, *directly* be held criminally liable for his *own conduct* under a statute that, through its express terms, prohibits the *offering of a bribe*. *See, e.g.,* N.Y. Penal Law § 20.00 cmt. ("[T]he crime of bribe giving by A to B is necessarily incidental to the crime of bribe receiving by B . . . [Therefore] A is not guilty of bribe receiving [as an accomplice]. But, A is criminally liable for his own conduct which constituted the related but separate offense of bribe giving.") (quoted in *People v. Manini*, 79 N.Y.2d 561, 571 (1992)).

[18] D.C. Code § 22-300 8.

[19] D.C. Code § 22-3009.

[20] *See* D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."); *Ballard v. United States*, 430 A.2d 483, 486 (D.C. 1981) ("[T]he statutory proscription against carnal knowledge is intended to protect females below the age of sixteen, regardless of the use of force or consent, from any sexual relationship.").

[21] D.C. Code § 22-1805 ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.").

of child sex abuse against him or herself.[22] Consider, for example, the situation of a minor who both initiates and pursues a sexual act or contact with an adult. Under these circumstances, it might be said that the minor purposefully assisted and encouraged the adult to commit statutory rape in a manner sufficient to satisfy the requirements of accomplice liability under D.C. Code § 22-1805.[23] In practical effect, then, applying general principles of aider and abettor liability to the District's child sex abuse statutes would mean that a minor may be subject to the same liability as the adult who perpetrates the offense.

Treating the minor-victim of a statutory rape in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's statutory rape offenses. Given these problems, it's unsurprising that reported District case law involving prosecutions for first or second-degree child sex abuse do not appear to include a single prosecution involving charges of this nature. This example may also indicate that—from a broader legislative and executive perspective—a victim exception to accomplice liability is implicitly understood to exist in District law and practice.

This kind of exception has also been explicitly recognized in two century-old District judicial decisions in the course of interpreting congressionally-enacted statutes that have since been repealed. Although in both cases the victim exceptions to accomplice liability were recognized for testimonial/evidentiary purposes, and not because the would-be accomplices were themselves being prosecuted for aiding or abetting the target offenses, the holding in each case remains directly relevant. In the first case, *Yeager v. United States* (1900), the U.S. Court of Appeals for the D.C. Circuit (CADC) determined that the victim of an offense criminalizing sexual intercourse with a female under sixteen years of age could not be deemed an accomplice to that offense precisely *because* she was victim of the party committing the act.[24] In the second case, *Thompson v. United States* (1908), the Court of Appeals for the District of Columbia applied similar reasoning in holding that a woman who consented to an illegal abortion

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[22] *See generally* RCC § 22E-210 and accompanying Commentary.

[23] *See id.*; *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (An accomplice is someone who "designedly encouraged or facilitated" the commission of criminal conduct by another) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)).

[24] *Yeager v. United States*, 16 App. D.C. 356, 357, 360 (D.C. Cir. 1900) ("The crime is committed against her, and not with her. She is, by force of the law, victim and not *particeps criminis* or accomplice.").

The relevant statute, as quoted in *Yeager*, reads:

> Every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction, . . . shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years and for each subsequent offense not more than thirty years.

Id.

could not be deemed an accomplice in the commission of an offense criminalizing the procurement of a miscarriage.[25]

Another relevant aspect of District law is the *de facto* victim exception incorporated into the District's prostitution offense. The relevant criminal statute, D.C. Code § 22-2701, codifies a general policy of excluding "children"—defined as anyone under the age of 18[26]—from criminal liability for prostitution.[27] Beyond creating a general immunity from prosecution for victimized children (including, presumably, those who might otherwise satisfy the requirements of accomplice liability), this statute further requires the police to "refer any child suspected of engaging in or offering to engage in a sexual act or sexual contact in return for receiving anything of value to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834."[28] These provisions appear to reflect the D.C. Council's view, articulated in supporting legislative history, that "[v]ictims of sexual abuse should not be arrested, prosecuted, or convicted."[29]

RCC § 22E-212 accords with the above authorities, as well as the policy considerations that support them. These provisions exclude the victim of an offense from being held legally accountable as an accomplice in the commission of that offense under RCC § 22E-210, or for causing an innocent or irresponsible person to commit that

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[25] *Thompson v. United States*, 30 App. D.C. 352, 362–63 (D.C. Cir. 1908) (the woman whose "miscarriage has been produced, though with her consent, [] is regarded as his victim, rather than an accomplice.").
The relevant statute, as quoted in *Thompson*, reads:

> Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health, and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or, if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

Id.

[26] D.C. Code § 22-2701(d)(3).

[27] *See generally* D.C. Code § 22-2701. More specifically, subsection (a) of the relevant statute makes it "unlawful for any person to engage in prostitution or to solicit for prostitution," subject to the "[e]xcept[ion] provided in subsection (d)." *Id.* Thereafter, subsection (d) creates an exception from criminal liability for any "child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value." *Id.* at § (d)(1).

[28] *Id.* at § (d)(2).

[29] COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY, COMMITTEE REPORT ON BILL 20-714, *Sex Trafficking of Children Prevention Amendment Act of 2014*, at 5 (Nov. 7, 2014). The Committee Report goes on to observe that:

> Without this immunity, law enforcement can use threats of prosecution to coerce victims into testifying as witnesses and into participating in treatment programs. However, this coercion inevitably creates a relationship of antagonism between the government and these victims, causing victims to fear and distrust the police, prosecutors and services provided by the government, and being less willing to cooperate as trial witnesses or program participants.

Id.

offense under RCC § 22E-211, unless expressly provided by the target offense.[30] (This is consistent with the similar exclusion for victims applicable to the general inchoate crimes of solicitation and conspiracy under RCC § 22E-304.[31])

There is no current District law directly addressing whether, as a general principle of criminal law, a person can be held legally accountable for the commission of a crime in which his or her conduct was inevitably incident. That said, this exception is consistent with the legislative intent underlying current statutory offenses enacted by the D.C. Council. And it has also been implicitly recognized by the DCCA through *dicta* in the course of interpreting one of those statutes.

No current District criminal statute explicitly recognizes an exemption to accomplice liability for those who engage in conduct inevitably incident to the commission of an offense. However, an analysis of the drug statutes in the D.C. Code illustrates why this exception is consistent with legislative intent.

Compare the District's different approaches to punishing those who distribute and those who merely possess controlled substances. The District's distribution statute makes it a thirty year felony for "any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance," which is, in fact, "a narcotic or abusive drug" subject to classification "in Schedule I or II."[32] In contrast, the District's possession statute makes it a 180 day misdemeanor to "knowingly or intentionally to possess a controlled substance" of a similar nature.[33] This stark contrast in grading appears to reflect a legislative judgment that mere possessors are far less culpable and/or dangerous than distributors, and, therefore, should be subject to significantly less liability.[34]

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[30] Note that under RCC § 22E-22E-212(b) the legislature remains free to impose criminal liability upon victims on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[31] *See generally* Commentary on RCC § 22E-304(a)(1).

[32] D.C. Code § 48-904.01(a)(1)-(2); *see id.* at (a)(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both[.]")

[33] D.C. Code § 48-904.01(d)(1) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than $1,000, or both."); *compare* D.C. Code § 48-904.01(d)(2) ("Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both.").

[34] Indeed, "[t]he District of Columbia Uniform Controlled Substances Act was enacted, in part, in order to punish offenders according to the seriousness of their conduct." *Long v. United States*, 623 A.2d 1144, 1151 n.13 (D.C. 1993) (citing Council of the District of Columbia, COMMITTEE ON THE JUDICIARY, REPORT ON BILL 4–123, THE UNIFORM CONTROLLED SUBSTANCES ACT OF 1981, 2–3 (April 8, 1981)) (hereinafter "Committee Report").

For example, the legislative history underlying the District's Uniform Controlled Substances Act observes that:

At the same time, application of the District's normal principles of aider and abettor liability would appear to authorize holding a purchaser-possessor legally accountable for the distribution of drugs by the seller as an accomplice.[35] Consider, for example, the situation of a drug user who both initiates and pursues the purchase of a controlled substance from a seller. Under these circumstances, it might be said that the drug user purposefully assisted and encouraged the seller to commit distribution in a manner sufficient to satisfy the requirements of accomplice liability under D.C. Code § 22-1805.[36] In practical effect, then, applying general principles of aider and abettor liability to the District's drug distribution statute would mean that the drug user could be held liable to the same extent as the seller.

Treating the purchaser-possessor in a drug deal in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's controlled substances offenses.[37] Given these problems, it's unsurprising that reported District case law does not appear to include a single drug distribution prosecution brought against a drug user purchasing for individual use. This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to accomplice liability is implicitly understood to exist in District law and practice.

This conclusion is further bolstered by *dicta* in at least one reported DCCA opinion. In the relevant case, *Lowman v. United States*, two of the three judges on the panel held—relying on a line of prior District precedent—that an intermediary who arranges a drug transaction between "a willing buyer [and] a willing seller" can be held criminally liable for distribution as an accomplice.[38] One judge dissented, arguing that,

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> While there is dispute over what penalties should be imposed, the proposition that the criminal consequences of prohibited conduct should be tied to the nature of the offense committed is unassailable. Title IV of the CSA would abolish the unilateral approach of the UNA and would introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.

Id. at 5. *See also, e.g., Long*, 623 A.2d at 1150 (observing that "the fundamental message [in a federal case]—that the legislature did not intend to treat with equal severity on the one hand, entrepreneurs who profit from distribution of heroin or crack, and on the other hand, addicts who pool their resources to purchase drugs for their own joint use—finds meaningful support in the legislative history of the District's Uniform Controlled Substances Act."); *Lowman v. United States*, 632 A.2d 88, 98 (D.C. 1993) (Schwelb, J. dissenting) ("[A] central purpose of the enactment of the [District's] local [drug] statute was to abolish the 'unilateral approach' of the former Uniform Narcotics Act, which was viewed as not discriminating sufficiently between serious and less serious offenders, and to introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.").

[35] *See generally* RCC § 22E-210 and accompanying Commentary.

[36] *See generally* RCC § 22E-210 and accompanying Commentary.

[37] *See* sources cited *supra* notes 21-23 and accompanying text; *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that if every purchaser were to be "deemed an aider and abettor to [distribution]," this would effectively "write out of the Act the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his own possession.'") (quoting *United States v. Swiderski,* 548 F.2d 445, 451 (2d Cir. 1977)).

[38] *Lowman v. United States*, 632 A.2d 88, 91 (D.C. 1993) (upholding distribution conviction where defendant brought "a willing buyer to a willing seller" and "specifically asked [distributor] if he had any twenty-dollar rocks, the precise drugs that the undercover officer had said he wanted to buy"); *see, e.g.,*

among other problems, the majority's holding *could* logically support holding the *buyer* him or herself liable for distribution as an accomplice.[39] In response, the two-judge majority explained that they were "unpersuaded at this point that the court's interpretation of aiding and abetting might result in a buyer of illegal drugs being guilty of the crime of distribution," while citing to federal case law explicitly recognizing that "one who receives drugs does not aid and abet distribution 'since this would totally undermine the statutory scheme [by effectively writing] out of the Act the offense of simple possession."[40]

The bribery statute in the D.C. Code is susceptible to a similar analysis. The relevant District prohibition on bribery applies a statutory maximum of "not more than ten years" to anyone who:

> Corruptly offers, gives, or agrees to give anything of value, directly or indirectly, to a public servant . . . . in return for an agreement or understanding that an official act of the public servant will be influenced thereby . . . .[41]

On its face, the District's bribery statute embodies a legislative judgment that bribe giving and receiving are equally culpable acts deserving of no more than ten years of potential imprisonment. That said, application of the District's normal principles of aider and abettor liability would seem to provide the basis for effectively doubling the punishment for either party to a bribery scheme because each party's conduct is inevitably incident to the other.

Consider, for example, that most (if not all) bribe givers will purposely assist and encourage the bribe receiver's violation of D.C. Code § 22-712(a)(2), thereby satisfying the requirements of accomplice liability as to bribe receiving. Conversely, most (if not all) bribe receivers will purposely assist and encourage the bribe giver's violation of D.C. Code § 22-712(a)(1), thereby satisfying the requirements of accomplice liability as to bribe giving. Such an application of accomplice liability, if accepted, would seem to authorize up to twenty years of potential imprisonment in most (if not all) instances of bribery.

Dealing with bribery in this way seems disproportionate, counterintuitive, and in conflict with the penalty structure reflected in the District's bribery statute. Given these problems, it's unsurprising that reported District case law does not appear to include a

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Griggs v. United States, 611 A.2d 526, 527, 529 (D.C. 1992) (upholding distribution conviction where an officer approached the defendant and asked if anyone was "working," the defendant escorted the officer to a seller, and the defendant told the seller that the officer "wanted one twenty"); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993) ("[B]eing an agent of the buyer is not a defense to a charge of distribution.").

[39] *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that "if the government's position were adopted, and if everyone who assisted a buyer of drugs were thereby rendered a distributor, then, *a fortiori,* every purchaser would also logically have to be deemed an aider and abettor to a felony, and would therefore be subject to a mandatory minimum sentence.").

[40] *Lowman*, 632 A.2d at 92 (quoting *United States v. Swiderski,* 548 F.2d 445, 451 (2d Cir. 1977)).

[41] D.C. Code § 22-712(a), (c).

single prosecution for bribery involving duplicate liability of this nature.[42] This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to accomplice liability is implicitly understood to exist in District law and practice.[43]

RCC § 22E-212 accords with this implicit understanding, as well as the policy considerations that support it, by excluding conduct inevitably incident to the commission of an offense as a matter of law from the scope of legal accountability under RCC §§ 22E-210 and 211 unless expressly provided by the target offense.[44] (This is consistent with the similar exclusion for conduct inevitably incident applicable to the general inchoate crimes of conspiracy and solicitation under RCC § 22E-304.[45])

[42] The only reported case involving this statute appears to be: *Colbert v. United States*, 601 A.2d 603, 608 (D.C. 1992). *Compare May v. United States*, 175 F.2d 994, 1005 (D.C. Cir. 1949) (extending general complicity principles to hold offeror of bribe criminally responsible for aiding and abetting public official's violation of federal statute prohibiting receipt of unlawful compensation).

[43] One other relevant aspect of District law worth noting is the fact that a substantively related exclusion applies to the general inchoate crime of conspiracy by way of the judicially-recognized doctrine of "Wharton's Rule," which "is an exception to the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed." *Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)). The meaning and import of DCCA case law on Wharton's Rule is discussed in the Commentary on RCC § 22E-304(a)(2).

[44] Note that under RCC § 22E-212(b) the legislature remains free to impose criminal liability upon victims on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[45] *See generally* Commentary on RCC § 22E-304(a)(2).

RCC § 22E-213. Withdrawal Defense to Legal Accountability.

Explanatory Note. RCC § 22E-213 establishes a withdrawal defense to criminal liability premised upon the general principles of legal accountability set forth in RCC § 22E-210, Accomplice Liability, and RCC § 22E- 211, Liability for Causing Crime by an Innocent or Irresponsible Person.[1]

Subsection (a) sets forth the scope of this affirmative defense, which is comprised of two basic requirements.[2] The first is that the defendant must "in fact, terminate[] his or her efforts to promote or facilitate commission of an offense before it has been committed."[3] This clarifies that only withdrawals from criminal schemes prior to their completion will provide the basis for avoiding legal accountability for the conduct of another under the RCC.[4]

The second requirement is that the defendant's timely withdrawal must be accompanied by "reasonable efforts" at preventing the target offense.[5] Importantly, this does not mean that the defendant's conduct *actually* needs to prevent the target offense from being completed.[6] Rather, a withdrawal defense to legal accountability remains

[1] Typically, "an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019). However, there is an important exception applicable to criminal liability based on legal accountability for the conduct of another, which is similarly applicable in the context of general inchoate crimes. *Id.*; *see* RCC § 22E-305 (renunciation defense to attempt, solicitation, and conspiracy). In these contexts, the criminal justice system affords an "offender the opportunity to escape liability, even after he has satisfied the elements of these offenses, by renouncing, abandoning, or withdrawing from the criminal enterprise." *Id.* As it arises in the context of accomplice liability, this defense is typically referred to as "withdrawal." *E.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.3(d) (3d ed. Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.07 (6th ed. 2012).

[2] The idea that "a person who provides assistance to another for the purpose of promoting or facilitating the offense, but who subsequently abandons the criminal endeavor, can avoid accountability for the subsequent criminal acts of the primary party" is both historically rooted and well established. DRESSLER, *supra* note 1, at § 30.07; *see, e.g., United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) ("Withdrawal is traditionally a defense to crimes of complicity[.]"); CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL LAW § 37 (15th ed. 2018) ("At common law, a party could withdraw from a criminal transaction and avoid criminal liability by communicating his withdrawal to the other parties in sufficient time for them to consider terminating their criminal plan and refraining from committing the contemplated crime."); Commentary on Ky. Rev. Stat. § 502.040 (observing the "prevailing doctrine which allows an aider or abettor or an accessory before the fact to relieve himself of liability by countermanding his counsel, command or encouragement through a communication delivered in time to allow his principal to govern his actions accordingly"); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81 ("A majority of jurisdictions recognize some form of withdrawal or abandonment defense to complicity liability.").

[3] RCC § 22E-213(a) (prefatory clause).

[4] *See, e.g.,* DRESSLER, *supra* note 1, at § 30.07 (A "spontaneous and unannounced withdrawal will not do.") (citing *State v. Thomas*, 356 A.2d 433, 442 (N.J. Super. Ct. App. Div. 1976), *rev'd on other grounds*, 387 A.2d 1187 (N.J. 1978)); *State v. Formella*, 158 N.H. 114, 119 (2008) (It must "be possible for the trier of fact to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed.") (quoting *People v. Lacey*, 49 Ill. App. 2d 301, 307 (1964)).

[5] RCC § 22E-213(a)(3); *see* RCC § 22E-213(a)(2) and (3) (codifying two specific examples of reasonable efforts).

[6] *E.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d); DRESSLER, *supra* note 1, at § 30.07.

available under the RCC although the defendant's efforts are unsuccessful.[7] At the very least, though, the defendant must engage in conduct reasonably calculated towards disrupting—whether directly or indirectly—the offense that he or she initially promoted or facilitated.[8] Paragraphs (a)(1), (2), and (3) describe three alternative standards for evaluating the sufficiency of the defendant's conduct in this regard.

Paragraph (a)(1) establishes that a withdrawal defense is available where the defendant "[w]holly deprives his or her prior efforts of their effectiveness."[9] The type of conduct that satisfies this standard is necessarily contingent upon the nature of the

[7] For this reason, the withdrawal defense to legal accountability specified in this section is more lenient than the renunciation defense to general inchoate crimes under section 305, which requires proof that the target offense was actually prevented in order to avoid liability for an attempt, solicitation, or conspiracy. *See* RCC § 22E-305(a) ("In a prosecution for attempt, solicitation, or conspiracy *in which the target offense was not committed* . . . .") (italics added).

Another way in which the withdrawal defense to legal accountability is more lenient than the renunciation defense to general inchoate crimes relates to the defendant's motive. Whereas a renunciation defense is *unavailable* where the defendant was motivated by a desire to avoid getting caught, the withdrawal defense does not incorporate a comparable requirement of blameless intent (i.e., any motive underlying the withdrawal will suffice). *Compare* RCC § 22E-213(a) (no voluntariness requirement), *with* RCC § 22E-305(a)(2) (requirement of voluntary renunciation); RCC § 22E-305(b)(1) (renunciation not voluntary when "motivated in whole or in part by [a] belief that circumstances exist which . . . Increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; [or] Render accomplishment of the criminal plans more difficult . . . .").

Because of these two differences, it is possible for a defendant to avoid legal accountability for another person's conduct yet still incur general inchoate liability for his or her own conduct under the RCC. The following example is illustrative. V personally insults P. P is predisposed to let the insult slide, but A persuades P over the phone that P must respond with lethal violence to protect P's reputation. In providing this encouragement, A consciously desires to bring about the death of V, who A also has an outstanding beef with due to a prior perceived slight that V earlier made against A. One day later, A has a change of heart, which is motivated, in large part, by A's having been alerted to the fact that the police were monitoring the phone call and are therefore very likely to catch and arrest both P and A. So A decides to again call P, and does his very best to persuade P to desist from violence against V, and, ultimately, to forgive V for the slight. However, A's reasonable efforts at dissuading P from carrying out the planned execution is unsuccessful; P goes on to kill V anyways.

On these facts, A satisfies the standard for withdrawal under section 213, and, therefore, cannot be deemed an accomplice to P's murder of V under section 210. A would not, however, be able to avail himself of a renunciation defense under section 305 to avoid liability for his original solicitation of P (to commit murder) under the RCC's general solicitation statute. *See* RCC § 22E-302(a) ("A person is guilty of a solicitation to commit an offense when, acting with the culpability required by that offense, the person: (1) Purposely commands, requests, or tries to persuade another person; (2) To engage in or aid the planning or commission of conduct, which, if carried out, will constitute that offense or an attempt to commit that offense; and (3) The offense solicited is, in fact, [a crime of violence]."). Specifically, a renunciation defense would not be available to A under section 305 because: (1) the target offense at the heart of A's solicitation, the murder of V, was completed; and (2) A's renunciation was not voluntary (i.e., it was motivated by a desire to avoid getting caught).

[8] *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d) (The defendant must terminate his or her participation in a criminal scheme and: "(1) repudiate his prior aid, or (2) do all that is possible to countermand his prior aid or counsel, and (3) do so before the chain of events has become unstoppable."); DRESSLER, *supra* note 1, at § 30.07 ("[T]he accomplice must communicate his withdrawal to the principal and make bona fide efforts to neutralize the effect of his prior assistance.").

[9] *See, e.g.,* Model Penal Code § 2.06(6)(c)(i) (withdrawal defense available where defendant "wholly deprives [aid or encouragement] of effectiveness in the commission of the offense").

conduct that provides the basis for the defendant's legal accountability in the first place.[10] For example, where the defendant's contribution to a criminal scheme takes the form of verbal encouragement, a clear (and timely) oral statement of disapproval communicated to his or her co-participants may provide the basis for a withdrawal defense.[11] However, a statement of this nature will not suffice where the defendant's participation involved loaning a weapon central to the scheme's success.[12] In that case, the actual retrieval of the weapon may be necessary to meet the standard proscribed in this paragraph.[13]

Paragraph (a)(2) establishes that a withdrawal defense is available where the defendant "[g]ives timely warning to the appropriate law enforcement authorities."[14] Under this standard, a defendant who provides reasonable notice to a law enforcement agency with jurisdiction over the requisite criminal scheme may avoid legal accountability.[15] This indirect means of withdrawing from an offense is to be encouraged, particularly where it is: (1) unlikely that the defendant will be able to prevent the consummation of the target offense acting alone,[16] or (2) dangerous for the defendant to attempt to do so on his or her own.[17]

Paragraph (a)(3) establishes that a withdrawal defense is available where the defendant "[m]akes reasonable efforts to prevent the commission of the offense."[18] This catchall "reasonable efforts" alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (a)(1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably calculated towards disrupting it.[19] This standard should be evaluated in light of the totality of the

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[10] *See, e.g.,* Commentary on Haw. Rev. Stat. § 702-224 ("What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary depending on the conduct that establishes the accomplice's complicity.").

[11] *See, e.g.,* Model Penal Code § 2.06(6) cmt. at 326 (If "complicity inhered in request or encouragement, countermanding disapproval may suffice to nullify its influence, providing it is heard in time to allow reconsideration by those planning to commit the crime.").

[12] *See, e.g.,* Commentary on Haw. Rev. Stat. § 702-224 ("More will be required of one who distributes arms than one who offers verbal encouragement.").

[13] *See, e.g.,* Model Penal Code § 2.06(6) cmt. at 326 ("If the behavior consisted of aid, as by providing arms, a statement of withdrawal ought not to be sufficient; what is important is that he get back the arms, and thus wholly deprive his aid of its effectiveness in the commission of the offense.").

[14] *See, e.g.,* Model Penal Code § 2.06(6)(c)(ii) (withdrawal defense available where defendant "gives timely warning to the law enforcement authorities").

[15] *See, e.g.,* DRESSLER, *supra* note 1, at § 30.07 (In the situation of a defendant who opts to withdraw by notifying law enforcement, that notification must be early enough to provide the police with a reasonable opportunity to disrupt the criminal scheme); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d) (same).

[16] For example, where A aids an armed robbery planned to take place in another state by providing a weapon to P1 and P2, alerting the relevant legal authorities in that state in a timely fashion may be the only practical alternative if P1 and P2 later become unreachable by phone or email.

[17] For example, where A aids an armed robbery by loaning a weapon to P1 and P2, but P1 and P2 also have many other weapons available to them, and any attempt by A at retrieving the weapon may pose a risk to A's life, then alerting the relevant legal authorities in a timely fashion would clearly be a more desirable alternative.

[18] *See, e.g.,* Model Penal Code § 2.06(6)(c)(ii) (withdrawal defense available where defendant "otherwise makes proper effort to prevent the commission of the offense.").

[19] *See* Model Penal Code § 2.06 cmt. at 326 ("The sort of effort that should be demanded turns so largely on the circumstances that it does not seem advisable to attempt formulation of a more specific rule.").

circumstances.[20]

Relation to Current District Law. *RCC § 22E-213 codifies, clarifies, and fills gaps in District law concerning the availability and burden of proof governing a withdrawal defense to legal accountability.*

The D.C. Code does not address the availability of a withdrawal defense; however, the DCCA has discussed it on a few different occasions. The relevant case law can generally be divided into two categories: decisions involving withdrawal from a conspiracy (a topic not addressed by RCC § 22E-213); and decisions involving withdrawal from aider and abettor liability (the focus of RCC § 22E-213).

With respect to the first category, the relevant case law pertains to when an actor may be relieved from the *collateral consequences of a conspiracy*.[21] For example, "a defendant may attempt to establish his withdrawal as a defense in a prosecution for substantive crimes subsequently committed by the other conspirators."[22] Or the defendant "may want to prove his withdrawal so as to show that as to him the statute of limitations has run."[23] On these kinds of collateral issues, the DCCA recognizes a defense of withdrawal, under which the defendant "must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation."[24]

With respect to the second category, the relevant case law addresses when an actor may be relieved from liability as an aider and abettor.[25] In this context, withdrawal

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

[21] ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81 (Westlaw 2018) ("Withdrawal," commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor's abandonment to his confederates."); Model Penal Code § 5.03 cmt. at 456 (distinguishing "withdrawal from the conspiracy (1) as a means of commencing the running of time limitations with respect to the actor, or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (3) as a defense to substantive crimes subsequently committed by the other conspirators").

[22] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 1, at § 29.09 ("If a person withdraws from a conspiracy, she may avoid liability for subsequent crimes committed in furtherance of the conspiracy by her former co-conspirators.").

[23] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 1, at § 27.07 ("[O]nce a person withdraws, the statute of limitations for the conspiracy begins to run in her favor."); Buscemi, *supra* note 21, at 1168 ("[W]ithdrawal is principally directed toward the time dimension of conspiracy.").

[24] *Bost v. United States*, 178 A.3d 1156, 1200 (D.C. 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); *see, e.g., Tann v. United States,* 127 A.3d 400, 467 (D.C. 2015) (citing *United States v. Moore,* 651 F.3d 30, 90 (D.C. Cir. 2011); *Baker v. United States*, 867 A.2d 988, 1007 n.24 (D.C. 2005).

[25] *See Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("Legal withdrawal has been defined as '(1) repudiation of the defendant's prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.") (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

provides the basis for a *complete defense to criminal liability*.[26] Which is to say, under District law an accomplice who "take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation" cannot be convicted of the crime for which he or she has been charged with aiding and abetting.[27]

With respect to both categories, there does not appear to be any reported District case law in which a defendant has successfully raised a withdrawal defense. Rather, the published decisions in these areas of law primarily clarify the kind of proof that fall short of establishing it. For example, in at least two cases the DCCA has determined that where the defendant plays a central role in the planning and facilitation on a crime (e.g., providing a weapon), "[l]eaving the scene before a crime occurs is," by itself, "insufficient to demonstrate withdrawal."[28]

The DCCA has also clarified that a withdrawal defense is unavailable although an accused who was intimately involved in a robbery scheme "may have 'wanted to get out of there, and didn't want to do further damage to the victim'" after the robbery had commenced.[29] Observing the requirement that the defendant take "affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation,"[30] the court deemed the mere fact that the defendant "regretted the unfolding consequences of the brutal robbery in which he participated" to be insufficient to "relieve him of criminal liability."[31]

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[26] ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81.

[27] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) ("Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.") (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); *see In re D.N.*, 65 A.3d at 95 ("Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability."); *Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994).

[28] *Bost v. United States*, 178 A.3d 1156, 1201 (D.C. 2018) (citing *Harris*, 377 A.2d at 38) (the fact that appellant merely left the scene before the shooting occurred was "insufficient to establish withdrawal as a matter of law"). Relatedly, the U.S. Court of Appeals for the D.C. Circuit has observed that:

> Whatever may be the other requirements of an effective abandonment of a criminal enterprise, it is certain both as a matter of law and of common sense that there must be some appreciable interval between the alleged abandonment and the act from responsibility for which escape is sought. It must be possible for a jury to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed. While it may make no difference whether mere fear or actual repentance is the moving cause, one or the other must lead to an actual and effective retirement before the act in question has become so imminent that its avoidance is practically out of the question.

Mumforde v. United States, 130 F.2d 411, 413 (D.C. Cir. 1942) (quoting *People v. Nichols*, 230 N.Y. 221, 222, 129 N.E. 883 (1921)).

[29] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013).

[30] *Id.* (citing *Harris v. United States,* 377 A.2d 34, 38 (D.C. 1977)).

[31] *Id.* (citing *Plater v. United States,* 745 A.2d 953, 958 (D.C. 2000) ("The defendants' fleeing of the crime scene after participating in the assault does not constitute legal withdrawal.").

One issue relevant to a withdrawal defense that is unresolved by DCCA case law is the *burden of proof*.[32] The commentary accompanying the District's criminal jury instruction on conspiracy seems to recommend that, "[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction," the burden should be on the "government to prove that the defendant was a member of the conspiracy and did not withdraw it."[33] However, recent U.S. Supreme Court case law—cited to in recent DCCA case law—indicates that the burden of proof should instead rest with the defendant.[34] And the commentary accompanying the District's criminal jury instruction on accomplice liability says nothing at all about the burden of proof for a withdrawal defense.[35]

Even assuming that under current District law the burden of persuasion for a withdrawal defense to the collateral consequences of a conspiracy rests with the government, there are sound policy and practical reasons (discussed below) to place the burden of persuasion for a withdrawal defense to accomplice liability (the focus of RCC § 22E-213) on the defendant, subject to a preponderance of the evidence standard. And there is also general District precedent supporting such an approach; many statutory defenses in the D.C. Code are subject to a preponderance of the evidence standard that must be proven by the defendant.[36]

Consistent with the above analysis, the RCC recognizes a broadly applicable withdrawal defense to legal accountability, subject to proof by the defendant beyond a

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[32] As the D.C. Court of Appeals explained in *Green v. Dist. of Columbia Dep't of Employment Servs.*:

> The term 'burden of proof' [] encompass[es] two separate burdens: the burden of production and the burden of persuasion . . . The former refers to the burden of coming forward with satisfactory evidence of a particular fact in issue . . . The latter constitutes the burden of persuading the trier of fact that the alleged fact is true.

499 A.2d 870, 873 (D.C. 1985) (internal citations omitted).

[33] Commentary on D.C. Crim. Jur. Instr. § 7.102.

[34] *Smith v. United States*, 568 U.S. 106 (2013) (placing burden on defendant to prove withdrawal from conspiracy under federal law); *see Bost v. United States*, 178 A.3d 1156, 1201 (D.C. 2018) (citing *id.*).

[35] *See generally* D.C. Crim. Jur. Instr. § 3.200.

[36] Most notably, this includes the District's statutory insanity defense, D.C. Code § 24-501 ("No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence."); *see Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a prima facie case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury."); *see also Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) ("Reasonablely viewed, the concepts of both diminished capacity and insanity involve a moral choice by the community to withhold a finding of responsibility and its consequence of punishment."). For other examples, see D.C. Code § 22-3611 (b) (providing, with respect to penalty enhancement for crimes committed against minors, that it "is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense," which "defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(c) (same for penalty enhancement for crimes committed against minors); D.C. Code § 22-3011(b) (providing, with respect to child sex abuse, that [m]arriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence . . . .").

preponderance of the evidence.[37] (Recognition of a withdrawal defense to legal accountability is broadly congruent with recognition of the renunciation defense to general inchoate crimes under RCC § 22E- 305.[38])

[37] *See* RCC § 22E-201(b). The withdrawal defense established by RCC § 22E-213 also applies to legal accountability based upon culpably causing an innocent or irresponsible person to commit an offense. It is unclear under current District law whether a withdrawal defense would be available in this rare situation. There are only a handful of reported District cases involving this theory of liability and none implicate withdrawal.

[38] *See* RCC § 22E-305(a) ("In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that: (1) The defendant engaged in conduct sufficient to prevent commission of the target offense; (2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent."). Note, however, that the RCC renunciation defense differs from the RCC withdrawal defense in two primary ways. First, the renunciation defense incorporates an "actual prevention" standard, which entails that the defendant successfully prevent the target of the general inchoate crime from being consummated—whereas "reasonable efforts" on behalf of the defendant will suffice to establish a withdrawal defense. Second, the renunciation defense incorporates a voluntariness requirement, which entails that the abandonment of criminal purpose have been motivated by something other than a desire to avoid getting caught—whereas the withdrawal defense does not incorporate any subjective requirement. Given these differences, it is possible that a defendant may satisfy the standard for a withdrawal defense, and therefore escape legal accountability under RCC §§ 22E-210 and 211, but fail to satisfy the standard for a renunciation defense, and thus retain criminal liability under one or more of the general inchoate crimes under RCC §§ 22E-301, 302, and 303. *See supra* note 7 (providing illustration).

RCC § 22E-214. Merger of Related Offenses.

Explanatory Note. Section 214 sets forth a comprehensive framework for addressing issues of sentencing merger[1] that arise when a defendant has been convicted of two or more substantially related criminal offenses[2] arising from the same course of conduct.[3] This framework is comprised of general merger principles, which preclude the imposition of multiple liability for violation of overlapping criminal statutes that protect the same (or sufficiently similar) societal interests.[4] Barring the unjust and ineffective

[1] The issue of merger is "[o]ne of the more important and vexing legal issues" confronting sentencing courts. Tom Stacy,k *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 (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."). 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." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 518-19 (2001); *see, e.g.,* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 708 (2005) (observing that "Congress has adopted repetitive and overlapping statutes," such as "mostly superfluous offenses like 'carjacking' that deal with conduct addressed by existing provisions such as robbery and kidnapping."). If a defendant is charged with, and subsequently convicted of, two or more of these overlapping offenses based on a single course of conduct, the sentencing court will then be faced with deciding 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.")).

[2] The merger policies set forth in this section only apply to *RCC* offenses (in contrast to *all* criminal offenses in the D.C. Code). This limitation is consistent with RCC § 22E-103(a), which establishes that "[u]nless otherwise provided by law, a provision in this title applies to this title alone." Because of this limitation, the principles and procedures established in section 214 would not govern the merger of multiple District offenses located outside the RCC, nor would they apply to multiple convictions for an RCC offense and one or more non-RCC District offenses.

[3] § 22E-214 addresses what are sometimes referred to as "multiple description claims" of merger, 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). In contrast, § 22E-214 does not address what are sometimes referred "unit-of-prosecution claims" of merger, 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 2019).

[4] Legislation of this nature is appropriate because "[t]he gradation of punishment for an offense is clearly a matter of legislative choice, whether it be as severe as authorizing dual punishment for lesser-included offenses . . . or as mild as prohibiting the imposition of multiple convictions even where two offenses clearly involve different elements." *Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991); *see, e.g.,* Model Penal Code § 1.07(1) (recommending legislative specification of "the situations in which conviction for more than one offense based on the same conduct is precluded"). Merger issues, while implicating the Fifth Amendment's prohibition against "twice [placing someone] in jeopardy of life or limb" for the "same

aggregation of convictions under these circumstances facilitates proportionate punishment.[5]

The prefatory clause of subsection (a) establishes that the general principles set forth in subsection (a) only address the merger of multiple convictions that "aris[e] from the same course of conduct."[6] It is under these circumstances that the imposition of multiple liability most clearly raises issues of proportionality.[7] In contrast, where the

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offense," are ultimately a matter of legislative intent subject to the safeguards afforded by the constitutional prohibition on cruel and unusual punishment and the due process requirement of fundamental fairness. *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."); MICHAEL S. MOORE, ACT AND CRIME 309 (1993) (discussing difference between a double jeopardy question and an Eighth Amendment question). The merger principles incorporated into section 214 provide an express codification of legislative intent, and have been drafted to *limit* multiple liability well *below* what the constitutional ceiling on excessive punishments might otherwise allow for. *See, e.g.,* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (observing that in non-capital cases the ceiling for constitutionally excessive punishments is extremely high); Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835 (2012) (discussing relationship between proportionality and the Eighth Amendment).

[5] 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. *See, e.g., State v. Davis*, 68 N.J. 69, 77 (1975) (noting 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.'"). 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.

[6] 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. For example, charges for homicide and assault, if based on the defendant's firing of a single shot at a single victim, arise from the same course of conduct. That said, the fact that multiple charges are based on a single act or omission does not necessarily mean they arise from the same conduct, such as, for example, where a defendant's single shot causes the death of V1 and bodily injury to V2, thereby satisfying the requirements of liability for murder against V1 and assault against V2.

Conversely, multiple charges may be based on a series of related acts or omissions yet still arise from the same course of conduct. For example, where X contracts with Y at 8:00am to assault V in Northwest D.C., and Y attempts to fulfill the contract that evening at 8:00pm by shooting V in the leg in Southeast D.C., but is frustrated by the police immediately prior to consummation, both X's solicitation and the subsequent attempted assault by Y—for which X is accountable as an accomplice, see RCC § 22E-210(a)—arise from the same course of conduct. *See infra* note 30 and accompanying text (discussing same course of conduct limitation in the context of merger of multiple inchoate crimes under RCC § 22E-214(a)(6)).

[7] 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

defendant's convictions arise from separate courses of conduct, the imposition of multiple liability is less likely to be unfairly duplicative.[8] The principles of merger set forth in subsection (a) are not intended to govern the latter situation.

The first of these principles, set forth in paragraph (a)(1), establishes that merger is required where "[o]ne offense is necessarily established by proof of the elements of the other offense as a matter of law."[9] This language effectively codifies the elements test originally set forth by the U.S. Supreme Court in *Blockburger v. United States*.[10] The

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(3) theft and intentional damage of property as it pertains to the immediate destruction of a single piece of stolen property.

[8] 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.

[9] *See, e.g.,* Model Penal Code §§ 1.07(1)(a), (4)(a) (barring 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"); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 68 ("Most jurisdictions bar conviction for both an offense and a lesser included offense arising from the same conduct. Indeed, this multiple offense limitation is generally accepted to be a constitutional requirement under the double jeopardy clause.") (collecting legal authorities).

[10] 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, e.g.,* 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.").

It is important to note that the elements test has received significant criticism, particularly where it operates as the sole basis for conducting merger analyses. Four general problems have been highlighted. The first is a marked lack clarity and consistency, namely, the element test "is formally indeterminate, has no ready application to common crimes with alternative elements, and facilitates result-oriented manipulation of elements." Hoffheimer, *supra* note 10, 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."); *Texas v. Cobb*, 532 U.S. 162, 185-86 (2001) ("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.") (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting) (internal quotations and citations omitted).

The second problem is disproportionality in convictions, namely, 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." Stuntz, *supra* note 1, at 519-20; Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 770-71 (2004) ("from the intuitive perspective of a layperson, [in contrast to the elements test,] the defendant has committed a single crime").

The third problem, which follows directly from the second, is that of disproportionality in sentencing exposure. 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. *See, e.g.,* Stacy, *supra* note 1, at 832 ("Allowing multiple convictions can add years to criminal sentences

elements test supports merger whenever the elements of one offense are a subset of the other offense.[11] In practice, two offenses share this kind of elemental relationship whenever it is impossible to commit one offense without also committing the other offense.[12]

Paragraph (a)(2) next addresses three particular kinds of variances, which, if constituting the sole distinctions between two or more offenses, support merger.[13] The first, codified by subparagraph (a)(2)(A), 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

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because consecutive sentences are imposed or because the elevated criminal history score lengthens the term of imprisonment for subsequent offenses."); *Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970) ("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 criminal transaction . . . But as the separate violations multiply by legislative action, the likelihood increases that [under the elements test] a defendant will actually be punished several times for what is really and basically one criminal act.").

The fourth problem emphasizes the corrosive procedural dynamics that flow from the two proportionality problems just noted. Specifically, it is argued that the narrow scope of merger inherent in the elements test encourages a prosecutorial practice known as "charge-stacking," wherein the government brings as many substantially-overlapping charges as possible, thereby subjecting defendants to more severe punishments and providing defendants with "greater incentives to plead guilty." Husak, *supra* note 10, at 770-71; Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 453 (2009) ("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.").

Section 214 addresses these criticisms by incorporating a range of merger principles—including but also going beyond the elements test—which together constitute a more proportionate approach that is neither "too rigid" nor can be said to "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); Stacy, *supra* note 1, at 856 ("The Blockburger test, and even more so the same-elements test, reflexively stack the deck in favor of multiple [] punishments.").

[11] 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.

[12] For example, one way to confirm that the elements of assault are a subset of the elements of robbery, as defined *supra* note 11, is to determine that it is impossible to commit robbery without also committing assault under the relevant statutory definitions. *See also 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"); *but see* notes 37-41 and accompanying text (discussing unit of analysis issues, and the concomitant limited relevance of factual considerations, to merger under section 214).

[13] *See, e.g.,* Model Penal Code §§ 1.07(1)(a), (4)(c) (barring 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."); *id.* § 1.07(1)(d) (barring multiple liability 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."); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 68 (collecting authorities that employ comparable formulations).

the other offense.[14] The second, codified by subparagraph (a)(2)(B), is where the offenses differ only in that one requires a lower culpable mental state under RCC § 22E-206 than the other.[15] And the third, codified by subparagraph (a)(2)(C), 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.[16] Where two offenses satisfy one or more of these principles, the imposition of multiple liability would be disproportionate.[17]

Paragraph (a)(3) establishes that merger is required where "[o]ne offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law."[18] This principle applies when the facts required to prove offenses

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[14] 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." *See, e.g.,* Model Penal Code § 1.07, cmt. at 133 (giving the example of an "offense consisting of an intentional infliction of bodily harm" and "the charge of intentional homicide").

[15] 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." *See, e.g.,* Model Penal Code § 1.07, cmt. at 133 (giving the example of offenses that are "less serious types of homicides," and also observing that this principle would apply to "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").

This may go beyond the scope of the elements test codified in paragraph (a)(1). 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 the elements test:

> 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 elements test] 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 elements test], 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).

[16] 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." *See, e.g.,* Model Penal Code § 1.07, cmt. at 114 (giving the example of "a general statute prohibiting lewd conduct and [] a specific-statute prohibiting indecent exposure," and stating that, "[i]n the absence of an expressed intention to the contrary, it is fair to assume that the legislature did not intend that there be more than one conviction under these circumstances.").

[17] 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."

[18] *See, e.g.,* Model Penal Code § 1.07(1)(c) (barring multiple liability where "inconsistent findings of fact are required to establish the commission of the offenses"); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 68 (collecting authorities that employ comparable formulations); *see also* Model Penal Code § 1.07, cmt. at 112 n.32 (observing that this principle accords with longstanding common law and important constitutional considerations).

arising from the same course of conduct are legally "inconsistent with each other."[19] 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, the imposition of multiple liability would be disproportionate.[20]

Paragraph (a)(4) establishes that merger is required where "one offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each."[21] This principle applies whenever the gravamen of one

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[19] *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, paragraph (a)(3) precludes the imposition of multiple liability for these two offenses. *See, e.g.,* Model Penal Code § 1.07, cmt. at 114 (giving the example of "robbery and receiving the stolen property, in which it was clear that the defendant had either robbed or received the goods but could not have done both"). The same analysis would also preclude the imposition of 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*."

[20] Precluding 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 paragraph (a)(3) would preclude multiple liability for theft and unlawful use, 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.

[21] This proportionality-based merger principle is loosely modeled on a comparable merger principle incorporated into a few other recent code reform projects. *See, e.g.,* Proposed Del. Crim. Code § 210(a)(2017) (barring multiple liability where "two offenses are based on the same conduct and . . . the harm or wrong of one offense is . . . entirely accounted for by the other offense."); Proposed Ill. Crim. Code § 254(1)(a) (2003) (same); Proposed Ky. Penal Code § 502.254(1)(a) (2003) (same). Of all the merger principles codified by section 214, it is the most directly responsive to the four main shortcomings of the elements test discussed *supra* note 10. *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, 606 (2004) ("[Rather than] considering the theoretical possibility of committing one offense without committing another" under the elements test, this "proposed ["entirely accounted for"] standard calls for a consideration of the relevant offenses' purposes") (discussing Proposed Ill. Crim. Code § 254(1)(a)); Brown, *supra* note 10, at 453 (many of the problems implicated by the elements test can be addressed by asking 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"); Stacy, *supra* note 1, at 855 ("In developing a common law of offense interrelationships, courts [should 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.").

Numerous jurisdictions have adopted comparable proportionality-based approaches through case law. *See, e.g., Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970) (replacing elements test with an approach 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") (collecting legal authorities and scholarly commentary that support this kind of approach); *Monoker v. State*, 582 A.2d 525, 529 (Md. 1990) (complementing elements test with proportionality-based approach founded upon recognition that one of "the most basic considerations in all

offense duplicates that of another offense.[22] This purpose-based evaluation goes beyond mere consideration of whether it is theoretically possible to commit one offense without committing another.[23] 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.[24]

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our [merger] decisions is the principle of fundamental fairness in meting out punishment for a crime"); *State v. Davis*, 68 N.J. 69, 77, 81 (1975) (adopting proportionality-based approach to merger, which aims to "insure that the punishment imposed is commensurate with the criminal liability," and is "attended by considerations of fairness and fulfillment of reasonable expectations in the light of constitutional and common law goals"). It is important to note, however, that the scope of merger under paragraph (a)(4) is likely narrower than under any of these judicially-created approaches, all of which appear to rest upon consideration of the specific facts presented at trial. *See infra* notes 40-41 and accompanying text (discussing narrow role of factual considerations under section 214).

Note also that a handful of jurisdictions appear to have legislatively adopted categorical bars on multiple convictions arising from the same conduct—i.e., merger without regard to the nature of the underlying offenses—which are significantly broader than paragraph (a)(4) (as well as any other principle in section 214). *See, e.g.,* Minn. Stat. Ann. § 609.035 ("[I]f 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 . . . ."); *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn.1986) (this provision categorically "prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident"); Cal. Penal Code § 654 ("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."); *People v. Myers*, 59 Cal. App. 4th 1523, 1529, 69 Cal. Rptr. 2d 889, 892 (1997) (observing that this categorical bar on multiple liability ensures that "punishment is commensurate with a defendant's culpability").

[22] *See, e.g.,* Cahill, *supra* note 21, at 606 (arguing that elements test should be replaced with a broader principle that "asks whether the gravamen of one offense duplicates that of another"); Antkowiak, *supra* note 1, 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."); *see also* Stacy, *supra* note 1, 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.").

[23] *See generally* RCC § 22E-214(a)(1).

[24] 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).

For another illustration of this merger principle, compare the general inchoate offense of conspiracy, which generally criminalizes agreements to commit crimes, and specific offenses that criminalize particular kinds of consensual transactions, such as, for example, drug distribution. Where dual convictions for conspiracy and a completed target offense that typically involves a mutual transaction both

Paragraph (a)(5) addresses merger in two different situations involving multiple convictions for general inchoate offenses and completed offenses.[25] The first is where "[o]ne offense consists only of an attempt or solicitation of [t]he other offense."[26] The

arise from the same course of conduct, paragraph (a)(4) would require merger given the overlapping harm, culpability, and penalty proscribed by each offense. *Compare infra* note 26 (discussing paragraph (a)(5), which generally *does not* require that conspiracy and completed target offense merge). This means that (for example) where D, a drug dealer, is convicted of both conspiracy to commit drug distribution and drug distribution, and those convictions arise from the same course of conduct (e.g., a single drug deal with purchaser X), the conspiracy charge would merge with the drug distribution charge, since the latter, by effectively requiring an agreement to distribute as a precursor, "reasonably accounts" for the former. *See also* RCC § 22E-304(a), Explanatory Note (explaining that this outcome accords with the narrower, and most justifiable, interpretation of Wharton's Rule, and collecting legal authorities in support).

[25] The merger principle set forth in this paragraph arguably departs from the elements test, codified in paragraph (a)(1), in that convictions for both a substantive offense and an inchoate offense designed to culminate in that same offense "would not necessarily be barred under *Blockburger*." Model Penal Code § 1.07, cmt. at 108. So, for example, under *Blockburger*, "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." *Id.* Nevertheless, because the general inchoate crime of solicitation is "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," it "would be a perversion of the legislative intent to [] pyramid convictions and punishment." *Id.* at 109.

[26] RCC § 22E-2214(a)(5)(A); *see, e.g.,* Model Penal Code § 1.07(1)(a) (establishing that no person may be convicted of more than one offense if one offense is "included in the other charge," which, as defined in Model Penal Code § 1.07(4)(b), includes "an attempt or solicitation to commit the offense charged"); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84 ("It 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").

Note that paragraph (a)(5) *excludes* the general inchoate offense of conspiracy from its reach. This is consistent with the well-established common law rule, which authorizes multiple liability "for both the conspiracy and the completed offense." Model Penal Code § 1.07 cmt. at 109. However, it is inconsistent with the recommendations of the Model Penal Code, which precludes multiple liability where one offense "consists only of a conspiracy or other form of preparation to commit the other." Model Penal Code § 1.07(1)(b).

The drafters of the Model Penal Code sought to overturn the common law rule on the rationale that general inchoate liability largely exists to provide a basis for arresting, incarcerating, and rehabilitating dangerous offenders—which purposes are equally well-served by a conviction for the completed offense. Model Penal Code § 1.07 cmt. at 109 (conviction for a completed offense alone "adequately deals with such conduct"). Since publication of the Model Penal Code, however, "only [] a minority of the modern recodifications" appear to have been persuaded by this position. WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4(d) (3d ed. Westlaw 2019) (collecting statutes); *see, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.03 (6th ed. 2012) (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").

Today, most American jurisdictions appear to believe that—consistent with the common law approach—"[conspiratorial] agreement is 'a distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.'" *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)). Specifically, the argument driving the common law approach is that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts" for three interrelated reasons: (1) it "increases the likelihood that the criminal object will be successfully attained"; (2) it "decreases the probability that the individuals involved will depart from their path of criminality"; and (3) it "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Callanan v. United States*, 364 U.S. 587, 593-94

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 (a)(1)-(4)."[27] In the first situation, subparagraph (a)(5)(A) requires merger for engaging in preparation to commit an offense and the subsequent completion of that offense whenever the convictions involve the same criminal objective.[28] In the second situation, subparagraph (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 merger under any of the other principles specified in subsection (a).[29]

Paragraph (a)(6) addresses merger in two different situations involving multiple convictions for general inchoate offenses.[30] The first is where the general inchoate offenses are "designed to culminate in commission of [t]he same offense."[31] The second

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(1961). And where, as under the RCC, a criminal code employs a bilateral definition of conspiracy, the argument against categorical merger of all conspiracies rests on an even stronger foundation. *See, e.g.,* DRESSLER, *supra* note 26, 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.*") (italics added); RCC § 22E-303(a) (requiring proof that the defendant and "at least one other person" agree to commit a crime).

[27] RCC § 22E-2214(a)(5)(B); *see, e.g.,* Proposed Ill. Crim. Code § 254(1)(b) (requiring merger whenever: "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)."); *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).

[28] 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, subparagraph (a)(5)(A) precludes 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, subparagraph (a)(5)(A) precludes imposing multiple convictions upon X for both offenses. Note that the above limitations would not apply if the charges for either attempt or solicitation to commit armed murder and the (completed) armed murder involved *different victims*.

[29] 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, subparagraph (a)(5)(B) precludes 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, subparagraph (a)(5)(B) precludes imposing multiple imposing multiple convictions upon X for both offenses because armed murder and murder satisfy the general merger principles set forth in paragraphs (a)(1)-(4). Note that the above principles would not apply if the charges for either attempt or solicitation to commit (unarmed) murder and the (completed) armed murder involved *different victims*.

[30] The merger principle set forth in this paragraph, like that set forth in paragraph (a)(5), arguably departs from the elements test, codified in paragraph (a)(1). *See supra* note 25 (providing analysis consistent with this conclusion); Model Penal Code § 5.05, cmt. at 492 (arguing that there's "no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense").

[31] RCC § 22E-2214(a)(6)(A); *see, e.g.,* Model Penal Code § 5.05(3) ("A person may not be convicted of more than one [general inchoate inchoate offense] for conduct designed to commit or to culminate in the

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 (a)(1)-(4) of this section."[32] In the first situation, subparagraph (a)(6)(A) requires merger for engaging in various forms of preparation to commit the same offense whenever the convictions involve the same criminal objective.[33] In the second situation, subparagraph (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 merger under any of the other principles specified in subsection (a).[34]

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commission of the same crime."); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84 ("Most jurisdictions bar multiple convictions for combinations of inchoate offenses designed to culminate in the same offense.").

Note that paragraph (a)(6) is limited to merger of multiple inchoate offenses that occur in the "same course of conduct." This is in contrast to the Model Penal Code approach, which appears to categorically preclude multiple liability for more than one general inchoate crime directed towards a single criminal objective, even where the convictions rest upon *separate* courses of conduct. *See* Model Penal Code § 5.05(3) (merger for multiple inchoate crimes whenever they rest upon "*conduct designed to commit or to culminate in the commission of the same crime*") (italics added); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84 ("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."). If this reading of the Model Penal Code is accurate, then subsection 5.05(3) would dictate that (for example) where X unsuccessfully attempts to murder V in 2015, and thereafter unsuccessfully attempts to murder V again (or, alternatively, unsuccessfully solicits Y to murder V) in 2018, X *cannot* be convicted for more than one general inchoate crime. ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84.

Given the unintuitive nature of this outcome, various jurisdictions appear have revised this aspect of the Model Penal Code to incorporate a "same course of conduct" requirement. *See, e.g.,* Ky. Rev. Stat. Ann. § 506.110(3) ("A person may not be convicted of more than one (1) [general inchoate offense] for a *single course of conduct* designed to consummate in the commission of the same crime."); *State v. Badillo*, 317 P.3d 315, 321 (Or. Ct. App. 2013) ("[T]he commission intended [the Oregon Criminal Code] 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."). The RCC accomplishes the same through paragraph (a)(6), which effectively limits merger of multiple inchoate offenses to situations where the underlying convictions share a relatively close temporal/substantive relationship to one another. *Compare, e.g., 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).

[32] RCC § 22E-2214(a)(6)(B); *see also* sources cited *supra* note 27 (providing support for comparable principle specified in subparagraph (a)(5)(B)).

[33] 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, subparagraph (a)(6)(A) precludes imposing multiple convictions upon X for more than one of these three offenses. Note that this rule would not apply if the charges for attempted armed murder, solicitation of armed murder, and conspiracy to commit armed murder involved *different victims*.

[34] 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*

Subsection (b) establishes that "[t]his section is inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct."[35] This means that 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.[36]

Subsection (c) establishes a rule of priority for determining which of two or more merging convictions should be vacated and which should remain.[37] It is comprised of two different principles. The first dictates that where, among any group of merging offenses, one has a higher statutory maximum term of incarceration than the others, the conviction for that more severely punished offense is the one that should remain. The second proscribes that where, among any group of merging offenses, two or more offenses have the highest statutory maximum term of incarceration, then the determination of which among those more severely punished offenses should remain is submitted to the court's discretion.

Subsection (d) clarifies two important procedural aspects of the merger analysis set forth in RCC § 22E-214. First, § 22E-214 should not be construed as 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 section 214 for which the requirements of liability have been met.[38] Second, § 22E-214 only places limitations on the entry of a final judgment of liability—i.e., a conviction that exists after

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aggravated assault. However, subparagraph (a)(6)(B) precludes imposing multiple convictions upon X for more than one of these three offenses because *armed murder*, *murder*, and *aggravated assault* satisfy the general merger principles set forth in paragraphs (a)(1)-(4). Note that this rule would not apply if the charges for attempted armed murder, solicitation of murder, and conspiracy to commit aggravated assault involved *different victims*.

[35] *See, e.g.,* Antkowiak, *supra* note 1, 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 . . . ."); Poulin, *supra* note 4, at 647 (when courts are confronted with merger issues, "the focus is legitimately, inevitably, and almost exclusively on legislative intent"); *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."); *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.").

[36] Provided, of course, that it respects other constitutional limitations on excessive punishment. *See supra* note 3.

[37] *See, e.g.,* 42 Pa.C.S. § 9765 ("Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense."); Cal. Penal Code § 654 ("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.");

[38] *See, e.g.,* Model Penal Code § 1.07 ("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 . . . ."); Alaska Stat. Ann. § 11.31.140(d) ("[The merger principle set forth in this] section does not bar inclusion of multiple counts in a single indictment or information charging commission of a crime defined by AS 11.31.100-11.31.120 and commission of the crime that is the object of the attempt, conspiracy, or solicitation.").

the expiration of appellate rights or affirmance on appeal—for merging offenses.[39]

The principles of merger set forth in § 22E-214 present questions of law regarding the manner in which the statutory elements of criminal offenses relate to one another.[40] 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.[41] And once a court determines that § 22E-214 requires merger of two or more offenses, that determination should be treated as binding on all future cases involving the same offenses.[42]

The principles of merger set forth in § 22E-214 do not have 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 includes, but is not limited to, determining: (1) when successive

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[39] 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. *See, e.g., 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).

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. *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*.").

In the event that one or more convictions is dismissed by the trial court pursuant to section 214, 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).

[40] Cahill, *supra* note 21, at 607 (observing that comparable merger principles "would present issues of law regarding how defined offenses relate to each other," and arguing that, because "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," this would enhance the "predictability, stability, and evenhandedness in the imposition of multiple liability.") (discussing Proposed Ill. Crim. Code § 254(1)(a)); *see, e.g.,* Commentary on Proposed Del. Crim. Code § 210(a).

[41] 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*). *See supra* notes 39-41 and accompanying text (discussing appropriate treatment of alternative elements).

[42] Provided, of course, that they arise from the same course of conduct. *See, e.g.,* Cahill, *supra* note 21, at 607 ("[Under this kind of approach to merger] any bar on multiple convictions would govern only subsequent cases where those two offenses were again based on the same conduct. Multiple convictions for the two offenses would remain acceptable where they are not both based on the same conduct.") (discussing Proposed Ill. Crim. Code § 254(1)(a)); *see, e.g.,* Commentary on Proposed Del. Crim. Code § 210(a).

This same principle of *stare decisis* also 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 paragraph of an alternative element statute upon which a criminal conviction rests, a court's holding concerning the relationship between an offense committed pursuant to that paragraph and another offense would still be binding on all future cases involving those same provisions.

prosecutions for substantially related offenses may be brought[43]; (2) when a jury may be instructed on an offense that was not specifically charged in the indictment[44]; and (3) when an appellate court may direct the entry of judgment for an offense over which the jury never deliberated.[45]

Relation to Current District Law. RCC § 22E-214 codifies, clarifies, changes, and fills in gaps reflected in District law governing merger.

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,[46] 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 § 22E-214 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

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[43] *See, e.g., 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); Poulin, *supra* note 4, 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.").

[44] *See, e.g., Com. v. Jones*, 590 Pa. 356, 369-70 (2006) ("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."); *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."); WAYNE R. LAFAVE ET AL., 6 CRIM. PROC. § 24.8(e)) (4th ed. Westlaw 2019)) ("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.").

[45] *See, e.g., Rutledge v. United States*, 517 U.S. 292, 306 (1996) ("Consistent with the views expressed by the District of Columbia Circuit, federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense.") (citing, e.g., 8A J. MOORE, FEDERAL PRACTICE ¶ 31.03[5], and n. 54 (2d ed. 1995)).

[46] 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.").

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. Paragraph (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 § 22E-214(a)-(d): Relation to Current District Law on Substantive Merger Policy. Subsections (a), (b), and (c) 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.[47] 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.'"[48] And, in the 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.[49]

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[47] *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)).

[48] *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 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).

[49] *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 *Blockburger* rule, as applied to multiple convictions for different offenses prosecuted in a single proceeding, supports a rebuttable presumption of legislative intent[50] as to merger when (but only when) two basic requirements are met: (1) the convictions arise from the same act or course of conduct[51]; and (2) the underlying offenses upon which the convictions are based entail proof of the same facts.[52] 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

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> 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:
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> > "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).

[50] 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).

[51] *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).

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

single conviction and sentence."[53] 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.'"[54] The third factor asks whether "a subsequent criminal act is '[] not the result of the original impulse, but a fresh one.'"[55] 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.[56] Judicial evaluation of the latter two factors, in contrast, requires application of "a fact-based approach,"[57] which revolves around whether the defendant reached a "fork-in-the-road."[58]

The second requirement, which is the crux of the *Blockburger* rule, incorporates what is often referred to as the elements test.[59] 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[?]'"[60] 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.[61] 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

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[53] *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.*

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

[55] *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").

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

[57] *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).

[58] *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 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)).

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

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

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

it is presumed that the legislature intended to authorize multiple liability and punishments.[62] 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.[63]

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*.[64] Under this broader approach to merger, the DCCA would look beyond "abstract consideration of the statutes involved or the wording of the indictment,"[65] 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]."[66] 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

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

[63] *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.").

[64] 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 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)).

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

[66] *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.").

charge were necessarily used by the government to prove the second charge, the two charges constituted the 'same offense.'"[67] 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."[68]

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.[69] To help clarify matters, the DCCA frequently relies on the concept of a "lesser included offense" (LIO) to guide its analysis.[70] 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.[71] 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."[72] 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.[73] 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.[74]

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[67] 598 A.2d at 390.
[68] *Id.*
[69] *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.").
[70] *See, e.g., Alfaro*, 859 A.2d at 155; *Lee v. United States*, 668 A.2d 822, 825 (D.C. 1995).
[71] *See, e.g., Alfaro*, 859 A.2d at 155; *Lee*, 668 A.2d at 825.
[72] *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").
[73] *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).
[74] *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 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,

An illustrative example of two crimes that share this kind of element-based, LIO relationship are the District's offenses of second degree murder[75] and murder of a police officer (MPO).[76] Both offenses require a malicious killing; however, MPO, but not second degree murder, requires that the victim be a police officer.[77] Therefore, it *cannot* be said that each offense "requires proof of a fact which the other does not."[78] 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.[79] 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."[80] 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 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 . . . ."[81]

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.[82] 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.[83] For example, it is possible to commit carjacking without also committing a

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even with a concurrent sentence, could have collateral consequences, the imposition of concurrent sentences "cannot be squared with Congress' intention")).

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

[76] 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 . . . .").

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

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

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

[80] D.C. Code § 22-2801.

[81] D.C. Code § 22-2803(a)(1).

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

[83] *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)).

robbery since robbery requires proof that the property have been *carried away*.[84] 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*.[85] Accordingly, the DCCA concluded, the District's carjacking and robbery offenses do not merge under the elements test.[86]

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. 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.[87] 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."[88] For 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.[89] 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).[90]

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[84] *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.").

[85] *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.").

[86] *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.*

[87] *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).

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

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

[90] 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]."

It is, therefore, theoretically possible to commit one of these offenses without necessarily committing the other.[91]

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 interpretation 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*.[92]

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."[93] 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. 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.

In the face of this abstract elemental analysis, the DCCA (as well as the U.S. Supreme Court interpreting District law[94]) has repeatedly held that "the underlying

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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).

[91] Indeed, the reported cases contain numerous examples of instances of where this has, in fact, occurred *See* cases cited *supra* note 95.

[92] 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.").

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

[94] *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

felony will merge with [] felony murder."[95] 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.

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 interpretation 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.[96] 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[97]—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, while both intuitive and seemingly just, does not appear to be consistent with the results generated by a *Blockburger* analysis.[98]

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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).

[95] *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).

[96] *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).

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

[98] 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,

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.[99] 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 summing 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.[100] 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 conviction for carjacking would seem to suffice.[101] 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[102]), which is three-and-a-half times the ten year statutory maximum facing someone who commits a "life-threatening or disabling" aggravated assault.[103]

> 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.")

[99] *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").

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

[101] 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.

[102] 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 95 (discussing alternative element of "stealthy seizure" in the context of robbery).

[103] 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

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.[104] 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.[105] 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.[106] (This conclusion is further 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.[107]) 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

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[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.").

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

[105] *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.")

[106] 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 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.

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

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[108]; (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.[109]

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.[110] 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."[111] 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 $1,000.[112] (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.

[108] D.C. Code § 22-3215(b) ("A person commits the offense of unauthorized use of a motor vehicle under this paragraph 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.").
[109] D.C. Code § 22-3214(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.").
[110] *Allen*, 697 A.2d at 2.
[111] *In re Z.B.*, 131 A.3d at 353 (comparing robbery and misdemeanor threats, which has essentially the same elements as felony threats).
[112] *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).

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[113]; (2) robbery while armed, a combination offense subject to a forty five year statutory maximum alongside a five to ten year mandatory minimum[114]; (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[115]; and (7) carrying a pistol without a license (CPWL), which is subject to a five year statutory maximum.[116]

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. 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

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[113] 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.").

[114] 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 . . . .

[115] 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 paragraph, the person 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.")

[116] 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 . . . .").

not necessarily prove a firearm or imitation thereof."[117] 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."[118] 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."[119] 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.[120]

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:

> 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

[117] *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").

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

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

[120] *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).

> for conspiracy, for the "overt act" requirement as to that crime is far less exacting; a preparatory act, innocent in itself, may be sufficient.[121]

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.[122] 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.[123]

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.[124]

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.

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[121] *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)

[122] 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.

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

[124] *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, 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.").

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.[125] 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[126]; and (2) conspiracy to commit aggravated assault, which is subject to ten years of potential punishment.[127] 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:

> 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.[128]

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[125] 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.").

[126] 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.").

[127] 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.").

[128] 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,

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.[129]

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[130] 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"[131] and "event"[132]—indicates that multiple convictions for all non-

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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).

[129] D.C. Code § 22-3010.

[130] 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).

[131] 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, 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.

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.[133] 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.[134]

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.

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

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D.C. Code § 23-1331(4).

[132] 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.

[133] 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.").

[134] 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.

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."[135] 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*."[136]

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[137]—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.[138] In contrast, the DCSG are completely silent on how to deal with comparable convictions for violent offenses.[139] 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."[140]

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[135] *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.").

[136] D.C. Code § 22-3215(2)(A).

[137] 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.

[138] 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.

[139] 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 involve 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 . . .").

[140] *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 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.

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.[141] This is a function of "the extra stigma imposed upon one's reputation" by the imposition of multiple criminal convictions.[142] 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."[143]

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 interpretation—creates the possibility of a disproportionate multiplication of criminal convictions and punishment. With those problems in mind, RCC § 22E-214 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.[144]

The centerpiece of this framework is RCC § 22E-214(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, paragraph (a)(1) codifies the elements test by requiring 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 as a matter of law."[145]

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[141] *Com. v. Jones*, 382 Mass. 387, 396 (1981).
[142] *O'Clair v. United States*, 470 F.2d 1199, 1203 (1st Cir. 1972).
[143] *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.
[144] 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.
[145] *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

Thereafter, paragraph (a)(2) addresses three particular kinds of variances, which, when constituting the sole distinctions between substantially related offenses, require 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, paragraph (a)(3) requires merger where "[o]ne offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law." 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,"[146] 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).[147]

Although the District's law of merger is not a paradigm of clarity, it nevertheless appears that that each of the principles in paragraphs (a)(1)-(a)(3) is supported by District case law.[148] However, the next merger principle in RCC § 22E-214 clearly goes beyond it.

'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").

[146] *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*).

[147] This rule 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).

[148] For District case law in support of the elements test as codified RCC § 22E-2214(a)(1), see, for example, cases cited *supra* notes 52-68 and accompanying text.

For District case law in support of the lesser harm principle as codified in RCC § 22E-2214(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 § 22E-2214(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 § 22E-2214(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).

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

Specifically, paragraph (a)(4) requires merger where "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), calls for the 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 § 22E-214(a) address merger of general inchoate offenses. The first principle, codified in paragraph (a)(5), requires 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 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.[149]

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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 § 22E-2214(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.").

[149] For District case law in support of RCC § 22E-2214(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 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,

The second principle, codified in paragraph (a)(6), requires 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 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.[150]

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.[151]

Subsection (c) 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 the "offense with the highest statutory maximum term of incarceration."[152] However, "[i]f the offenses have the same statutory maximum term of incarceration," then "any offense that the court deems appropriate" may remain.[153] This rule of priority is consistent with current District law.[154]

When viewed collectively, subsections (a)-(c) 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

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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 § 22E-2214(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).

[150] *See supra* notes 30-21 and accompanying text (discussing merger of conspiracy and attempt under District law).

[151] *See* cases cited *supra* notes 52-54 and accompanying text.

[152] RCC § 22E-2214(d)(1).

[153] RCC § 22E-2214(d)(2).

[154] *See* cases cited *supra* note 79 and accompanying text.

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 § 22E-214(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[155]—be conducted without regard to the underlying facts of a case.[156]

RCC § 22E-214(d): Relation to Current State of Judicial Administration of Merger Policy. RCC § 22E-214(d) 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."[157] 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.[158]

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[155] Note that where the merger analysis involves one or more offenses comprised of alternative elements of a nature described in RCC § 22E-2214(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 99-106 and accompanying text.

[156] Therefore, the merger analysis under RCC § 22E-2214 is not a return to the fact-based approach disclaimed in *Byrd*, but rather, an expansion of the current law-based approach.

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

[158] 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 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;

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.[159]

> 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).

[159] *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 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.

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.[160]

When, pursuant to this regime, the DCCA is presented with merger issues on appeal, they are subject to a *de novo* standard of review[161] 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."[162] 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[163]—then the appellate court will remand the convictions "to the trial court for the limited purpose of merger and resentencing."[164] Importantly, however, "when

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> 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).

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

[161] *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).

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

[163] *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.").

[164] *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.
>
> (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

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."[165] And, when a defendant's sentences for the merged counts "are concurrent and congruent," it is well-established that "[r]esentencing is not required."[166]

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.

The unintuitive-ness of such an approach is well captured by the DCCA's decision *Mooney v. United States*.[167] 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

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> 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).

[165] *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)).

[166] *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.

[167] *Mooney*, 938 A.2d at 722–23.

of multiple punishments for the same offense."[168] 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.'"[169]

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.[170]

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."[171] 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.[172] 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.[173] On the first appeal, the DCCA overturned the burglary (assault) conviction, and ordered the previously vacated burglary (theft) conviction to be reinstated.[174] Thereafter, the trial court reinstated the burglary (theft)

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[168] *Id.*
[169] *Id.*
[170] *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).
[171] *Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985).
[172] 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.").
[173] *Id.*
[174] *Id.*

conviction and sentenced the defendant on that conviction.[175] The defendant appealed again arguing that the reinstatement of the burglary (theft) conviction violated the Double Jeopardy Clause.[176] 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."[177]

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."[178] 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."[179]

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.**
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> **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 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

[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *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.").
[179] 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)).

> 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.[180]

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.[181] Further, one probable byproduct of a system of trial level merger analyses

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

[181] 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 imposed based on those facts. *See also* D.C. Super. Ct. R. Crim. P. 32 ("*Pronouncement.* Sentence shall

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.[182]

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 § 22E-214 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.[183]

The key provision, subsection (d), provides that "[a] person may be found guilty of 2 or more offenses that merge under [RCC § 22E-214]; 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 decided." This language is comprised of two different procedural principles. The first is that RCC § 22E-214 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 § 22E-214.[184] The second, and perhaps more important, procedural principle is that the merger analysis set

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thereafter be pronounced . . . . *Judgment*. A judgment of conviction shall set forth the plea, verdict or finding, and the adjudication and sentence . . . .").

[182] *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.").

[183] 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).

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

forth in RCC § 22E-214 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.

RCC § 22E-215. De Minimis Defense.

Explanatory Notes. RCC § 22E-215 establishes a *de minimis* defense for those actors whose conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction.[185] Although, strictly speaking, such actors may satisfy the minimum requirements of liability for a given offense, section 215 precludes imposing a criminal conviction where doing so would clearly be unjust under the circumstances. Barring the imposition of criminal liability in these situations improves the proportionality of punishments.[186]

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[185] Rooted in ancient Roman law, the *de minimis* defense principally rests on the common law principle of *de minimis non curat lex*, which means "The law does not concern itself with trifles." Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 334–35 (2017); *see, e.g.,* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 258 (1966); *De Minimis Non Curat Lex*, BLACK'S LAW DICTIONARY (9th ed. 2009).

The RCC's codification of this defense is influenced by two different legislative sources. The first are those statutes that afford courts the authority to dismiss a prosecution in furtherance of justice. Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 631 (2015) ("In the judicial branch, some state courts have the power to dismiss cases *sua sponte*. Acting 'in the furtherance of justice,' these courts can consider context, as well as the just or unjust application of laws."); *see, e.g.,* Roberts, *supra* note 1, at 332 (collecting statutes from 15 states and Puerto Rico, which employ this approach). In New York, for example, courts are empowered to dismiss a prosecution in furtherance of justice when "such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such [indictment] or count would constitute or result in injustice." N.Y. Crim. Proc. Law § 210.40 (enumerating factors to consider).

The second source are those state statutes based on Model Penal Code § 2.12, which establishes that courts "shall dismiss" a prosecution if, "having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances," a judge finds one of three conditions to obtain. *Id.*, Explanatory Notes; *see* Roberts, *supra* at 335 (collecting statutes of four states and Guam, which employ a similar approach). The first is where the defendant's conduct falls within a customary license or tolerance. *Id.*, § 2.12(1). The second is where the defendant's conduct does not cause or threaten the harm sought to be prevented by the charged offense—or does so only to a trivial degree. *Id.*, § 2.12(2). And the third is where the defendant's conduct raises other extenuations that cannot reasonably be regarded within the legislative prohibition. *Id.*, § 2.12(3).

Material differences between these legislative sources and RCC § 22E-215 are discussed below.

[186] The most direct way of avoiding the disproportionate punishment addressed by section 215 would be to draft criminal statutes to exclude such actors from liability in the first place. However, as a practical

Subsection (a) sets forth the basic components of the *de minimis* defense. First, it establishes that the *de minimis* defense is an "affirmative defense," the procedural implications of which are addressed in subsection (c). Second, subsection (a) provides that the *de minimis* defense applies to all misdemeanors, but only to Class 6, 7, 8, or 9 felonies. Third, subsection (a) establishes the crux of the *de minimis* defense, namely, excluding from criminal liability those persons whose "conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances."

Subsection (b) codifies the central criteria to be considered by the factfinder in determining whether the latter standard is met in a particular case.[187] The first factor asks the factfinder to evaluate the triviality of the harm caused or threatened by the actor's conduct. The second factor asks the factfinder to evaluate the extent to which the actor was unaware that his or her conduct would cause or threaten that harm. The third factor asks the factfinder to evaluate the extent to which the actor's conduct furthered or was

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matter, drafting offenses that solely extend to actors whose conduct and accompanying state of mind are sufficiently blameworthy to warrant the condemnation of a criminal conviction, without also creating gaps in coverage, is extremely difficult. *See infra* note 5 and accompanying text. While the offenses in the RCC's Special Part have been drafted to exclude insufficiently blameworthy actors to the extent possible, application of the general *de minimis* defense specified in this section is essential to facilitating the overall proportionality of the RCC.

[187] These blameworthiness factors are largely objective, rather than subjective, in nature. For example, in considering the "triviality" of the harm caused or threatened by the defendant's conduct (factor 2), or the extent to which the defendant's conduct furthered or was intended to further "legitimate" societal objectives (factor 3), the factfinder should consider the community's conception of triviality and the value that the community places upon particular types of activities, in contrast to the defendant's individual view of harmfulness or the subjective value that he or she placed on particular kinds of activities. *See, e.g.,* RCC § 22E-206, Explanatory Notes (discussing comparable blameworthiness analysis in the context of recklessness and negligence liability); David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. LAW 281, 334 (1981) ("To determine whether a risk is justifiable [the requisite] balance must be based on societal values, not the actor's personal gain"); *compare* RCC § 22E-214(b)(2) (focusing on the extent to which the actor was subjectively aware that his or her conduct would cause or threaten a given harm). And, along similar lines, it is immaterial whether the defendant believes him or herself to be "responsible" for an individual or situational factor that did, in fact, diminish his or her ability to follow the law (factor 4). Rather, the blameworthiness analysis required by this factor hinges on objective principles of criminal responsibility, as is the case throughout the RCC. *See, e.g.,* RCC § 22E-209(d) and accompanying Explanatory Notes (establishing objective principles for distinguishing between intoxication that is, and is not, self-induced).

In light of this largely objective understanding, it would be appropriate for the court to limit the presentation of evidence or argumentation in support of a *de minimis* defense when it conflicts with the proper construction of the blameworthiness factors codified in subsection (b) as a matter of law. For example, in a case where the defendant, a male white supremacist, premeditatedly and openly shoplifts chewing gum from a minority-owned store for the purpose of making the store's owner feel unwelcome in the neighborhood (or to send some other toxic message to either the owner or the community), the court would be justified in precluding the presentation of evidence in support of the benefits of racial segregation, or arguments focusing on why the defendant's subjective belief in those benefits diminish his blameworthiness (i.e., given that racial segregation is *not* a "legitimate societal objective" under factor 3). Likewise, in a case where the defendant knowingly and voluntarily takes PCP before committing an assault in order to bolster his violent resolve, the court would be justified in precluding the defendant from arguing that his intoxicated state at the time of the crime diminishes his blameworthiness (i.e., given that the defendant is, in fact, "responsible" for that intoxicated state under factor 4).

intended to further legitimate societal objectives. And the fourth factor asks the factfinder to evaluate the extent to which any individual or situational factors for which the actor is not responsible hindered the actor's ability to conform his or her conduct to the requirements of law.[188]

In general, the greater the weight afforded to each of these criteria by the factfinder, the more likely it is that the *de minimis* standard set forth in subsection (a) will be met.[189] Note, however, that this list is not intended to be exhaustive; rather, these four factors exist "among other appropriate factors." What qualifies as an "appropriate factor[]" is to be determined by the court as a matter of law, in light of general principles of fairness and efficient judicial administration.[190]

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[188] Textually speaking, section 215's explicit focus on mental state considerations departs from Model Penal Code § 2.12 and comparable state statutes, which seem to largely emphasize the "objective harmfulness of the conduct charged to the social interest protected by the statute in question." Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 B.Y.U. L. REV. 51, 94–98 (1997); *but see* Model Penal Code § 2.12, cmt. at 402 (describing the *de minimis* defense as an "ameliorative device[]" for ensuring that outcomes reflect the "proper level of the defendant's culpability."). That said, numerous state judicial decisions interpreting these Model Penal Code-based *de minimis* statutes extend "beyond the objective aspect of the offending conduct and have also found subjective, mental elements to have bearing on the issue of triviality of harm or evil." Pomorski, *supra* note 4, at 94–98 (1997); *see also* Roberts, *supra* note 1, at 375–76 ("The traditional view within criminal law is that defendants' alleged motives are irrelevant to the question of liability. [Yet there exists a large] body of case law challenges that view. Again and again, one finds judges moved to dismiss in light of their assessment of defendants' motives. When those motives are ones esteemed as noble—when, for example, they are focused on the welfare of children—courts show no hesitation in deeming motive a ground for dismissal.").

For example, Hawaii's *de minimis* statute, while nearly identical to Model Penal Code § 2.12, is understood to implicitly incorporate various mental state-based factors, such as: "the background, experience and character of [an actor] which may indicate whether they knew of, or ought to have known, the requirements of [the prohibition violate[d]; the knowledge on the part of [an actor] of the consequences to be incurred by them upon the violation of the statute; [] the mitigating circumstances, if any, as to [an actor]; [] and any other data which may reveal the nature and degree of the culpability in the offense committed by [the actor]"). *State v. Park*, 55 Haw. 610, 617, 525 P.2d 586, 591 (1974) (interpreting Haw. Rev. Stat. Ann. § 702-236). And the New Jersey courts have offered a nearly identical reading of the state's Model Penal Code-based *de minimis* statue. *State v. Halloran*, 446 N.J. Super. 381, 386–87 (Law. Div. 2014) (interpreting N.J. Stat. Ann. § 2C:2-11); *see, e.g., State v. Cabana*, 315 N.J. Super. 84, 88 (Law. Div. 1997) (New Jersey's *de minimis* statute clearly "contemplates" a "threshold consideration of criminal culpability" which is "dependent upon the state of mind of the actor and [requires] a fact-sensitive analysis on a case by case basis.").

[189] Which is to say: the more trivial the harm caused or threatened by the person's conduct, the greater the extent of an actor's lack of awareness of the conduct's harmful nature, the greater the extent to which a person's conduct furthered or was intended to further legitimate societal objectives, and the greater the extent to which any individual or situational factors for which the person is not responsible hindered the person's ability to conform his or her conduct to the requirements of law, the more likely it is that the person's conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances.

[190] In light of these dual considerations, it *would* be appropriate for the court to exclude consideration of evidence potentially relevant to an actor's blameworthiness—for example, an abusive or deprived upbringing, see generally Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985)—where its "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative

The analytical framework established by subsections (a) and (b) limits criminal liability in two different types of situations. The first involves an actor who causes or threatens a harm so trivial that—mental state considerations aside—the condemnation of a criminal conviction would not be warranted under the circumstances.[191] This kind of situation is most likely to arise in the context of prosecutions for low-level offenses, which effectively draw the line between criminal and non-criminal conduct—for example, the misdemeanor versions of theft, destruction of property, assault, and drug possession. For offenses of this nature, it is difficult to draft the objective elements (or *actus reus*) in a manner that captures only those forms of conduct deserving of criminal sanction without also extending to at least some forms of conduct that are insufficiently blameworthy to warrant the condemnation of a criminal conviction.[192] It is therefore necessary to provide actors who engage in such conduct with a means of escaping criminal liability in the event they are subject to a criminal prosecution.

Illustrative examples of these kinds of situations include: (1) a prosecution for fourth degree theft premised on the defendant's having intentionally stolen a single piece of chewing gum from a convenience store; (2) a prosecution for fifth degree assault premised on the defendant's having intentionally brushed up against co-riders on public transportation in an effort to be the first to the door; (3) a prosecution for fourth degree destruction of property premised on the defendant's having intentionally stepped on one flower in another person's garden; (4) a prosecution for misdemeanor drug possession premised on the defendant's having intentionally held a plastic bag with microscopic but measurable amounts of cocaine inside; or (5) a complicity-based prosecution for any of the above misdemeanors premised on the defendant's having purposely assisted or encouraged similar acts principally perpetrated by another.

The second situation to which the analytical framework established by subsections (a) and (b) applies involves an actor who causes or threatens a harm that, while not by itself *de minimis*, is accompanied by a state of mind that is insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances. This kind of situation is most likely to arise in the context of prosecutions for low to mid-level offenses which are committed in the presence of one or more

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evidence." *Moore v. United States*, 114 A.3d 646, 660 (D.C. 2015) (quoting Fed. R. Evid. 403) (Pryor, J., dissenting); *see, e.g., Ibn-Tamas v. United States*, 407 A.2d 626, 639 (D.C. 1979) (the DCCA, in determining the admissibility of logically relevant evidence, typically weighs its "probative value versus [its] prejudicial impact"); *Jackson v. United States*, 76 A.3d 920, 934 (D.C. 2013) ("barring specific evidence" of mental illness to negate culpable mental state requirement governing offense under "the diminished capacity doctrine," which "has been characterized as 'essentially a rule of evidence'"). Conversely, given that RCC § 22E-215 is focused on the blameworthiness of the defendant, it *would not* be appropriate for the court to allow consideration of evidence relevant only to offender dangerousness/risk of recidivism yet entirely detached from considerations of fairness, such as "socioeconomic status, gender, age, family, and neighborhood characteristics." Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 805 (2014).

[191] *See* RCC § 22E-215(b)(1) ("The triviality of the harm caused or threatened by the person's conduct . . .").

[192] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 108 (Boston, Little, Brown & Co. 1881) ("The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them . . . .").

mitigating circumstances that come close to, but ultimately fail to establish, a recognized justification or excuse defense—for example, duress,[193] insanity,[194] infancy,[195] entrapment,[196] necessity,[197] or self-defense.[198] In these situations, the binary, all-or-nothing nature of general criminal defenses fail to account for the continuous, graduated nature of culpability assessments.[199] Specifically, a defendant who causes or threatens a

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[193] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 6.8 (3d. ed. 2018) ("A person's unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defense of duress (sometimes called compulsion or coercion) to the crime in question unless that crime consists of intentionally killing an innocent third person."); *McCrae v. United States*, 980 A.2d 1082, 1086–87 (D.C. 2009) ("A duress instruction is appropriate if the evidence is sufficient for a reasonable jury to find that the defendant participated in the offense as the result of a reasonable belief that he would suffer immediate serious bodily injury or death if he did not participate in the crime.").

[194] LAFAVE, *supra* note 9, at 1 SUBST. CRIM. L. § 7.1(a) ("[I]n recent years a substantial minority of states have adopted the Model Penal Code approach, which is that the defendant is not responsible if at the time of his conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."); *Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a *prima facie* case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury.").

[195] LAFAVE, *supra* note 9, 2 SUBST. CRIM. L. § 9.6 ("At common law, children under the age of seven are conclusively presumed to be without criminal capacity, those who have reached the age of fourteen are treated as fully responsible, while as to those between the ages of seven and fourteen there is a rebuttable presumption of criminal incapacity. Several states have made some change by statute in the age of criminal responsibility for minors."); *see also* D.C. Code § 16-2301(3) (defining "child" for jurisdictional purposes).

[196] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 9.8(a) ("Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."); *Daniels v. United States*, 33 A.3d 324, 327 (D.C. 2011) ("A jury may be instructed on the affirmative defense of entrapment when there is sufficient evidence of government inducement of the crime and a lack of predisposition on the part of the defendant to engage in that criminal conduct.").

[197] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 10.1 ("For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is by virtue of the defense of necessity justified in violating it."); *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) ("In essence, the necessity defense exonerates persons who commit a crime under the 'pressure of circumstances,' if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law."); *see also Emry v. United States*, 829 A.2d 970, 972 (D.C. 2003) (medical necessity to possession of marijuana).

[198] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 10.4 ("One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger."); *Swann v. United States*, 648 A.2d 928, 930 (D.C. 1994) (To raise self-defense in a homicide case, the defendant: (1) "must have an actual belief both that he or she is in imminent danger of serious bodily harm or death and in the need to use deadly force in order to save himself or herself"; and "in addition to such an actual belief, the defendant's belief must be objectively reasonable.").

[199] *E.g.,* Douglas Husak, *"Broad" Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 460-484 (2012); DOUGLAS HUSAK, PARTIAL DEFENSES, IN THE PHILOSOPHY OF CRIMINAL LAW 311 (2010).

Continuous, graduated culpability assessments are a persistent feature of, and find strong support in, community sentiment (among other relevant national authorities). Michael Serota, *Proportional Mens*

minor or modest harm under one or more mental state-based mitigating circumstances which fail individually to establish a general defense may still be insufficiently blameworthy to warrant the condemnation of a criminal conviction (for a Class 6, 7, or 8 felony[200]).

Rea and the Future of Criminal Code Reform, 52 WAKE FOREST L. REV. 1201, 1205 (2017) (synthesizing public opinion surveys, which find that the community's assessments of blameworthiness and deserved punishment seem to revolve around, and ultimately account for, four basic mental criteria each of which rests on a spectrum: (1) awareness of wrongdoing; (2) motivations for wrongdoing; (3) the rational capacities of a wrongdoer; and (4) the extent to which a decision to engage in wrongdoing is freely made (i.e., un-coerced)."); *see, e.g.,* Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. REV. 161 (2016) (imperfect defenses and partial excuses cohere with traditional theories of punishment, represent lay and judicial intuitions of justice, and are reflected in a wide range of penal policies).

And they are also reflected in the District's criminal justice policies, such as, for example, the well-established mitigation principle, which provides for a reduced charge of "voluntary manslaughter where the perpetrator kills with a state of mind which, but for the presence of legally recognized mitigating circumstances, would render the killing murder." *Comber v. United States*, 584 A.2d 26, 41–42 (D.C. 1990) (*en banc*) (observing that this grading reduction is "predicated on the legal system's recognition of the weaknesses or infirmity of human nature . . . as well as a belief that those who [act] under extreme mental or emotional disturbance for which there is reasonable explanation or excuse are less morally blameworthy than those who [act] in the absence of such influences."); *compare* ROBINSON, *supra*, at 2 CRIM. L. DEF. § 123 ("[I]f mitigation is universally considered appropriate in the homicide context, one might question "why this policy should apply only to a charge of murder"?), with *Brown v. United States*, 619 A.2d 1180, 1181 (D.C. 1992) ("Although provocation is a matter usually connected with the law of homicide, we have held that the malice required . . . as an element of the charge of malicious destruction of property is the same as the malice required to make out a case of murder . . . Thus, provocation is a proper defense to the charge of malicious destruction of property, and we look to the doctrine of provocation as it has developed in the context of homicide, and elsewhere, to guide us in deciding this case.") (citing *Carter v. United States,* 531 A.2d 956, 963 (D.C. 1987) (rejecting the contention that "the malice involved in malicious destruction of property is somehow different from that malice which must be proven in murder cases" and noting that "the malice involved in both [MDP and arson] is the same")).

[200] This is in contrast to Model Penal Code § 2.12 and comparable state statutes, which appear to authorize a *de minimis* defense to any criminal charge (i.e., without regard to offense severity). *See, e.g.,* Model Penal Code § 2.12 ("The court shall dismiss *a[ny] prosecution*") (italics added); Roberts, *supra* note 1, at 380 ("While one might assume from their name that *de minimis* dismissals are limited to 'minor' alleged offenses, none of the *de minimis statutes* exclude any particular type of charge from their coverage."); *State v. Zarrilli*, 523 A.2d 284, 287 (Law. Div.), *aff'd*, 532 A.2d 1131 (App. Div. 1987) ("The *de minimis* statute applies to *all* prohibited conduct."); *State v. Vance*, 61 Haw. 291, 307, 602 P.2d 933, 944 (1979) (admitting at least a theoretical possibility of applying the *de minimis* doctrine in felony cases); Martin H. Belsky, Joseph Dougherty & Steven H. Goldblatt, *Three Prosecutors Look at the New Pennsylvania Crimes Code*, 12 DUQ. L. REV. 793, 807 (1974) (noting that "[de minimis] Section 312 gives the judiciary power to dismiss any prosecution at any stage or for any crime."); *see also State v. Fitzpatrick*, 772 A.2d 1093, 1096 (Vt. 2001) (suggesting that "serious" charges do not preclude an in furtherance dismissal).

That section 215 only applies to Class 6, 7, and 8 felonies is consistent with the elements of higher categories of RCC felonies, which are sufficiently serious to preclude the possibility of committing such offenses in a way that does not "warrant the condemnation of a criminal conviction." RCC § 22E-215(a). And it also appears to reflect the actual judicial administration of *de minimis* statutes. *See, e.g.,* Pomorski, *supra* note 4, at 94 ("In practically all cases where defendants were charged with felonies or other serious offenses, their de minimis/triviality claims failed . . . as a matter of law rather than on factual analysis."); *compare id.* at 95 ("Conduct which as a general rule is highly dangerous to society may not be dangerous at all, or may represent sub-minimal, trivial danger in exceptional, individual circumstances.").

The following examples are illustrative. A fourth degree theft prosecution is brought against a depressed and recently unemployed parent who makes a spur of the moment decision to steal one hundred dollars in groceries from a supermarket in order to feed her hungry children. A third degree criminal damage to property prosecution is brought against a local artist who paints a small mural of a beloved children's book on a privately-owned wall near a local elementary school for the children's own enjoyment, which costs the owner five hundred dollars to repaint. A third degree robbery prosecution—premised on a accomplice theory of liability—is brought against a teenager who assists his older brother's non-violent theft of a convenience store after the older brother threatened to destroy the teenager's computer should he decline to participate in the criminal scheme. Or a fifth degree assault prosecution is brought against a parent who, after being subjected to repeated racial slurs and profanities in the presence of his children for no reason other than the color of her skin, firmly shoves the antagonist who falls to the ground due to the force of the push.

In these kinds of situations, an actor may satisfy the minimum requirements of liability for an offense under the RCC, yet due to his or her conduct and accompanying state of mind nevertheless be insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances. Where this is the case, the RCC provides such actors with an affirmative defense subject to resolution by juries or, in a bench trial, judges.

Procedurally, the applicability of a *de minimis* defense should be treated no differently than any other affirmative defense under District law.[201] For example, a defendant seeking to raise a *de minimis* defense has the burden of producing some evidence to justify presenting the issue to the jury, and the sufficiency of that evidence is a threshold question for the court.[202] And even if the defendant meets his or her initial burden, the judge still has the power to exclude proffered evidence that is likely to confuse the jury or waste time.[203] Where the *de mimimis* defense is properly raised, the defendant is able to argue for it in closing, and the court should thereafter instruct the jury on the elements of the *de minimis* defense.[204] Finally, if the judge errs in excluding evidence or in instructing the jury, the defendant can challenge these rulings on appeal.[205]

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[201] RCC § 22E-201.

[202] *Pegues v. United States*, 415 A.2d 1374, 1377–78 (D.C. 1980) ("If [the defendant raising an affirmative insanity defense] fails to present a *prima facie* case, the judge is justified in removing the issue from the jury.") (citing *Cooper v. United States*, 368 A.2d 554, 559-60 (D.C. 1977)).

[203] *See, e.g., Pegues*, 415 A.2d at 1378 ("We agree with the trial judge that allowing appellant to present his proffered testimony [regarding affirmative defense of insanity] to a jury would have been a 'waste of time,' and, consequently, find no abuse of discretion in his refusal to allow the defense.") (citing *Clyburn v. United States*, 381 A.2d 260, 264 (D.C. 1977)).

[204] *See, e.g., Adams v. United States,* 558 A.2d 348, 349 (D.C.1989) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."). A jury determination in favor of the defendant should result in an acquittal, which would be unreviewable. *See, e.g., Farina v. United States*, 622 A.2d 50, 60 (D.C. 1993) ("Jury acquittals are unreviewable and unreversible.")(citing *United States v. Dougherty,* 154 U.S.App.D.C. 76, 93, 95, 473 F.2d 1113, 1130, 1132 (1972)).

[205] *See, e.g., Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("This court reviews a trial court's decision to deny presentation of testimony in support of an insanity defense for abuse of discretion.") (citing *Pegues,* 415 A.2d at 1378).

Subsection (c) establishes that the *de minimis* defense is unavailable in a situation reasonably envisioned by the legislature in forbidding the charged offense.[206] This clarifies that a *de minimis* defense will only provide a basis for escaping liability in unusual circumstances, which go beyond what the legislative intent underlying passage of a given criminal statute can fairly be understood to reach.[207] In contrast, where the defendant's conduct is merely a typical instance of a statutory violation of a particular offense, it can be assumed that the legislature has itself made an authoritative judgment that such behavior is "[]*sufficiently* blameworthy to warrant the condemnation of a criminal conviction under the circumstances."[208]

Subsection (d) imposes a special findings requirement for the *de minimis* defense.[209] This requirement applies in two different situations. The first is where the court is faced with determining the availability of a *de minimis* defense in a jury trial or bench trial. The second is where the court is faced with determining the applicability of a *de minimis* defense in a bench trial.[210] In either situation, the court is required to "state its specific findings of fact and law in open court or in a written decision or opinion."[211]

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[206] *Compare* Model Penal Code § 2.12(3) ("The Court shall dismiss a prosecution if," *inter alia*, "it finds that the defendant's conduct . . . . presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense."); *Id.,* cmt. at 404 ("In a sense, this suggests to the court a rule of reason in the interpretation of the basic statute, as indeed do the other provisions of this section."); N.J. Stat. Ann. § 2C:2-11(c) (same); Haw. Rev. Stat. Ann. § 702-236(1)(c) (same).

[207] Consistent with this reasoning, a *de minimis* defense would be unavailable under subsection (d) where, in the absence of mitigating circumstances: (1) a person charged with drug possession knowingly exercises control over a non-negligible amount of a controlled substance for the purpose of recreational use; or (2) a person charged with fare evasion intentionally jumps over a turnstile for the purpose of evading payment of his or her metro fare.

[208] The threshold determination presented by subsection (c) is a matter for judicial resolution. Specifically, where the court determines that the circumstances presented by a given case were "reasonably envisioned by the legislature in enacting the charged offense," the factfinder should not be instructed on, or (in a bench trial) allowed to consider, a *de minimis* defense.

[209] *See, e.g.,* Model Penal Code § 2.12 ("The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.") (citing subsection (3), which authorizes a *de minimis* dismissal when the defendant's conduct "presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense"); *Id.*, cmt. at 404 ("Because the authority in Subsection (3) [is] stated in terms of such generality, it is appropriate to require that the court explain, in a written opinion, its reasons when exercising the authority that the subsection grants."); *see also* ROBINSON, *supra*, at 1 CRIM. L. DEF. § 67 ("The requirement of written reasons may be useful in many situations, but it seems particularly useful where, as here, the court is stating what it believes to be the legislature's intent. These statements permit the legislature to easily review the court's interpretation and to take legislative action to overrule it if the court's interpretation is incorrect."); *compare id.* at 1 CRIM. L. DEF. § 67 ("A few jurisdictions have extended this to require a written statement of reasons for a dismissal under any ground.") (collecting state statutes).

[210] Where, in contrast, the *de minimis* defense is submitted to a jury, there is of course no requirement of specific findings.

[211] This phrase is drawn from, and should be construed in accordance with, the D.C. Superior Court Rules of Criminal Procedure. *Id.*, Rule 23(c) ("In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its *specific findings of fact in open court or in a written decision or opinion.*") (italics added); *see, e.g., Saidi v. United States*, 110 A.3d 606, 612 (D.C. 2015) ("[S]pecial findings in a non-jury criminal trial inform an appellate court of the specific grounds relied on by the trial judge in reaching a verdict and enable the

Relation to Current District Law. RCC § 22E-215 changes current District law by establishing a *de minimis* defense for those actors whose conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction. Barring the imposition of criminal liability under these circumstances improves the proportionality of District law.

While current District case law does not recognize a *de minimis* defense, it provides some support for its adoption. Specifically, the D.C. Court of Appeals (DCCA) has, in two cases, recognized the potential benefits of a *de minimis* defense.

The first case, *Dunn v. United States*,[212] involved an animal rights activist convicted of simple assault based on his slight, non-harmful shoving of a security guard, which occurred during a protest.[213] On appeal, the defendant argued that the misdemeanor assault conviction should be overturned "because his violation of the law, if any, was *de minimis*."[214] The DCCA ultimately declined the defendant's invitation to accept this kind of "*de minimis* defense" to assault through "judicial decree."[215] In so doing, however, the *Dunn* court observed that:

> Similar minor violations of the assault statute may well happen every day, yet it is exceedingly rare for the U.S. Attorney's Office to get involved. Why, then, should Dunn not be able to argue that his shove was too minor to warrant a criminal penalty?
>
> The answer is that [the defendant] fails to cite any authority for a *de minimis* defense in the District. Some jurisdictions have recognized *de minimis*-type defenses, but they have done so through legislation[]. New York, for instance, has a statute that permits trial judges to dismiss certain criminal charges where "some compelling factor, consideration or

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appellate court to undertake its review of the record with a clear understanding of the bases of the trial judge's decision.") (citations omitted).

Through such language, subsection (e) is also intended to further many of the same policy interests that underwrite the District's current approach to special findings. As the DCCA has observed:

> Special findings [] serve an important access to justice function and advance the goal of procedural fairness in the criminal justice system. A clear statement by a trial judge explaining the ruling in a case informs the parties of the reasons underlying the court's decision and provides critical assurance to an unsuccessful litigant that positions advanced at trial have been considered fairly and decided on the merits in accordance with governing law. The resulting increase in transparency promotes acceptance of the court's ruling and fosters compliance with its requirements.

Saidi, 110 A.3d at 612 (citing *United States v. Snow*, 484 F.2d 811, 812 (D.C. Cir. 1973) ("The requirement that a trial judge prepare findings which will cast light on his reasoning is not a trivial matter. It is an important element of fairness to the accused . . . . The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reasons is a hallmark of injustice.")).

[212] 976 A.2d 217 (D.C. 2009).

[213] Specifically, the defendant "moved his hands only five to six inches in striking" the victim. *Id.* at 222.

[214] *Id.*

[215] *Id.*

> circumstances clearly demonstrat[es] that conviction or prosecution of the defendant . . . would constitute or result in injustice." N.Y. Crim. Proc. Law § 170.40(1) (1979). And a few other states have adopted provisions based on Model Penal Code § 2.12 (2001), which "authorizes courts to exercise a power inherent in other agencies of criminal justice to ignore merely technical violations of law." *Id.,* Explanatory Note; *see* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense,* 1997 B.Y.U. L. REV. 51 & n. 2; *see, e.g.,* N.J. Stat. Ann. 2C:2-11 (2005); Me. Rev. Stat. Ann. 17-A, § 12 (2006); 18 Pa. Cons. Stat. § 312 (1998). The D.C. Council, however, has not joined ranks with the "very limited" number of states that have adopted the defense. Pomorski, 1997 B.Y.U. L. Rev. 51.[216]

Accordingly, while recognizing the potential merits of a *de minimis* defense, the *Dunn* court nevertheless concluded that it "lack[ed] the power to give [defendant] the relief that he seeks" in the absence of explicit legislative authorization.[217]

The second relevant case, *Watson v. United States*,[218] involved a simple assault conviction arising from a marital dispute. After an aggravating experience at the DMV, the defendant and his wife engaged in a "heated conversation" in the parking lot during which "his wife flipped open her mobile telephone to make a call, and he grabbed the phone's flip top to stop her, accidently breaking it loose."[219] The defendant was thereafter prosecuted for simple assault.[220]

At trial, and after the close of the government's case, the defendant submitted a motion for judgment of acquittal, which the court ultimately denied finding that the government had established a *prima facie* case of simple assault:

> [W]hile [the trial judge] had difficulty determining exactly what had occurred outside the DMV, appellant's own testimony about grabbing and breaking the mobile telephone was enough to establish an assault under [prior DCCA precedent]. The [trial judge] further found that [the defendant's] grabbing of the telephone was deliberate, that it occurred in the context of an argument, that it was unprovoked, and that it constituted a battery in that it was a touching without consent.[221]

Next, the defendant appealed his conviction for simple assault to the DCCA, "arguing that the government failed to prove the elements of assault beyond a reasonable doubt."[222] All three of the judges on the panel rejected this argument; however, one of

[216] *Id.* at 222-23.
[217] *Id.* at 223.
[218] 979 A.2d 1254 (D.C. 2009).
[219] *Id.* at 1255.
[220] *Id.*
[221] *Id.*
[222] *Id.* at 1256.

the three—Judge Schwelb—wrote a separate opinion concurring in the judgment but dissenting in part from the analysis.[223]

In his separate opinion, Judge Schwelb argued that the defendant's conduct "was, at most, a *de minimis* and inconsequential violation of the assault statute," such that it was "disproportionate and unjust to saddle [the defendant] with a criminal conviction under all of the circumstances of this case."[224] However, "[i]n light of [the DCCA's] recent decision in *Dunn v. United States,*" Judge Schwelb ultimately concluded that this "court lacks the power, in the absence of statutory authorization, to vacate Watson's conviction on *de minimis* grounds."[225] Nevertheless, Judge Schwelb also thought it important to explain why he believed that it would be "appropriate to propose a legislative remedy for this type of situation."[226] Specifically, Judge Schwelb suggested that:

> [T]he Council of the District of Columbia consider adopting the approach of the Model Penal Code (MPC) § 2.12 (2001), as several other jurisdictions have done, *see* Brent G. Filbert, Annotation: *Defense of Inconsequential or De Minimis Violation in Criminal Prosecution,* 68 A.L.R. 5th 299 (1999 & Supp. 2006), and that District of Columbia courts be authorized to dismiss criminal charges where the circumstances "clearly demonstrat[e] that conviction or prosecution of the defendant . . . would constitute or result in injustice." N.Y. Crim. Proc. Law § 170.40(1) (1979) (quoted in *Dunn,* at 223).[227]

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[223] *See id.* at 1258.
[224] *Id.*
[225] *Id.* The defense originates from the common law maxim "de minimis non curat lex," which means that "the law does not concern itself with trifling matters." 68 A.L.R. 5th 299 (1999); *see Watson*, 979 A.2d at 1258 n.1.
[226] *Id.* On this point, Judge Schwelb observed that:

> Although proposing a legislative remedy to a problem raised in a particular case goes beyond a judge's conventional responsibilities, courts (or concurring or dissenting judges) occasionally do so in the interests of justice. "We have heretofore deemed it appropriate in an opinion to suggest statutory changes." *Zalkind v. Scheinman*, 139 F.2d 895, 898 n. 3(b) (2d Cir.1943) (Frank, J., joined by Learned Hand, J.) (citations omitted); *see also Moravian School Advisory Bd. v. Rawlins*, 70 F.3d 270, 279 (3rd Cir. 1995) (Becker, J., concurring in part and dissenting in part); *Am. Mach. & Metals, Inc. v. De Bothezat Impeller Co., Inc.*, 173 F.2d 890, 893 (2d Cir.1949) (Frank, J., dissenting); *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911) (Learned Hand, J.).

Watson, 979 A.2d at 1258 n.2.
[227] *Id.* at 1258–59. Judge Schwelb's separate opinion caught the eye of at least one commentator, who summarized it accordingly:

> [I]n a recent District of Columbia case, one concurring judge wished that the court were able to dismiss on grounds that the prosecution was *de minimis*. Give us what Hawaii and New Jersey have, he urged the legislature, as he was forced to go along with the affirmation of a conviction for snatching at a cell phone at the end of a long hot day at the

In support of this proposal, Judge Schwelb's separate opinion provides a comprehensive overview of national legal trends relevant to adoption of statutory *de minimis* provisions, beginning with the basis for many such provisions, Model Penal Code § 2.12, which "provides in pertinent part as follows":

> *De Minimis* Infractions.
>
> The Court shall dismiss a prosecution[228] if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
>
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction . . . .[229]
>
> From there, Judge Schwelb's separate opinion proceeds to observe that:
>
> The exercise by a court of the power to dismiss a prosecution by resort to the maxim "*de minimis non curat lex*" is judicial in nature, and the vesting of that authority in the judicial branch does not contravene the doctrine of separation of powers. *State v. Park,* 55 Haw. 610, 525 P.2d 586, 592 (1974).
>
> The purpose of a *de minimis* statute is to remove "petty" infractions from the reach of the criminal law. *In re R.W.,* 855 A.2d 107, 109 (Pa. Super. Ct. 2004). Under these provisions, dismissal of a prosecution by the court is contemplated where no harm was done by the defendant either to the victim or to society. *Commonwealth v. Moses,* 350 Pa.Super. 231, 504 A.2d 330, 332 (1986). Dismissal is appropriate where the matter is too trivial to warrant the condemnation of a conviction, for "mere trifles or technicalities must yield to practical common sense and substantial justice." *State v. Brown,* 188 N.J.Super. 656, 458 A.2d 165, 169 (1983) (citation omitted). "The Legislature in recognition of the

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> Department of Motor Vehicles. "*De minimis non curat lex*" read the heading of his opinion, but his call to reclaim this principle went unheeded.

Roberts, *supra* note 1, at 338.

[228] As Judge Schwelb observes: "The statutes of at least two states provide that the court 'may' rather than 'shall' dismiss a prosecution if the conditions set forth in those statutes are met. *See* N.J. Stat. Ann. § 2C:2.11[]; Haw. Rev. Stat. § 702-236(1)." *Watson*, 979 A.2d at 1265 n.15.

[229] *Watson*, 979 A.2d at 1265.

> serious consequences which may attend a conviction has granted this dismissal option to avoid an injustice in a case of technical but trivial guilt." *Smith, supra* note 10, 480 A.2d at 241.
>
> The *de minimis* doctrine is designed to provide the court with discretion similar to that exercised by the police, prosecutors and grand jurors, who constantly make decisions as to whether it is appropriate to seek a conviction under the particular circumstances. *State v. Wells,* 336 N.J.Super. 139, 763 A.2d 1279, 1281 (2000). That discretion is appropriately exercised by the court, which is the institution best equipped to resolve such issues impartially. In exercising its discretion, the court may consider a wide variety of "attendant circumstances." *Park,* 525 P.2d at 591; *Cabana,* 716 A.2d at 579 (defendant's conduct "under the de minimis statute is not viewed in isolation, but coupled with the surrounding circumstances which play an integral part herein to explain the what, why and how of defendant's intent.").[230]

Judge Schwelb's separate opinion also specifically focuses on the New Jersey Law Revision Commission's recommendation to adopt that state's *de minimis* statute, which highlighted that:

> [T]he police, prosecutors and grand jurors must frequently deal with the question whether particular conduct merits prosecution and conviction. The Commission surmised that some judges may also decline to convict defendants for technical violations if the conviction would bring about an absurd result. The Commission continued:
>
>> The drafters of the MPC summarize all of this as a "kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications." In order to bring this exercise of discretion to the surface and to be sure that it is exercised uniformly throughout the judicial system, [the *de minimis*] Section of the Code has been included.[231]

Based on the above analysis, Judge Schwelb's separate opinion proceeds to argue that the record in the *Watson* case itself "reflects the soundness of a policy which would permit a court to act as a gatekeeper, and, at least, to give serious consideration to vacating Watson's conviction."[232] In so doing, Judge Schwelb was careful not to "criticize the government for initiating the prosecution, for the accusation directed at Watson by his wife was not *de minimis,* and probable cause existed for charging an assault based on arm-twisting and the like."[233] Nevertheless, Judge Schwelb asserted that

[230] *Watson*, 979 A.2d at 1265–66.
[231] *Watson*, 979 A.2d at 1267.
[232] *Id.*
[233] *Id.*

"once the judge had made his findings and rejected Ms. Sellers-Watson's most serious allegations, it was at least arguably unjust and disproportionate to burden Watson with a criminal conviction."[234]

With that in mind, and in closing, Judge Schwelb's separate opinion again specifically:

> recommends a legislative remedy in this case . . . because, in [his] view, the adoption of the relevant provisions of the MPC (or of the Hawaii and New Jersey variations of the MPC) would promote justice by protecting citizens from significant burdens attendant upon a criminal conviction when they have committed, at most, trifling and essentially harmless violations of the law. "Proportionality is of consummate importance in judicious adjudication." *Allen v. United States,* 603 A.2d 1219, 1227 (D.C. 1992) (*en banc*), *cert. denied* 505 U.S. 1227, 112 S.Ct. 3050, 120 L.Ed.2d 916 (1992).[235]

Consistent with the above considerations of District law, national legal trends, and policy analysis, legislative adoption of a *de minimis* defense is both appropriate and necessary under the circumstances.[236] And compelling considerations of legislative drafting further bolster this conclusion. Ideally, for example, the District's criminal statutes should be drafted sufficiently narrow as to exclude *de minimis* conduct from criminal liability in the first place. However, as a practical matter, drafting offenses that solely extend to actors whose conduct and accompanying state of mind are sufficiently blameworthy to warrant the condemnation of a criminal conviction, without also creating 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, the employment of a *de minimis* defense is essential to facilitating the overall proportionality of District law.

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[234] *Watson*, 979 A.2d at 1267-68.

[235] *Id.*

[236] It should be noted that while only "four states (Hawaii, Maine, New Jersey, and Pennsylvania) and Guam enacted statutes based on MPC 2.12," "[f]ifteen states and Puerto Rico have enacted statutes that give the courts power to dismiss a prosecution in furtherance of justice." Roberts, *supra* note 32, at 332 (collecting citations).

For a sense of the range of conduct to which *de minimis* statutes apply, consider the following dismissals; *State v. Akina*, 828 P.2d 269 (Haw. 1992) (giving shelter to a runaway teenager ("custodial interference")); *New Jersey v. Bazin*, 912 F. Supp. 106 (D.N.J. 1995) (verbal harrassment); *State v. Zarrilli*, 523 A.2d 284 (N.J. Super. Ct. Law Div. 1987) (taking a single sip of beer by an underage boy attending a church function); *State v. Smith*, 480 A.2d 236 (N.J. Super. Ct. Law Div. 1984) (shoplifting three pieces of bubble gum worth 15¢); *State v. Nevens*, 485 A.2d 345 (N.J. Super. Ct. Law Div. 1984) (taking fruit from the premises of a buffet-type restaurant after paying for the meal); *Commonwealth v. Moll*, 543 A.2d 1221 (Pa. Super. Ct. 1988) (damaging a drainage pipe belonging to the town to prevent flooding of the defendant's land (mischief)); *Commonwealth v. Jackson*, 510 A.2d 1389 (Pa. Super. Ct. 1986) (riot and failure to disperse by prison inmates upon official order); *Commonwealth v. Houck*, 335 A.2d 389 (Pa. Super. Ct. 1975) (verbal harassment—calling the victim on the phone "morally rotten" and "lower than dirt"); *see also State v. Cabana*, 315 N.J. Super. 84, 716 A.2d 576 (Law Div. 1997), *aff'd without opinion*, 318 N.J. Super. 259, 723 A.2d 635 (App. Div. 1999) (defendant's conduct in striking a fellow politician's chin while waving a flier during a confrontation was an "offensive touching" not sufficiently serious to warrant prosecution for a simple assault).

RCC § 22E-215 is both based on, and in important ways departs from, the Model Penal Code approach—codified in § 2.12—advocated for by Judge Schwelb in *Watson*. For example, like the Model Penal Code approach, § 22E-215 provides a basis for exoneration where the defendant engaged in conduct "too trivial to warrant the condemnation of conviction."[237] Unlike Model Penal Code § 2.12, however, the RCC approach to *de minimis* does two critical things. First, section 215 explicitly clarifies that mental state considerations are a central part of the *de minimis* analysis—whereas the Model Penal Code approach is unclear as to the relevance of issues of culpability. And second, § 22E-215 reframes the *de minimis* analysis as an affirmative defense to be adjudicated by the factfinder under a preponderance of the evidence standard—in contrast to the general grant of judicial discretion under Model Penal Code § 2.12 to vacate convictions on the courts own initiative. Both of these departures, as explained below, are justified by compelling policy considerations as well as considerations of current District law.[238]

De Minimis *and Culpability*. The Model Penal Code approach to the *de minimis* defense does not explicitly make any mention of mental state-based considerations, instead placing a singular focus on harm. Specifically, Model Penal Code § 2.12 directs the court to:

> dismiss a prosecution if, having regard to the *nature of the conduct* charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's *conduct* . . . . did not actually

[237] Model Penal Code § 2.12(2).

[238] The analysis here focuses on Model Penal Code § 2.12(2). It should be noted, however, that this section of the Model Penal Code incorporates two additional grounds for dismissal. The first arises where the defendant's conduct "was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense . . . ." Model Penal Code § 2.12(1). And the second arises where the defendant's conduct "presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense." Model Penal Code § 2.12(3).

Section 215 does not codify either of these alternative grounds for dismissal for two reasons. First, the intended meaning of, and interaction between, these additional grounds for dismissal are both unclear and the subject of some dispute. *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 67 (2d ed. 2018). Second, and perhaps more important, section 215 is sufficiently capacious to capture relevant fact patterns addressed by these alternative grounds of dismissal.

For example, Model Penal Code § 2.12(1) would provide a defense to a neighbor who had previously been allowed to use a landowner's yard as a shortcut in the event that the landowner unexpectedly decided to revoke the privilege and accuse the neighbor of trespass on the basis that the neighbor's prior usage was within "customary license or tolerance." *See* Model Penal Code § 2.12 cmt. at 402-03; Commentary on Del. Reform Code § 209(a). And Model Penal Code § 2.12(3) would provide a defense to a charge of impersonating a public servant for an individual who chooses to dress up as a police officer on Halloween on the basis that such conduct "cannot reasonably be regarded as envisaged by the legislature in forbidding the offense." *See* Model Penal Code § 2.12 cmt. at 404; Commentary on Del. Reform Code § 209(c). However, section 215 would also provide a defense in these situations since the "conduct and accompanying state of mind" of both the neighbor and Halloween-goer quite clearly are "insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances." RCC § 22E-215(a). In this way, section 215 strives to articulate the overarching principle, which ties paragraphs 1, 2, and 3 of Model Penal Code § 2.12 together.

> cause or threaten *the harm or evil* sought to be prevented by the law defining the offense or did so only to an extent *too trivial* to warrant the condemnation of conviction.[239]

In contrast, RCC § 22E-215(a) emphasizes the blameworthiness of the defendant's "*conduct* and *accompanying state of mind*." This dual focus is likewise reflected in the analytical factors specified in RCC § 22E-215(b): while the first of these factors focuses on harm, the latter three revolve around mental state considerations. As the proposed statute reads:

> In determining whether subsection (a) is satisfied, the factfinder shall consider, among other appropriate factors:
>
> (1) The triviality of the *harm* caused or threatened by the person's conduct;
>
> (2) The extent to which the person was *unaware* that his or her conduct would cause or threaten that harm;
>
> (3) The extent to which the person's conduct furthered or was *intended to further legitimate societal objectives*; and
>
> (4) The extent to which any individual or situational factors for which the person is not responsible *hindered the person's ability to conform his or her conduct to the requirements of law*.[240]

The more expansive dual emphasis reflected in the CCRC approach is justified by both intuitive notions of fairness as well as District law's codification and judicial endorsement of those intuitions. On a basic level, for example, it seems clear that an actor's state of mind is critical to determining whether his or her criminal conduct does, in fact, "warrant the condemnation of conviction." To illustrate, consider the following question: is stealing an apple from a grocery store *de minimis* conduct? The answer to this question would seem to depend upon various psychological facts accompanying the grocery theft, which go above and beyond the intent to steal required for a theft conviction.

For example, where someone premeditatedly steals an apple for the purpose of making the store's owner feel unwelcome in the neighborhood (or to send some other toxic message to either the owner or the community), then it seems arguable that such conduct could be sufficiently blameworthy to warrant the condemnation of conviction. But if, in contrast, the taking was a spur of moment decision committed by an emotionally distraught parent who had recently been fired from her job by an abusive boss and sought to feed her hungry child, then it seems arguable that the condemnation of a conviction would not be warranted under the circumstances.

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[239] *Id.* (italics added).
[240] RCC § 22E-215(b) (italics added).

What explains this intuitive difference? Insofar as community sentiment is concerned, the public's assessments of blameworthiness and deserved punishment seem to revolve around, and ultimately account for, four basic mental criteria: (1) awareness of wrongdoing; (2) motivations for wrongdoing; (3) the rational capacities of a wrongdoer; and (4) the extent to which a decision to engage in wrongdoing is freely made (i.e., un-coerced).[241] Viewed from this perspective, it would appear that the relevant distinctions to be made in the above theft hypothetical are that: (1) the first actor's motivations seem particularly blameworthy—whereas the second actor's motivations are praiseworthy; and (2) the first actor's decision was deliberative and uncoerced—whereas the second actor's decision was both rash and influenced by the emotional pull of a hungry child and recent unemployment.[242]

The same spectrum of psychological blameworthiness reflected in community sentiment also pervades District law. This correspondence is perhaps most apparent in the context of general justification and excuse defenses—for example, duress,[243] insanity,[244] entrapment,[245] necessity,[246] or self-defense[247]—which rely on one or more of these four mental criteria to provide the basis for complete exoneration.[248]

Less obvious, but just as important, is that District law also recognizes the salience of these mental criteria where they fall short of establishing a complete justification or excuse defense. This is reflected in the well-established mitigation principle, which, as the DCCA explained in its *en banc* decision in *Comber v. United States*, is "predicated on the legal system's recognition of the weaknesses or infirmity of human nature . . . as well as a belief that those who [act] under extreme mental or

[241] *See, e.g.,* Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1205 (2017) (collecting and synthesizing public opinion surveys).

[242] Which is to say, the second actor possessed a diminished capacity for reason and/or self-control.

[243] *McCrae v. United States*, 980 A.2d 1082, 1086–87 (D.C. 2009) ("A duress instruction is appropriate if the evidence is sufficient for a reasonable jury to find that the defendant participated in the offense as the result of a reasonable belief that he would suffer immediate serious bodily injury or death if he did not participate in the crime.").

[244] *Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a *prima facie* case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury.").

[245] *Daniels v. United States*, 33 A.3d 324, 327 (D.C. 2011) ("A jury may be instructed on the affirmative defense of entrapment when there is sufficient evidence of government inducement of the crime and a lack of predisposition on the part of the defendant to engage in that criminal conduct.").

[246] *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) ("In essence, the necessity defense exonerates persons who commit a crime under the 'pressure of circumstances,' if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law."); *see also Emry v. United States*, 829 A.2d 970, 972 (D.C. 2003) (medical necessity to possession of marijuana).

[247] *Swann v. United States*, 648 A.2d 928, 930 (D.C. 1994) (To raise self-defense in a homicide case, the defendant: (1) "must have an actual belief both that he or she is in imminent danger of serious bodily harm or death and in the need to use deadly force in order to save himself or herself"; and "in addition to such an actual belief, the defendant's belief must be objectively reasonable.").

[248] *See generally* Serota, *supra*, at 1205; David O. Brink & Dana K. Nelkin, *Fairness and the Architecture of Responsibility, in* OXFORD STUDIES IN AGENCY AND RESPONSIBILITY 285 (David Shoemaker ed., 2013).

emotional disturbance for which there is reasonable explanation or excuse are less morally blameworthy than those who [act] in the absence of such influences."[249]

The District's mitigation principle accounts for a broad range of mental state-related considerations in two different contexts.[250] The first is that of offense grading, and is reflected in the District's law of homicide, which recognizes that "a homicide constitutes voluntary manslaughter where the perpetrator kills with a state of mind which, but for the presence of legally recognized mitigating circumstances, would render the killing murder."[251]

Generally speaking, these "legally recognized mitigating circumstances" fall into two different categories: imperfect justifications and partial excuses.[252] With respect to imperfect justifications, the DCCA has determined that an intentional killing is not malicious, and therefore cannot constitute murder, if it is motivated by a *bona fide* belief in the need to use defensive force to protect against death or serious bodily injury regardless of whether: (1) the "killing is committed in the [unreasonably] mistaken belief that one may be in mortal danger" and/or (2) "the belief [in] the need to resort to force [is] objectively unreasonable."[253] With respect to partial excuses, in contrast, the DCCA has recognized that a person who intentionally causes the death of another has not acted maliciously if he or she "has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger."[254]

The second context in which the District's mitigation principle operates relates to determinations of threshold liability, and is reflected in various statutory property crimes. Specifically, the District's destruction of property[255] and arson[256] statutes incorporate the

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[249] *Comber v. United States*, 584 A.2d 26, 41–42 (D.C. 1990) (*en banc*); *see, e.g., Brown v. United States*, 619 A.2d 1180, 1181 (D.C. 1992); *Swann*, 648 A.2d at 931 (D.C. 1994).

[250] *See generally* Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. REV. 161 (2016) (imperfect defenses and partial excuses, as well as the mitigation principle they comprise, are pervasive in the criminal law: they cohere with traditional theories of punishment, represent lay and judicial intuitions of justice, and are reflected in a wide range of penal policies).

[251] *Comber*, 584 A.2d at 42-43.

[252] Imperfect justifications typically arise when the person is *unreasonably mistaken* as to the *facts* bearing on the triggering or necessity conditions that, if true, would otherwise provide the actor with a complete justification defense to his or her criminal conduct. That the factual mistakes motivating commission of the crime are unreasonable means that the person is still culpable for his or her conduct. However, because his or her conduct is motivated by a legally-recognized purpose, his or her culpability is substantially less than it would be in the typical case (and, therefore, he or she is entitled to lessened punishment). Partial excuses cover situations where the accused's capacity for reason and/or self-control is diminished enough to lessen his or her blameworthiness for causing some criminal harm, but not enough to exonerate him or her completely. *See generally* DOUGLAS HUSAK, PARTIAL DEFENSES, IN THE PHILOSOPHY OF CRIMINAL LAW 311 (2010); Paul H. Robinson et al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 72 (2015).

[253] *Swann*, 648 A.2d at 930–33. "These principles," in turn, "are recognized in the standard instruction relating to mitigating circumstances as they apply to imperfect self-defense." *Id.*; *see* D.C. Crim. Jur. Instr. § 4.202 ("Mitigating circumstances . . . exist when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable.").

[254] *Comber*, 584 A.2d at 41.

[255] D.C. Code § 22-303 (penalizing an actor who "maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property . . . .")

mental state of "malice," which is understood by the DCCA[257] and Redbook[258] to require proof of "the absence of mitigating circumstances" as that concept has developed in the homicide context.[259] Notably, however, there are no "'in between'" offenses, such as "voluntary property destruction" or "voluntary arson," in the context of property crimes.[260] This means that someone who intentionally destroys or burns property may not be convicted of *any grade of the District's current destruction of property or arson offenses* when the conduct occurs in the presence of mitigating circumstances—whereas, in the homicide context, such circumstances merely provide the basis for *reducing murder to manslaughter*.[261] Although the defendant may have intentionally caused a serious harm to property, the partially justified or excused nature of the conduct does not—according to the logic inherent in these current District property statutes—support a criminal conviction.[262]

A similar (though less sweeping) logic animates § 22E-215, which—through the legal framework established in subsection (b)—broadly incorporates the kinds of mitigating circumstances relevant to homicide and property crimes under District law into the *de minimis* analysis. In so doing, section 215 decidedly does *not* make the complete absence of mitigating circumstances an element as is otherwise the case in the context of the District's murder, destruction of property, and arson statutes. But it does provide the defendant with an opportunity to persuade the factfinder, in appropriate cases, that his or her conduct and relevant mitigating circumstances are insufficiently blameworthy to warrant the condemnation of a criminal conviction.[263]

Whether the dual consideration of harm and culpability in section 215 actually constitutes a departure from the Model Penal Code approach to *de minimis* is unclear. For example, it has been observed that while "the major emphasis" of the case law

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[256] D.C. Code § 22-301 (penalizing an actor who "maliciously burn[s] or attempt[s] to burn [a qualifying structure] . . . .").

[257] *See, e.g., Brown*, 584 A.2d at 539 ("Although provocation is a matter usually connected with the law of homicide, we have held that the malice required . . . as an element of the charge of malicious destruction of property is the same as the malice required to make out a case of murder . . . Thus, provocation is a proper defense to the charge of malicious destruction of property, and we look to the doctrine of provocation as it has developed in the context of homicide, and elsewhere, to guide us in deciding this case.") (citing *Carter v. United States,* 531 A.2d 956, 963 (D.C. 1987) (rejecting the contention that "the malice involved in malicious destruction of property is somehow different from that malice which must be proven in murder cases" and noting that "the malice involved in both [MDP and arson] is the same"));

[258] Commentary on D.C. Crim. Jur. Instr. § 5.400 ("It is clear from the cases that the malice involved in malicious destruction of property is the same as the malice needed for murder.").

[259] *Comber v. United States*, 584 A.2d 26, 43 n.21 (D.C. 1990) ("[A] voluntary manslaughter conviction may not be predicated upon a mental state other than one which would, in the absence of mitigating circumstances, render a killing murder.")

[260] LAFAVE, *supra* note 6, at 2 SUBST. CRIM. L. § 10.4.

[261] *See* cases cited *supra* notes 56-64.

[262] *See* cases cited *supra* notes 60-64. *Cf.* ROBINSON, *supra* note 43, at 2 CRIM. L. DEF. § 123 ("[I]f mitigation is universally considered appropriate in the homicide context, one might question "why this policy should apply only to a charge of murder"?)

[263] For discussion of a specific "'insufficient culpability' defence" that would provide the jury with "the power to reject a criminal prosecution" if, after considering "relevant [*mens rea*] factors, the defendant is insufficiently culpable to deserve punishment," see Kenneth W. Simons, *Understanding the Topography of Moral and Criminal Law Norms, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 228, 250-51 (R.A. Duff & Stuart P. Green eds., 2011).

interpreting Model Penal Code-based *de minimis* statutes has been on the "objective harmfulness of the conduct charged to the social interest protected by the statute in question," numerous decisions also extend "beyond the objective aspect of the offending conduct and have also found subjective, mental elements to have bearing on the issue of triviality of harm or evil."[264] And such an approach also appears to be supported by Judge Schwelb's opinion in *Watson*, which recognizes that a defendant's conduct "under the *de minimis* statute is not viewed in isolation, but coupled with the surrounding circumstances which play an integral part herein to explain the what, why and how of *defendant's intent*."[265]

The Hawaii Supreme Court's decision in *State v. Park*, cited repeatedly by Judge Schwelb, is illustrative. In that case, the court interpreted Hawaii's Model Penal Code-based *de minimis* statute to implicitly incorporate critical culpability-based factors, such as:

> the background, experience and character of [an actor] which may indicate whether they knew of, or ought to have known, the requirements of [the prohibition violate[d]; the knowledge on the part of [an actor] of the consequences to be incurred by them upon the violation of the statute; [] the mitigating circumstances, if any, as to [an actor]; [] and any other data which may reveal the nature and degree of the culpability in the offense committed by [the actor].[266]

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[264] Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 B.Y.U. L. REV. 51, 94–98 (1997); *see also* Roberts, *supra* note 32, at 375–76 ("The traditional view within criminal law is that defendants' alleged motives are irrelevant to the question of liability. [Yet there exists a large] body of case law challenges that view. Again and again, one finds judges moved to dismiss in light of their assessment of defendants' motives. When those motives are ones esteemed as noble—when, for example, they are focused on the welfare of children—courts show no hesitation in deeming motive a ground for dismissal.").

[265] *Watson*, 979 A.2d at 1265–66 (quoting *State v. Cabana*, 315 N.J. Super. 84, 88, 716 A.2d 576, 579 (Law. Div. 1997), *aff'd sub nom. State (Harris) v. Cabana*, 318 N.J. Super. 259, 723 A.2d 635 (App. Div. 1999)).

[266] *State v. Park*, 55 Haw. 610, 616–17, 525 P.2d 586, 591 (1974). New Jersey applies a similar approach under which courts are to "consider[] the following factors in evaluating a *de minimis* application":

> (a) Defendant's background, experience and character as indications of whether he or she knew or should have known the law was being violated;
>
> (b) Defendant's knowledge of the consequences of the act;
>
> (c) The circumstances surrounding the offense;
>
> (d) The harm or evil caused or threatened;
>
> (e) The probable impact of the violation on the community;
>
> (f) The seriousness of the punishment;
>
> (g) Possible improper motives of the complainant or prosecutor; and

This kind of "comprehensive approach" to interpreting the Model Penal Code's *de minimis* provision rests upon the well-founded belief that—as one commentator phrases it—"the antisocial substance of criminal behavior is inseparable from the mental attitude of the actor," such that "[n]ot only must the objectively harmful effects of the act be considered, but also its inner antisocial tendency."[267] Section 215 accords with this perspective by explicitly codifying a comprehensive approach to *de minimis* that "combines the societal-harm analysis of the objective approach with consideration of the mental elements of the defendant's conduct" on the basis that the latter is "inseparable from the concept of crime as an antisocial act."[268]

De Minimis *and Procedure.* The second way that RCC § 22E-215 differs from the Model Penal Code approach to *de minimis* advocated for by Judge Schwelb relates to procedure. For example, although the precise mechanics of Model Penal Code § 2.12 are the subject of some confusion and debate, it is relatively clear that the *de minimis* analysis set forth in the Model Penal Code is intended to be the province of trial judges, and is applicable at the earliest stages of legal proceedings.[269] Under § 22E-215, in contrast, the *de minimis* analysis is treated as a true affirmative defense subject to resolution by juries (or a judge in a bench trial) at the close of evidence. There are a few different reasons for this departure.

First, and most fundamental, is that in those situations where the defendant has the right to jury adjudication, the jury—in contrast to the judge—is the decisionmaker best situated to resolve *de minimis* claims.[270] This is because, at the heart of *de minimis* claims, is the following question: was the defendant's conduct and accompanying state of mind sufficiently blameworthy to warrant the condemnation of a criminal conviction? And the appropriate basis for resolving this kind of question is a "shared community sense" of justice, which juries are both appropriately constructed and well-equipped to draw upon.[271] As the U.S. House of Representatives has observed: "[T]he jury is

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(h) Any other information which may reveal the nature and degree of culpability.

State v. Halloran, 446 N.J. Super. 381, 386–87, 141 A.3d 1216, 1219–20 (Law. Div. 2014) (collecting cases); *see also Cabana*, 315 N.J. Super. at 88 (New Jersey's *de minimis* statute clearly "contemplates" a "threshold consideration of criminal culpability" which is "dependent upon the state of mind of the actor and [requires] a fact-sensitive analysis on a case by case basis.").

[267] Pomorski, *supra* note 69, at 98 ("Under this approach, for example, the "evil" of an assault committed intentionally is greater than the "evil" of an assault committed recklessly. By the same token, the "evil" of an unprovoked assault is greater than the "evil" of an assault provoked by the victim, even though the objective harm in all the above cases may be exactly the same.").

[268] *Id.*

[269] *Id.* at 101.

[270] This does not mean, however, that juries *must* resolve *de minimis* claims. The same constitutional and pragmatic considerations that limit the defendant's right to a jury trial in general may also support, in relevant cases, judicial factfinders resolving *de minimis* claims in bench trials.

[271] Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 460 (1988).

designed not only to understand the case but also to reflect the community's sense of justice in deciding it."[272]

This is to be contrasted with "the criminal court judge," who "may be one of the persons in the community least able to represent the community's normative judgment at all reliably."[273] Here, for example, is how one commentator has summarized this judicial shortcoming:

> Magistrates and judges are not typical members of the community. They differ significantly from the general population in education, intelligence, economic status, and political views. Further, their judgments are likely to be distorted by the experience of becoming a lawyer and judge; common sense may be the first casualty of legal training. Moreover, the criminal court judge is exposed to a daily parade of the worst side of human behavior. Such exposure is likely to alter the judge's perceptions about the standard of unacceptable conduct.
>
> Beyond a judge's atypical qualities and experience, he or she is at a disadvantage compared to a juror in making normative judgments because of the judge's isolated position when deciding cases. Where a shared community normative judgment is at issue, the process of expression, reaction, and response to others is critical, and much of one's judgment on such matters depends upon one's assessment of others' reactions. Juries, in contrast, are ideally suited in these respects for making normative judgments. Some writers suggest that, although magistrates would be more reliable at the sometimes technical job of factfinding, we use a lay jury system because of the importance of the more reliable normative judgments that the jury provides.[274]

None of which is to say, of course, that juries are perfect venues of legal decisionmaking—or that judges don't have comparative strengths as decisionmakers. For example, it has also been observed that: (1) "jurors generally lack the education and training that a judge has"[275]; (2) that "[j]uries are likely to be less consistent than judges"[276]; and (3) that juries (unlike judges) lack access to "tools that increase the likelihood that their normative judgments will reflect what the legislature intended," such

[272] H.R. Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968) (the House Committee Reports accompanying the Federal Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified at 28 U.S.C. §§ 1861-1871 (1982))).
[273] Robinson, *supra* note 76, at 460.
[274] *Id.*
[275] *Id. See, e.g.*, *In re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976) (striking jury demand on ground that trial to the court assured greater fairness and thereby furthered due process requirements of fifth and fourteenth amendments); *but see Zenith Radio Corp. v. Matsushita Electrical Industrial Co.,* 478 F. Supp. 889, 935 (E.D. Pa. 1979) ("A jury, applying its collective wisdom, judgment and common sense to the facts of a case . . . is brighter, more astute, and more perceptive than a single judge.").
[276] Robinson, *supra* note 76, at 460.

as "[l]egislative histories, official commentaries, and prior case law applying a statute."[277] Nevertheless, there also exist mechanisms for compensating for the comparative shortcomings of juries. For example:

> If a jury is an inherently better normative decisionmaker but lacks the explanations and guidance available to judges, the better approach may be to leave the normative judgments to the jury but to have the jury instructions include the available guidance information. Such detailed jury instructions may not be appropriate in all cases but may be justified where a vague standard presents the central issue in a case. To avoid improper delegation of the criminalization authority to the courts, it would be best to have the criminal code, rather than the individual judge, provide the additional explanation or guidance that is to be given to the jury. Such guidance might take the form of a series of illustrative applications of the provision or a description of the factors to be considered and their interrelation.[278]

RCC § 22E-215 has been drafted in a manner consistent with this analysis. Specifically, it authorizes factfinders to conduct the *de minimis* evaluation, such that in those situations where a defendant exercises his or her right to jury adjudication, juries will be the institutional decisionmaker empowered to resolve *de minimis* claims. And the multi-factor analysis contained in RCC § 22E-215(b) affords all factfinders the same legal guidance for resolving such claims.[279] This ensures that juries have access to the same tools for rendering *de minimis* judgments consistent with legislative intent that would otherwise be available to judicial decisionmakers.[280]

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[277] *Id.* ("Each of these mechanisms can give judges a greater opportunity to understand the intended concept and its application and thereby increase the reliability and consistency of the judgment.").
[278] *Id.*
[279] One commentator provides a different approach to codifying relevant factors, which reads:

> In evaluating whether an actor's conduct caused or threatened a harm or evil that is 'too trivial to warrant the condemnation of criminal conviction,' the decisionmaker should consider, among other things, the following factors:
>
> (a) the nature and degree of tangible harms caused or threatened,
>
> (b) the nature and degree of intangible harms and evils caused or threatened,
>
> (c) the nature and degree of a disruption of the social order caused or threatened, and
>
> (d) the potential that allowing a defense in this instance would undercut the criminal law's condemnation of related, more serious conduct.

Robinson, *supra* note 76, at 433–34.
[280] *See also* Pomorski, *supra* note 69, at 99 (noting that "the factual picture of the defendant's conduct available to the jury after a full trial will often be different from the picture available to the judge at the pretrial stage of the proceedings").

Considerations of current District law provide further support for allocating authority to resolve the *de minimis* defense to juries (again, where legally available). This is because the *de minimis* defense is closely related to existing general defenses—for example, self-defense, duress, necessity, insanity, and entrapment—as well as partial defenses—for example, the absence of mitigating circumstances—all of which are the province of the jury under current District law.[281]

Specifically, these District-recognized defenses cover situations where the defendant has committed the *actus reus* of a crime and perhaps also has the narrow *mens rea* (i.e., the purpose, knowledge, recklessness, or negligence) necessary to establish affirmative liability, but is not punished because his actions were justified or excused, whether fully or (in the case of mitigating circumstances) partially. So it is with many instances of *de minimis* conduct: the defendant has satisfied the elements of the crime, but due, at least in part, to the presence of justifying or excusing conditions, the defendant is insufficiently blameworthy to warrant the condemnation of a criminal conviction.[282] Given this fundamental similarity, then, the *de minimis* defense is best adjudicated in the same manner, and by the same decision maker.

Maintaining this consistency of treatment also offers practical benefits in that there already exists an established body of procedural/evidentiary rules governing affirmative defenses in the District.[283] For example, consistent with these rules, *de minimis* claims would be subject to the following procedural framework:

> (1) A defendant seeking to raise a *de minimis* defense would have the burden of producing some evidence to justify presenting the issue to the factfinder, and the sufficiency of that evidence would be a threshold question for the court.[284]
>
> (2) Even if the defendant met his initial burden, the judge would still have the power to exclude proffered evidence that was likely to confuse a jury or waste time.[285]

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[281] *See* sources cited *supra* notes 6-11 and sources cited *infra* notes 88-92; *see also Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) ("Properly viewed, the concepts of both diminished capacity and insanity involve a moral choice by the community to withhold a finding of responsibility and its consequence of punishment.").

[282] *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 312 (1996).

[283] *See, e.g., McCrae v. United States*, 980 A.2d 1082, 1086–87 (D.C. 2009); *but see Comber v. United States*, 584 A.2d 26, 41 (D.C.1990) (*en banc*) ("government bears the ultimate burden of persuasion" to disprove defenses of justification, excuse, and mitigation).

[284] *Pegues v. United States*, 415 A.2d 1374, 1377–78 (D.C. 1980) ("If [the defendant raising an affirmative insanity defense] fails to present a *prima facie* case, the judge is justified in removing the issue from the jury.") (citing *Cooper v. United States*, 368 A.2d 554, 559-60 (D.C. 1977)); *see also* Commentary on Del. Reform Code § 209(c) (observing "that the defendant bears the burden of persuasion and must prove [the *de minimis* defense] by a preponderance of the evidence").

[285] *See, e.g., Pegues*, 415 A.2d at 1378 ("We agree with the trial judge that allowing appellant to present his proffered testimony [regarding affirmative defense of insanity] to a jury would have been a 'waste of time,' and, consequently, find no abuse of discretion in his refusal to allow the defense.") (citing *Clyburn v. United States*, 381 A.2d 260, 264 (D.C. 1977)).

(3) Where the defense is properly raised, the defendant would be able argue for *de minimis* in closing, and the court would instruct a jury on the elements of the *de minimis* defense.[286]

(4) If the judge erred in excluding evidence or in instructing a jury, the defendant would be able to challenge those rulings on appeal.[287]

This established process is in stark contrast to the procedural uncertainty and novelty inherent in Model Penal Code § 2.12, which appears to grant judges broad discretion to dismiss charges as they see fit. This kind of approach raises significant questions about "the legal nature of the *de minimis* doctrine," which in turn has lead to "substantial procedural differences" in its statutory implementation.[288] These differences include: whether the *de minimis* analysis is mandatory or discretionary[289]; the point at which the *de minimis* analysis is applied[290]; governing standards of legal review on appeal[291]; and the appropriate judicial officer vested with the authority to dismiss charges.[292]

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[286] *See, e.g., Adams v. United States,* 558 A.2d 348, 349 (D.C.1989) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."). A jury determination in favor of the defendant should result in an acquittal, which would be unreviewable. *See, e.g., Farina v. United States*, 622 A.2d 50, 60 (D.C. 1993) ("Jury acquittals are unreviewable and unreversible.") (citing *United States v. Dougherty,* 154 U.S.App.D.C. 76, 93, 95, 473 F.2d 1113, 1130, 1132 (1972)).

[287] *See, e.g., Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("This court reviews a trial court's decision to deny presentation of testimony in support of an insanity defense for abuse of discretion.") (citing *Pegues,* 415 A.2d at 1378).

[288] Pomorski, *supra* note 69, at 98. As one commentator observes:

> On one view, for example, *de minimis* is a substantive law doctrine, such that defendants should be entitled to dismissals as a matter of right, applicable at every stage of regular judicial proceedings (i.e., the defendant should be able to litigate the issue to the fullest extent, including appellate and postappellate remedies). On another view, in contrast, the *de minimis* statute is merely a grant of discretionary power, perhaps predominantly instituted for the sake of economy and expediency, such that it's procedural deployment could only be as broad as administrative convenience would suggest.

Id.

[289] ROBINSON, *supra* note 43, at 1 CRIM. L. DEF. § 67 ("[U]nder Model Penal Code § 2.12 the court is directed to 'dismiss a prosecution' when the requirements of the defense are met. It can thus provide not just a defense to conviction, but also a bar to prosecution. However, some jurisdictions have altered the Model Penal Code's 'shall dismiss' to a permissive 'may dismiss,' in an attempt to give the court broader discretion in the matter.") (collecting statutes).

[290] Pomorski, *supra* note 69, at 89 ("There seems to be unanimity that the *de minimis* issues can be reached only after it is established that the defendant's conduct, as alleged or as proved, violated a specific statutory prohibition. This analytically correct view, however, has not been consistently applied in individual cases.") (collecting citations).

[291] Pomorski, *supra* note 69, at 88-89. ("Most reported appellate decisions dealing with *de minimis* cases have declared that the review should be conducted under the abuse of discretion standard . . . . However, a closer look reveals a more complex situation. In some instances, in spite of declarations to the contrary, appellate courts have substituted their own concept of a *de minimis* infraction for the one applied by the decision appealed from. Thus, operationally, the review was conducted de novo, as if such concepts as

Another notable difference is reflected in the fact that whereas Model Penal Code § 2.12 requires the court to file a written statement when dismissing a prosecution in only some instances, "[a] few jurisdictions have extended this to require a written statement of reasons for a dismissal under any ground."[293] And at least one other state provides for an entirely different oversight process entirely: "No doubt in response to concerns over the broad authority that the defense vests in the judiciary," the New Jersey *de minimis* statute "substitutes for the written reasons provision a requirement of notice to the prosecutor, who then has a right to a hearing on the matter and an appeal of any dismissal."[294]

Treating the *de minimis* defense as a regular affirmative defense thus avoids the need to resolve these difficult procedural issues, let alone create entirely new processes of review to deal with the manner in which it is adjudicated. Instead, all relevant *de minimis* issues will be subject to the same procedural and evidentiary framework to which all other comparable affirmative defenses are subject, and for which the District's juries—where legally available—are best situated to adjudicate.

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Viewed collectively, then, both compelling policy considerations and current District practice support adoption of section 215, which, in contrast to Model Penal Code § 2.12: (1) explicitly clarifies that mental state considerations are a central part of the *de minimis* analysis; and (2) reframes the *de minimis* analysis as an affirmative defense to be adjudicated by the factfinder under a preponderance of the evidence standard.[295]

"trivial harm or evil" were concepts of substantive law and the trial court was duty bound to apply it "correctly.")

[292] Pomorski, *supra* note 69, at 89; *see id.* ("In addition, the judicial authority in New Jersey is split on the issue of whether the *de minimis* provision applies to juveniles: the intermediate appellate court decided in the negative, [] while some trial courts have held otherwise . . . .") (collecting cases).

[293] *Id.*

[294] ROBINSON, *supra* note 43, at 1 CRIM. L. DEF. § 67.

[295] Additional distinctions between Model Penal Code § 2.12 and section 215 are analyzed in the accompanying Explanatory Notes.

RCC § 22E-301. Criminal Attempt.

Explanatory Note. RCC § 22E-301 provides a comprehensive statement of general attempt liability under the RCC. This statement establishes the culpable mental state requirement and conduct requirement of a criminal attempt, the relationship between a criminal attempt and the target offense, and the penalties applicable to a criminal attempt. Section 301 replaces the District's current general attempt statute, D.C. Code § 22-1803.

Paragraphs (a)(1) and (2) establish two basic culpability principles governing general attempt liability. The first principle, set forth in paragraph (a)(1), is that an attempt entails proof that the defendant "plann[ed] to engage in conduct constituting [an] offense."[1] This planning requirement is the foundation of attempt liability[2]; it communicates the basic tenet that attempting to commit an offense involves, among other things, being committed to a course of conduct that, if carried out, would[3] satisfy the objective elements of that offense.[4]

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[1] *See, e.g.,* Model Penal Code § 5.01(1)(c) (liability for incomplete attempt entails proof of, *inter alia*, "a course of conduct *planned* to culminate in his commission of the crime").

[2] *See, e.g.,* Gideon Yaffe, *Criminal Attempts*, 124 YALE L.J. 92, 109 (2014) ("Plans play various roles in making possible and effective organized behavior that takes place over extended periods of time."); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994) (planning requirement, referred to as "future conduct intention," has "a critical independent role to play" in criminal code); Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1170 (1997) ("[T]he most coherent justification [for attempt liability] rests on the assumption that forming an intention to engage in future criminal conduct is itself a culpable act[.]").

[3] That is, assuming "the situation was as the person perceived it." RCC § 22E-301(a)(3)(A)(ii); *see infra* notes 15-19 and accompanying text (discussing impossibility).

[4] *See, e.g.,* Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 755 (2012) (with a charge of attempted purposeful murder, "the key question is not (only) whether the actor desires the death of the victim, but whether he is committed to a course of conduct that would, if completed, bring about the death of the victim"); Gideon Yaffe, *Attempt, Risk-Creation, and Change of Mind: Reflections on Herzog*, 9 OHIO ST. J. CRIM. L. 779, 781 (2012) ("To attempt murder is to have an intention that commits one to causing another's death and to be guided by that intention in one's conduct.").

This planning requirement is largely implicit in the other elements of a criminal attempt. For example, to hold that a defendant arrested by the police two blocks away from a bank in possession of a mask and firearm was "dangerously close to completing" a bank robbery, see RCC § 22E-301(a)(3)(A), necessarily entails a determination that the defendant was planning to engage in conduct that, but for the police intervention, would have culminated in a bank robbery. Conversely, if the only reason the defendant's criminal scheme failed is because the bank manager, upon threat of death, was unable or unwilling to hand over physical currency, then the requisite plans would be established by the fact that the defendant's scheme was actually carried out.

This planning requirement is to be distinguished from the voluntariness requirement under section 203. *See* RCC § 22E-203(a) ("No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense."). The voluntariness requirement, which implicates what is sometimes referred to as a "*present* conduct intention," can be "satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed." Robinson, *supra* note 2, at 864. In contrast, the planning requirement, which implicates what is sometimes referred to as a "*future* conduct intention," "serves to show that the actor is planning to do more than what he has already done." *Id.*

The second principle, set forth in paragraph (a)(2), is that a criminal attempt necessarily incorporates "the culpability required for [the target] offense."[5] Pursuant to this principle, a defendant may not be convicted of a criminal attempt absent proof that he or she acted with, at minimum, the culpable mental state(s)[6]—in addition to any broader aspect of culpability[7]—required to establish that offense.[8]

In this sense, the term "planning" as employed in this section is substantively identical to the term "intent" under RCC § 22E-206(c), and thus should not be read to incorporate additional requirements such as premeditation or deliberation (i.e., a person who, having been provoked, is stopped by police immediately prior to firing his weapon in retaliation has "planned" to kill). Paragraph (a)(1) could have just as easily been drafted to state "intending to engage in conduct constituting [an] offense"; however, this would fail to clearly distinguish between the planning requirement and the culpability requirement derived from the target offense. *See* RCC § 22E-301(a)(2) (defendant must act "[w]ith the culpability required by [the target] offense").

For example, an actor may plan to carry out a course of conduct that, if completed, would cause the prohibited result of death without being culpable at all—as would be the case where a demolition operator is stopped just before destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the ensuing destruction. Alternatively, that same demolition operator may have sought to cause that result culpably, e.g., if the operator knew that a person was residing in the building and acted with the intent to kill. In both versions of the hypothetical, the question of whether the operator acted with the culpable mental state requirement of murder (i.e., whether the operator intended to kill the occupant) is a separate and distinct question from whether the operator "planned to engage in conduct constituting" murder (i.e., whether the operator planned to demolish the building, which was in fact occupied). Use of the term "planning," as opposed to "with intent," in paragraph (a)(1) helps to distinguish these concepts. *See infra* notes 5-8 and accompanying text (discussing culpability required by target offense).

[5] *See, e.g.,* Model Penal Code § 5.01(1) (government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime").

[6] It is possible, and may sometimes be necessary, to distinguish between an attemptor's state of mind as to: the planning requirement; the result elements of the target offense; and the circumstance elements of the target offense.

To illustrate, consider the situation of an individual who is arrested by police just as he's about to set off an explosive device near an unmarked metropolitan police department building in the middle of a work day. This individual is subsequently prosecuted for attempting to murder a police officer under a statute that prohibits: "(1) knowingly killing another person, (2) reckless as to whether the person is a police officer." On these facts, the defendant satisfies the planning requirement, namely, he planned to engage in conduct that, if carried out, would have resulted in the death of a police officer. Likewise, the defendant also seems to satisfy the culpable mental state governing the result element incorporated into prong (1), namely, he either desired to kill or was practically certain that his conduct would result in the death of a person (i.e., the unmarked building's occupants). Less clear (and also a separate question), however, is whether the defendant satisfies the culpable mental state governing the circumstance element incorporated into prong (2), namely, that he was aware of a substantial risk that he would kill a police officer (i.e., that one of the unmarked building's occupants was a police officer). Absent proof of such recklessness, which is required by the target offense, the defendant could not be convicted of attempting to murder a police officer. *See infra* note 8 (further discussing treatment of culpability as to circumstance elements).

[7] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(d) (culpability requirement defined). For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, attempt liability is subject to the same

Paragraph (a)(3) establishes an additional aspect of the conduct requirement governing attempt liability, namely, that the defendant's conduct must have been "reasonably adapted" to completion of the target offense.[9] This reasonable adaptation requirement is intended to limit attempt liability to those situations where there exists a basic relationship between the defendant's conduct and the criminal objective sought to be achieved.[10] Requiring the government to establish this basic relationship both limits the risk that innocent conduct will be misconstrued as criminal[11] and precludes convictions for inherently impossible attempts.[12]

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voluntariness requirement governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(d)(1) (voluntariness requirement also part of culpability requirement).

[8] Note that whereas the culpable mental state(s) governing the result element(s) of the target offense are subject to an additional principle of culpable mental state elevation under subsection (b), the culpable mental state(s) governing the circumstances element(s) of the target offense are not. *See infra* notes 23-25 and accompanying text (discussing RCC § 22E-301(b)). This means that, with respect to circumstance elements, it is both "[necessary and] sufficient that the actor possessed the degree of culpability required to commit the target offense." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.09(C) (6th ed. 2012).

So, for example, "if D would be guilty of statutory rape on proof that he was reckless as to the girl's age (the attendant circumstance), then he may be convicted of attempted statutory rape if he was reckless, but not if he was negligent or innocent, as to the girl's age." DRESSLER, *supra* note 8, at § 27.09(c). And, along similar lines, "[i]f the material element of the girl's age is one of strict liability, i.e., D may be convicted of statutory rape although he reasonably believed that she was old enough to consent, then he may also be convicted of attempted statutory rape although he lacked a culpable mental state as to this attendant circumstance." *Id.*; *see, e.g.,* Commentary on Haw. Rev. Stat. Ann. § 705-500 ("[I]t would be anomalous to hold that . . . the defendant's lack of intent with respect to an attendant circumstance precludes penal liability for the attempt," whereas "had the defendant succeeded, and the substantive crime been consummated, the defendant would be guilty of the substantive crime[.]"); DRESSLER, *supra* note 8, at § 27.05(d) ("There is relatively little case law on point, but virtually all commentators agree that the ordinary specific-intent requirement of attempt law should not apply to attendant circumstances[.]").

[9] RCC § 22E-301(a)(3)(B). This standard is drawn directly from D.C. Court of Appeals case law. *E.g., Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992); *Johnson v. United States*, 756 A.2d 458, 463 n.3 (D.C. 2000). However, numerous other jurisdictions employ comparable standards, whether through case law or by statute. *See* John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1902-04 (1999) (collecting relevant legal authorities); *compare* Model Penal Code § 5.05(2) (providing sentencing mitigation for an attempt that "is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section").

[10] *See, e.g.,* Edwin R. Keedy*, Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954) (where "the means employed are not reasonably adapted to carry out" the actor's intent to commit a crime, an attempt conviction is not justified "for in such case there can be no damage or danger of damage"); Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225, 273 (2014) ("[I]t is difficult to see how a state could justify criminalizing [an attempt which lacks this basic relationship.] Criminalizing attempted murder by means of implausible causal theories seems dangerously close to criminalizing the sincere hope that somebody dies accompanied by the slightest act in this direction—for example, a diary entry. And this kind of infringement on a person's thoughts is not only unjust; it is unconstitutional.").

[11] The risk of this kind of misconstruction is perhaps most obvious in the context of inherently impossible attempts. *See, e.g.,* Brodie, *supra* note 16, at 245-46 ("[I]t is difficult to be sure that the person using aspirin to kill actually wanted the victim to die; if he did, why did he use such objectively ineffective means? In determining the actor's intent, we start with his actions, and then swing across a canyon of inference, landing at his probable intent; if the actions are absurd, then the gap between action and intent

Paragraph (a)(3) also establishes that attempt liability under the RCC rests upon dangerous proximity to completion of the target offense. This addresses a complex issue of longstanding disagreement in the criminal law[13]: at what point has an actor, intending to commit an offense, made sufficient progress towards the completion of his or her

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becomes too wide to cross."). But it is also a more general concern for all incomplete attempts given that the "farther that one moves from the paradigm of a completed act," the "more tenuous the link between the defendant and the anticipated harm becomes and, hence, the more likely it is that false positives will be generated." Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 435 (2007).

In light of these concerns, it is has been observed (in one of the most cited federal appellate decisions on the contours of attempt liability) that:

> When the question before the court is whether certain conduct constitutes mere preparation which is not punishable, or an attempt which is, the possibility of error is mitigated by the requirement that the objective acts of the defendant evidence commitment to the criminal venture and corroborate the *mens rea*. To the extent that this requirement is preserved it prevents the conviction of persons engaged in innocent acts on the basis of a *mens rea* proved through speculative inferences, unreliable forms of testimony, and past criminal conduct.

United States v. Oviedo, 525 F.2d 881, 884–85 (5th Cir. 1976) (internal citation omitted); *see, e.g.,* Model Penal Code § 5.01(2) (incorporating strong corroboration requirement, which provides that an actor's conduct may not "constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose.").

[12] Inherent impossibility is an issue in attempt prosecutions where the defendant "employs means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5(a)(4); *see, e.g.,* Preis, *supra* note 20, at 1904 (recognition of inherent impossibility defense most strongly supported by relevant case law, statutes, and commentary); *see also* Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 564 (2008) (attempt liability should entail proof that the defendant was "a substantial threat to the interests that the law declaring X to be an offense seeks to protect"). Conduct of this nature would not be "reasonably adapted" to completion of the target offense under subparagraph (a)(3)(B), and, therefore, could constitute a (failure of proof) defense to attempt liability under the RCC. In practice, however, it will take more than a "routine miscalculation of attendant circumstances, as in cases of factual or hybrid [] impossibility," to call into question the necessary relationship between the defendant's conduct and the criminal objective sought to be achieved. Preis, *supra* note 19, at 1904. Rather, only "an exceedingly unreasonable miscalculation of circumstances" would be relevant (insofar as impossibility is concerned) to the determination of whether the reasonable adaptation standard is met. *Id.*

So, for example, the fact that the defendant in an attempted murder prosecution tried to kill the victim by pulling the trigger on a broken firearm that she mistakenly believed to be operable would not call into question whether the defendant's conduct was reasonably adapted to the completion of murder. In contrast, the fact that a defendant in an attempted murder prosecution tried to kill the victim by shooting a fully functional firearm at a voodoo doll with the victim's picture attached to it would be relevant—and ultimately preclude the attachment of attempt liability under subparagraph (a)(2)(B). *See, e.g.,* Keedy, *supra* note 20, at 470 (where the defendant "invokes witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result") (collecting authorities).

[13] *See, e.g.,* O.W. HOLMES, JR., THE COMMON LAW 68 (1881) ("Eminent judges" have long "been puzzled where to draw the line" of where an attempt begins, "or even to state the principle on which it should be drawn . . . ."); *Mims v. United States*, 375 F.2d 135, 148 (5th Cir. 1967) ("Much ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparations ends and attempt begins").

criminal objective to be subject to attempt liability?[14] Under RCC § 22E-301(a)(3)(A), the requisite line between preparation and perpetration is crossed when an actor engages in conduct that is "dangerously close to completing that offense."[15] This threshold does not entail proof that the actor carried out every part of his or her criminal scheme.[16]

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[14] At the heart of the issue is the fact that the intentional perpetration of a crime "is the result of a six-stage process," which has been described accordingly:

> First, the actor conceives the idea of committing a crime. Second, she evaluates the idea, in order to determine whether she should proceed. Third, she fully forms the intention, i.e., resolves, to go forward and commit the crime. Fourth, she prepares to commit the crime, for example, by obtaining any instruments necessary for its commission. Fifth, she commences commission of the offense. Sixth, she completes her actions[.]

DRESSLER, *supra* note 8, at § 27.01; *see* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 3.3.2 (2000).

It is well established that attempt liability is not supportable during the first three stages of the process. DRESSLER, *supra* note 8, at § 27.01 ("Until the third step occurs, the actor lacks a mens rea," and "[e]ven after the mens rea is formed, she is not punished . . . for thoughts alone."). Conversely, it is equally well established that once a person reaches the sixth stage, and has carried out all that he or she plans to do in order to consummate an offense, attempt liability is appropriate. *See, e.g., United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) (all who engage in last proximate act may be subject to attempt liability); Model Penal Code § 5.01 cmt. at 321 n.97 ("No jurisdiction operating within the framework of Anglo-American law requires that the last proximate act occur before an attempt can be charged."). The controversy over the conduct requirement governing criminal attempts thus focuses on "[a]ctivity in the middle ranges, i.e., after the formation of the *mens rea* but short of attainment of the criminal goal." DRESSLER, *supra* note 8, at § 27.01; *see, e.g.,* FLETCHER, *supra* note 10, at § 3.3.2 (having "br[oken] from the moorings of the 'last step,' it proves harder than expected to find a secure anchor in the ebb and flow of events leading from preparation to consummation").

[15] The dangerous proximity standard is rooted in the writings of former U.S. Supreme Court Justice Oliver Wendell Holmes, and has subsequently been adopted by many jurisdictions, including the District of Columbia. *See, e.g., Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978) ("The act [necessary for attempt liability] must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained. This 'dangerous proximity' test, formulated by Justice Holmes, does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended.") (quoting CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 4.04 (2d ed. 1972)); *Com. v. Bell*, 455 Mass. 408, 425 (2009) (discussing genesis of dangerous proximity standard); FLETCHER, *supra* note 10, at § 3.3.2-.4 (discussing relevant policy and philosophical considerations).

Explicitly, the dangerous proximity standard addresses *incomplete attempts*, which involve situations where an attempt fails because external events frustrate a person from carrying out all that he or she planned to do. *See* Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 901 n.59 (2007) ("An incomplete attempt would be one where the shot has not yet been fired, but the actor has done enough to be liable for an attempt—say, buying the gun, loading it, pursuing the victim, aiming and preparing to fire."). Implicitly, however, this standard also covers *complete attempts*, which involve situations where the person has, in some sense, done everything he or she plans to do, yet the target offense is not consummated by virtue of an accident on behalf of the person. *Id.* ("A classic completed attempt is the shoot-and-miss scenario, where no further act is need beyond firing the shot; the attempt fails only because of the inaccuracy of the shot.").

[16] So, for example, an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under this standard. *See Jones*, 386 A.2d at 312 (upholding attempt liability on such facts). Along similar lines, the dangerous proximity standard could also be established in the following illustrative contexts: (1) the attempted murder prosecution of a person whose pistol accidentally slips from that person's hand and breaks as he or she, with the intent to kill, is walking towards the front door of the victim's residence; (2) the attempted felony assault prosecution of a person who

However, it does require that the actor have taken more than a mere "substantial step" towards completion of the target offense.[17] In evaluating whether the dangerous proximity standard is met, the focus should be placed on closeness to completion

suffers a debilitating heart attack minutes before he or she plans to walk across the street and repeatedly beat, with the intent to cause significant bodily injury, a neighbor mowing her front lawn; and (3) the attempted arson prosecution of a person who is arrested at the site of a building she intends to burn down upon exiting her vehicle with flammable materials in her trunk.

[17] This means that conduct which satisfies the Model Penal Code's widely adopted substantial step standard may nevertheless fail to provide the basis for attempt liability under section 301. *See, e.g.,* Model Penal Code § 5.01(1) (attempt liability where, *inter alia*, defendant engages in an "act or omission constituting a *substantial step* in a course of conduct planned to culminate in his commission of the crime") (italics added); *id.* § 5.01(2) (enumerating situations that, "if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law" under the "substantial step" standard). Indeed, the drafters of the Model Penal Code developed the substantial step standard for the express purpose of "broadening liability" beyond that provided for under common law tests such as the dangerous proximity standard. Model Penal Code § 5.01, cmt. at 294; *see id*. at 333 (enumerated situations in subsection (2) will support "convictions on the basis of circumstances that courts have considered insufficient").

At the heart of the Model Penal Code's expansion of attempt liability was a belief that "[c]onduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others." *Id.* at 294, 331. In accordance with this line of reasoning, the drafters of the Model Penal Code argued that attempters present "a special danger," who must "be made amenable to the corrective process that the law provides," without regard to proximity to completion. *Id.* at 294, 331.

These policy arguments are "a reflection of the so-called rehabilitative ideal," which has been described as a "future-oriented predictively based theory of guilt and of punishment" under which "personal dangerousness justifies the decision to prohibit attempts equally as much as it justifies sentencing and correctional decisions." Paul R. Hoeber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377, 384 (1986). While popular during the mid-twentieth century, the "rehabilitative ideal, of which the concept of dangerousness is a cornerstone, has [more] recently undergone a rather painful process of demystification." Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231, 235 (1978). That is, "[t]he optimistic view . . . that we are able to diagnose an individual's dangerous propensities and to treat him effectively . . . has given way to widespread skepticism." *Id.*

This skepticism is clearly reflected in, for example, the recently completed Model Penal Code Sentencing Project, which retreats from the dangerousness-based rationales at the heart of many of the original Code's provisions (including the substantial step standard), based upon a recognition that:

> There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders. Any sentencing policy based on predictions of future misconduct will yield a significant number of "false positives"—that is, individuals who have been classified as dangerous when, in fact, they would not reoffend if released or would commit only minor crimes.

Model Penal Code: Sentencing § 6.06 PFD (2017); *see, e.g.,* Model Penal Code: Sentencing § 1.02(2) TD No 1 (2007) ("[I]t is not reasonably feasible to pursue the goal of incapacitation of dangerous offenders through the confinement of individuals who pose little or no risk of serious reoffending."); Hoeber, *supra* note 13, at 386 (questioning whether the MPC drafters "can explain why personal dangerousness should nevertheless continue to be thought an appropriate basis for criminalizing attempts").

considered in light of "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension."[18]

Paragraph (a)(3) also codifies an alternative formulation of the dangerous proximity standard, which is articulated in terms of the actor's view of the situation. This reframing addresses yet another complex criminal law issue of longstanding disagreement[19]: is impossibility—i.e., the fact that the target offense cannot be consummated under the circumstances due to a mistake on behalf of the defendant—a defense to attempt liability?[20] The RCC largely answers this question in the negative

[18] *Com. v. Kennedy*, 170 Mass. 18, 22 (1897) (Holmes, J.); *see, e.g.,* HOLMES, *supra* note 11, at 68 ("[The] considerations [central to attempt liability are] the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."). So, for example, in a prosecution for attempted murder by poisoning:

> Any unlawful application of poison is an evil which threatens death according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison, even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes.

Kennedy, 170 Mass. at 22; *see, e.g.,* FLETCHER, *supra* note 10, at § 3.3.2 (discussing relevant factors).

[19] *See, e.g.,* DRESSLER, *supra* note 8, at § 27.07 ("Many pages of court opinions and scholarly literature have been filled in a largely fruitless effort to explain and justify the difference between factual and legal impossibility. Perhaps no aspect of the criminal law is more confusing and confused than the common law of impossible attempts"); Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 789 (1940) ("Whoever has speculated on criminal attempt will agree that the problem is as fascinating as it is intricate.").

[20] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense and engaged in significant conduct, but nevertheless argue that impossibility of completion should by itself preclude the imposition of attempt liability. *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(a) (3d ed. Westlaw 2019); DRESSLER, *supra* note 8, at § 27.07. In resolving this claim, there are four general categories of impossibility that might be considered for evaluative purposes (i.e., these are not analytically perfect distinctions).

The first category is *pure factual impossibility*, which arises when a person whose intended end constitutes a crime is precluded from consummating that crime because of circumstances unknown to her or beyond her control. Illustrative scenarios include: (1) a pickpocket who is unable to consummate the intended theft because, unbeknownst to her, she picked the pocket of the wrong victim (namely, one whose wallet is missing); and (2) a murderer-for-hire who is unable to complete the job because, unbeknownst to him, his murder weapon malfunctions.

The second category is *pure legal impossibility*, which arises where a person acts under a mistaken belief that the law criminalizes his or her intended objective. For an illustrative scenario, consider the attempted statutory rape prosecution of a 44-year-old male who: (1) has consensual sexual intercourse with someone he knows to be 17 years of age; (2) in a jurisdiction that sets the age of consent for intercourse at 16; (3) while mistakenly believing the age of consent in that jurisdiction to be 18. *See* DRESSLER, *supra* note 8, at § 27.07 ("This is a mirror image of the usual mistake-of-law case, in which an actor believes that her conduct is lawful, but it is not. [In this context,] "D believed that he was violating a law, but he was wrong," [thereby raising the following question:] "If ignorance of the law does not ordinarily exculpate, may it nonetheless inculpate?").

The third category is *hybrid impossibility*, which arises where an actor's goal is illegal, but commission of the offense is impossible due to a factual mistake regarding the legal status of some attendant circumstance that constitutes an element of the charged offense. Illustrative scenarios include: (1) the prosecution of a defendant who sends illicit photographs to a person he believes to be an underage female, but who is actually an undercover police officer, for attempted distribution of obscene material to a

through RCC § 22E-301(a)(3)(B), which authorizes the fact-finder to evaluate whether the dangerous proximity standard is met based on "the situation . . . as the person perceived it."[21] Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.[22]

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minor; and (2) the prosecution of a defendant who purchases what he believes to be stolen property in a sting operation, but which property is not in fact stolen, for attempted receipt of stolen property.

The fourth category of impossibility is *inherent impossibility*, which arises where the actor "employs means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5(a)(4). Inherent impossibility can take the form of pure factual impossibility, such as, for example, where a person attempts to kill by a fantastic superstitious practice or by throwing red pepper in the eyes of another. And it can also take the form of hybrid impossibility, such as, for example, where a person, with intent to kill a person, shoots at what is obviously a manikin or statute. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244-45 (1995) (common denominator underlying inherent impossibility is that the "attemptor's actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances").

[21] *See, e.g.,* Model Penal Code § 5.01(1)(c) ("[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person engages in conduct that would satisfy the *actus reus* requirement "*under the circumstances as he believes them to be*[.]"). Note that the phrase "the situation [] as the person perceived it," for purposes of the subjective approach incorporated into RCC § 22E-301(a)(3)(A)(ii), does *not* include a defendant's (inculpatory) mistaken belief that his or her (innocent) conduct is criminalized. *See infra* note 18 (explaining that the legality principle precludes convicting someone of an imaginary crime, and, therefore, pure legal impossibility remains a viable theory of defense under the RCC).

[22] Specifically, the subjective approach incorporated into RCC § 22E-301(a)(1)(B) renders pure factual and hybrid impossibility claims immaterial. *See supra* note 16 (defining these categories). For example, under the RCC it would not be a defense to attempted murder that: (1) the would-be victim was already dead, provided that the defendant mistakenly believed the person to be alive at the moment he pulled the trigger; or that (2) the murder weapon was empty, provided that the defendant mistakenly believed it be loaded. Nor would it preclude liability for attempted theft under the RCC that: (1) the owner of the target property consented to its taking, provided that the defendant mistakenly believed it to be absent; or that (2) the safe targeted by the defendant is empty, provided that the defendant mistakenly believed it be filled with valuable objects. *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019) ("The modern trend, evident in most jurisdictions, is to reject both [forms of] impossibility as defenses."); DRESSLER, *supra* note 8, at § 27.07 (same).

In contrast, pure legal impossibility remains a viable theory of defense under the RCC. *See supra* note 16 (defining this category). However, this does not hinge on RCC § 22E-301(a)(3)(A)(ii), or any other provision in section 301. *See generally* Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles*, 12 LAW & PHIL. 33 (1992). Rather, the "underlying basis for acquittal is the principle of legality," which "provides that we should not punish people—no matter culpable or dangerous they are—for conduct that does not constitute the charged offense at the time of the action." DRESSLER, *supra* note 8, at § 27.07; *see* Model Penal Code § 5.01 cmt. at 318 ("It is of course necessary that the result desired or intended by the actor constitute a crime. If . . . the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.").

For example, "it is not a crime to throw even a [District of Columbia] steak into a garbage can." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 595 (2d ed. 1960). So if after a loss against the Washington Nationals, the Oriole Bird—the Baltimore Orioles mascot—places a local District steak in the garbage, he is not guilty of committing any offense. Nor could the Oriole Bird be convicted of an attempt to commit an imaginary offense of this nature although he honestly believed such conduct to be prohibited by the D.C. Code. *E.g.,* DRESSLER, *supra* note 8, at § 27.07 ("Just as a person may not

Subsection (b) provides additional clarity concerning the culpable mental state requirement governing a criminal attempt as it relates to the result elements (if any) of the target offense. Whereas the prefatory clause of subsection (a) generally clarifies that an attempt conviction entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the "person must intend to cause all result elements required for that offense."[23] The latter requirement incorporates a principle of culpable mental state elevation applicable whenever the target offense is comprised of a result that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[24] To satisfy this threshold culpable mental state

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ordinarily escape punishment on the ground that she is ignorant of a law's existence, it is also true that we cannot punish people under laws that are purely the figments of their guilty imaginations."). Along similar lines (and perhaps more realistically), an actor is not guilty of a criminal attempt if, unknown to her, the legislature has repealed a statute that she believes that she is violating. "For example, if D attempts to sell 'bootleg' liquor after the repeal of the Prohibition laws, she is not guilty of an attempt even though she is unaware of their repeal." *Id.*; *see, e.g.,* ROBINSON, *supra* note 18, at 1 CRIM. L. DEF. § 85 (no attempt liability for pure legal impossibility).

Inherent impossibility also remains a viable (if exceedingly limited) theory of defense under the reasonable adaptation standard codified in subparagraph (a)(3)(B). *See infra* note 22 and accompanying text.

[23] *See, e.g.,* Model Penal Code § 5.01(1)(b) ("[W]hen causing a particular result is an element of the crime," a person is guilty if he "does or omits to do anything with the purpose of causing or *with the belief* that it will cause such result without further conduct on his part[.]") (italics added); *see also* DRESSLER, *supra* note 8, at § 27.09(c) (this provision of the Model Penal Code, while explicitly addressing complete attempts, "implicitly" applies to incomplete attempts) (citing Model Penal Code § 5.01 cmt. at 305 n.17 (paragraphs (b) and (c) are to be "read in conjunction with [one another]")); *Cf.* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 n.301 (1983) ("'Belief' is the conditional form of 'know,' [which] is required here because in an impossible attempt the actor cannot 'know' that he will cause the result, since he in fact cannot.").

Note that RCC § 22E-301(b) expresses a principle of *intent* elevation, not *purpose* elevation. This means that (for example) if "the actor's purpose were to demolish a building and, knowing that persons were in the building and that they would be killed by the explosion, he nevertheless detonated a bomb that turned out to be defective, he could be prosecuted for attempted murder even though it was no part of his purpose that the inhabitants of the building would be killed." Model Penal Code § 501 cmt. at 305 (For both purposeful and knowing attempts, "a deliberate choice is made to bring about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause this result to occur. The absence in one instance of any desire for the forbidden result is not, under these circumstances, a sufficient basis for differentiating between the two types of conduct involved."); Commentary on Haw. Rev. Stat. Ann. § 705-500 (same).

[24] Which is to say, subsection (b) dictates that, "[w]here criminal liability rests on the causation of a prohibited result, the actor must have an intent to achieve that result even though violation of the substantive offense may require some lesser *mens rea*." Commentary on Haw. Rev. Stat. § 705-500 (quoting Prop. Mich. Rev. Cr. Code, comments at 82). This principle of culpable mental state elevation *does not* preclude the government from charging attempts to commit target offenses subject to non-intentional culpable mental states. However, to secure an attempt conviction for such offenses, proof that the accused acted with the intent to cause the required results is necessary. *Id.* ("A person charged with the substantive crime of manslaughter may be liable as a result of [] recklessness causing death, but the same recklessness would not be sufficient if the victim did not die and the actor were only charged with attempt; here, the state would have to show an intent to achieve the prohibited end result, death of the victim.").

This limitation on reckless and negligent attempt liability (as to result elements) precludes a wide range of endangerment activities, including, perhaps most notably, risky driving, from being treated as

requirement, the government must prove that the defendant acted with either a *practically certain belief* [25] that the prohibited result would occur, or, alternatively, that the defendant *consciously desired* to cause that result.[26]

Subsection (c) clarifies the relationship between a criminal attempt and the target offense. Specifically, this provision establishes that the government may, as an alternative to proving the requirements set forth in subsections (a) and (b), secure a conviction for an attempt by proving that the defendant satisfies the elements of the target offense itself.[27] In that case, however, subsection (c) also establishes that the accused may not be convicted of both the completed offense and an attempt to commit the same.[28]

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attempts to commit serious crimes (e.g., homicide). *See, e.g.,* Model Penal Code § 5.01, cmt. at 304 ("[T]he scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility."); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1033 (1998) (observing that such treatment would open the "floodgates to attempt liability").

To illustrate, consider how reckless attempt liability could authorize many instances of consciously risky driving to be charged as multiple counts of attempted manslaughter: (1) as to *actus reus*, the reckless driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others; and (2) as to *mens rea*, that same driver has consciously disregarded a substantial risk of death as to every pedestrian he or she passes on the road. Along similar lines, acceptance of negligent attempt liability could transform many instances of inadvertently risky driving into multiple counts of attempted negligent homicide along similar lines: (1) as to a*ctus reus*, the negligent driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others; and (2) as to *mens rea*, that same driver should have been aware that he or she was creating a substantial risk of death as to every pedestrian he or she passes on the road.

Subsection (b), by requiring proof of (at minimum) intent as to result elements, rejects these recklessness and negligence-based theories of attempt liability. *See, e.g.,* Model Penal Code § 5.01(1)(b) (excluding such theories through belief culpability threshold); LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.3 ("Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed."); Commentary on Haw. Rev. Stat. § 705-500 ("Reckless driving . . . does not constitute attempted manslaughter."); *State v. Holbron*, 904 P.2d 912, 920, 930 (Haw. 1995) ("We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter."). And, according to the same reasoning, subsection (b) would also preclude attempt liability premised on the aggravated forms of recklessness at issue in depraved heart murder and aggravated assault. *See, e.g.,* DRESSLER, *supra* note 8, at § 27.09 ("For example, if D blindfolds herself and fires a loaded pistol into a room that she knows is occupied, she may be convicted of murder if someone is killed. Such a killing, although unintentional, is malicious (the mens rea of murder), because it evinces a reckless disregard for the value of human life. However, if D's reckless act does not kill anyone in the room, almost all jurisdictions would rule that she is not guilty of attempted murder."); Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. Colo. L. Rev. 879, 882 (2007) ("In nearly all jurisdictions to consider the question [of whether attempted enhanced reckless murder exists], courts have held that no such offense exists.").

[25] RCC § 22E-206(c)(1) (definition of intent as to result elements).

When formulating jury instructions for an attempt to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance element), the term "intent," as defined in RCC § 22E-206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* RCC § 22E-206(b), Explanatory Note.

[26] RCC § 22E-206(a)(1) (definition of purpose as to result elements).

[27] This alternative basis of attempt liability serves three related functions. First, it clarifies that failure to consummate the target offense is *not* an element of an attempt. *See, e.g., Richardson v. State*, 390 So. 2d 4, 5 (Ala. 1980) ("Although the crime of attempt is sometimes defined as if failure were an essential element, the modern view is that a defendant may be convicted on a charge of attempt even if it is shown that the

Subsection (d) establishes the penalties for criminal attempts. Paragraph (d)(1) states the default rule governing the punishment of criminal attempts under the RCC: a fifty percent decrease in the maximum "punishment" applicable to the target offense.[29]

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crime was completed.") (quoting LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5). Second, it avoids any procedural complications that might result from the fact that a criminal attempt is not always a lesser-included offense of the target offense in light of the principle of culpable mental state elevation set forth in subsection (b). *See, e.g.,* WAYNE R. LAFAVE & GERALD ISRAEL, 6 CRIM. PROC. § 24.8(e) (4th ed. Westlaw 2017) ("When attempt carries a more demanding *mens rea* than a completed offense, it may not be considered a lesser included offense.") (citing, *e.g., People v. Bailey*, 54 Cal.4th 740 (2012)). And third, it provides greater flexibility for reaching appropriate sentencing outcomes in individual cases. *Cf. Com. v. LaBrie*, 473 Mass. 754, 764 (2016) ("[R]equiring the government to prove failure as an element of attempt would lead to the anomalous result that, if there were a reasonable doubt concerning whether or not a crime had been completed, a jury could find the defendant guilty neither of a completed offense nor of an attempt.") (quoting *United States v. York*, 578 F.2d 1036, 1039 (5th Cir. 1978)).

[28] *See, e.g.,* Model Penal Code §§ 1.07(1)(a), (1)(b), and (4)(b) (barring convictions for general inchoate offense and target offense); ROBINSON, *supra* note 17, at 1 CRIM. L. DEF. § 84 ("It 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."). This merger principle is similarly established in section 215. *See* RCC § 22E-215(a)(6) (barring multiple convictions for an attempt or solicitation to commit an offense and the target offense when arising from the same course of conduct).

[29] *See, e.g.,* DRESSLER, *supra* note 8, at § 27.04(b)(1) ("At common law and in most jurisdictions today, an attempt to commit a felony is considered a less serious crime and, therefore, is punished less severely, than the target offense."); LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5(c) (modern attempt legislation typically grades attempts at "one degree below the object crime.") (collecting statutes). This penalty reduction is to be contrasted with the Model Penal Code approach, which grades most criminal attempts as "crimes of the same grade and degree as the most serious offense which is attempted." Model Penal Code § 5.05(1); *but see id.* ("[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree.").

The drafters of the Model Penal Code adopted this policy of attempt penalty equalization—which was a stark departure from prevailing common law trends—on the basis of the same dangerousness-based rationale that motivated their endorsement of the substantial step standard. *See, e.g.,* Model Penal Code § 5.05, cmt. at 490 ("To the extent that sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan."). However, as discussed *supra* note 13, this rationale for punishment has been called into question by many on empirical grounds, including, perhaps most notably, by the drafters of the recent Model Penal Code Sentencing Project. *See, e.g.,* Model Penal Code: Sentencing § 6.06 PFD (2017) ("There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders.").

The (original) Model Penal Code's equalization of attempt penalties also conflicts with a strong intuitive sense, captured by public opinion surveys, that resultant harm should matter for grading purposes. *See, e.g.,* Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUDIES 409, 429-30 (1998) (failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades" by lay jurors, while the earlier the defendant's plans are frustrated, the greater this "no harm" discount). This may explain why only a minority of "modern American codes that are highly influenced by the Model Penal Code" equalize penalties for criminal attempts. Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 320 (1994) ("Nearly two-thirds of American jurisdictions have adopted codes that have been heavily influenced by the Model Penal Code, but less than 30% of these have adopted the Code's inchoate grading provision or something akin to."). And it may also provide at least a partial explanation for why, "even when the legislature imposes similar sanctions for attempts and completed crimes, in practice the punishment for an attempt is less than the punishment for a consummated crime." Omri Ben-Shahar & Alon Harel, *The*

"Punishment," for purposes of this paragraph, should be understood to mean: (1) imprisonment and fine if both are applicable to the target offense; (2) imprisonment only if a fine is not applicable to the target offense; and (3) fine only if imprisonment is not applicable to the target offense. Paragraph (d)(2) thereafter lists those offenses that are exempt from this default rule and specifies the punishment for each exception.[30]

Relation to Current District Law. RCC § 22E-301 clarifies, improves the proportionality of, and fill in gaps in the District law of criminal attempts.

The D.C. Code provides for attempt liability in a variety of ways. Most prominently, the D.C. Code contains a general attempt penalty provision that applies to a relatively broad group of offenses.[31] Additionally, the D.C. Code contains a variety of semi-general attempt penalty provisions, which create attempt liability for narrower groups of offenses with related social harms.[32] Finally, some specific offenses in the D.C. Code individually provide for attempt liability by incorporating the term "attempt" as an element of the offense.[33]

The District's recognized "patchwork of attempt statutes"[34] presents two main problems. The first is that it fails to clearly communicate the elements of a criminal attempt. In no place, for example, does the D.C. Code define the term attempt. This statutory silence has effectively delegated to District courts the responsibility to establish the contours of attempt liability. Over the years, the DCCA has issued numerous opinions and proffered a variety of statements relevant to determining the contours of attempt liability under District law. The case law in this area reflects the piecemeal evolution of doctrine over more than a century: it is sometimes ambiguous, occasionally internally inconsistent, and has never been clearly synthesized into a single analytical framework. Nonetheless, a holistic reading of District authority reveals basic and fundamental principles governing the contours of attempt liability. Consistent with the interests of clarity and consistency, RCC § 22E-301 translates these principles into a detailed statutory framework.

The second main problem reflected in the District's attempt statutes is that they lack a consistent grading principle. For example, some District attempts are subject to

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Economics of the Law of Criminal Attempts, 145 U. PA. L. REV. 299, 319 n.44 (1996) (citing GLANVILLE WILLIAMS, TEXTBOOK ON CRIMINAL LAW 404 (2d ed. 1983)).

[30] Many jurisdictions that subject attempt liability to generally applicable grading principles statutorily recognize exceptions for particular attempt offenses or categories of attempt offenses. *See, e.g.,* LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5(c) (observing "considerable variation" regarding the "authorized penalties for attempt," which includes routine departures from generally applicable grading principles); Model Penal Code § 5.05(1) ("[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree."); Robinson, *supra* note 29, at 320 n.67 (nearly all jurisdictions that statutorily equalize punishment for attempts recognize some exceptions); N.C. Gen. Stat. Ann. § 14-2.5 (applying standard attempt penalty discount "[u]nless a different classification is expressly stated").

[31] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished . . . .").

[32] *E.g.*, D.C. Code § 22-1837 (setting forth attempt penalties for the human trafficking related offenses); D.C. Code § 22-3018 (setting forth attempt penalties for the sexual offenses).

[33] *E.g.*, D.C. Code § 22-2601 (prison escape); D.C. Code § 22-951(c)(1)(a) (forcible gang participation).

[34] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

statutory maxima that are many orders of magnitude below the statutory maxima governing the completed offense. Other District attempts, in contrast, are subject to the same statutory maxima governing the completed offense. And still other District attempt statutes are subject to statutory maxima pegged to, but half as severe as, the statutory maxima applicable to the completed offense. Viewed collectively, then, the D.C. Code manifests at least three fundamentally different patterns in how it grades attempts, without any discernible rationale for the variances. This produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate. Consistent with the interests of consistency and proportionality, RCC § 22E-301 changes District law by adopting a uniform approach to grading attempts at one half the severity of the completed offense.

A more detailed analysis of District attempt law and its relationship with RCC § 22E-301 is provided below. It is organized according to five main topics: (1) the culpable mental state requirement governing as attempt; (2) the definition of an incomplete attempt; (3) impossible attempts; (4) the relationship between an attempt and the completed offense; and (5) attempt penalties.

RCC §§ 22E-301(a) & (b): Relation to Current District Law on Culpable Mental State Requirement. Subsections (a) and (b) codify, clarify, and fill in gaps reflected in District law governing the culpable mental state requirement of an attempt.

The DCCA has addressed the culpable mental state requirement of an attempt on a handful of occasions. While unclear and, in at least one important sense, contradictory, pertinent case law generally supports two propositions: (1) a principle of culpable mental state elevation applies to the results of the target offense when charged as an attempt; and (2) a principle of culpable mental state equivalency applies to the circumstances of the target offense when charged as an attempt. Subsections (a) and (b) respectively codify each of these principles.

Most of the DCCA case law relevant to the culpable mental state of an attempt focuses on whether a principle of culpable mental state elevation applies to the results of the target offense. On this issue, there exists two different lines of cases: one which points towards a principle of culpable mental state elevation and another in support of a principle of culpable mental state equivalency. This "inconsistency" in District law was recently recognized in, and summarized by, Judge Beckwith's concurring opinion in Jones v. United States.[35] Three aspects of Judge Beckwith's analysis, abstracted in the accompanying footnote, are worth highlighting.[36]

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[35] 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*).

[36] Judge Beckwith observes, in relevant part:

> In *Sellers v. United States*, 131 A.2d 300 (D.C. 1957), the Municipal Court of Appeals for the District of Columbia defined the elements of attempt as follows: "any overt act done with intent to commit the crime and which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime." *Id.* at 301 (quoting 14 Am. Jur., Criminal Law, § 65, p. 813). Thirty years later, in *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987), this court upheld the appellant's conviction for attempted taking property without right after concluding that the record contained sufficient evidence that she intended to steal a

First, although the discussion in Judge Beckwith's concurring opinion is framed around whether an attempt requires proof of "a specific intent to commit the unlawful

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> dress because of her "apparent dissemblance in folding the blue dress and concealing it inside her sweater, as well as her change of story about what she had done with the dress." *Id.* at 1375. Appellant's specific intent to commit a crime was central to the court's holding, even though the underlying crime required only general intent to commit the act constituting the crime. *See Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975).
>
> Then in *Ray v. United States*, 575 A.2d 1196 (D.C. 1990), we stated that "[e]very completed criminal offense necessarily includes an attempt to commit that offense." *Id.* at 1199 (holding that appellant was guilty of the "attempted-battery" type of assault even though the evidence showed a completed battery). In reaching this conclusion, *Ray* did not grapple with *Wormsley's* premise that an attempt requires specific intent. We later applied *Ray* to an attempted threats charge . . . in *Evans v. United States*, 779 A.2d 891 (D.C. 2001), holding that the government could charge attempted threats "even though it could prove the completed offense." *Id.* at 894. In other words, the government needed only to prove general intent to sustain a conviction for attempted threats. *See also Jenkins v. United States*, 902 A.2d 79, 87 (D.C. 2006) (noting that *Evans* analyzed threats as a general intent crime). While the court in *Evans* acknowledged *Wormsley's* holding on attempt, *Wormsley* did not control its analysis. Relying principally on *Ray*, the court explained that "[o]ur decisions have repeatedly held that 'a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'" *Evans*, 779 A.2d at 894 (quoting *Ray*, 575 A.2d at 1199).
>
> In *Smith v. United States*, 813 A.2d 216 (D.C. 2002), this court recognized the difficulty of the attempt issue, stating that "[t]o speak of 'specific intent' in the context of a prosecution for attempted anything is, in our view, somewhat misleading." *Id.* at 219. The court reiterated *Wormsley*'s premise that "[t]he only intent required to commit the crime of attempt is an intent to commit the offense allegedly attempted." *Id.* (citing *Wormsley*, 526 A.2d at 1375). But the court also stated that "[o]ur decision in *Evans* necessarily means that when an attempt is proven by evidence that the defendant committed the crime alleged to have been attempted, the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime." *Id.* (citing *Evans*, 779 A.2d at 894). The court then held that there was sufficient evidence of attempted second-degree cruelty to children when the appellant "intended to commit the acts which resulted in . . . the grave risk of injury" to the child, even though he did not intend to injure the child. *Id.* at 219–20.
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> Yet while *Evans* continues to feature prominently in our case law, other recent cases have required specific intent for an attempt conviction. For example, in *Brawner v. United States*, 979 A.2d 1191 (D.C. 2009), the court held that for an attempted escape conviction, the government must prove "the mental state of intending to commit the underlying offense," that is, "intent to escape," even though a charge for a completed escape did not involve such intent. *Id.* at 1194. And in *Dauphine v. United States*, 73 A.3d 1029 (D.C. 2013), this court held that animal cruelty is a general intent crime but nonetheless stated that "where the government charges an individual with attempt, as it did here, the government must demonstrate that the defendant possessed the intent to commit the offense allegedly attempted." *Id.* at 1033 (citation and internal quotation marks omitted). We held that the record contained sufficient evidence that the "appellant acted with intent to commit the crime of cruelty to animals," and we affirmed her conviction. *Id.*
>
> The *Wormsley-Brawner-Dauphine* line of cases requiring the government to prove specific intent to commit the crime intended appears to be in direct tension with the *Evans-Smith* line of cases that does not require such proof . . .

124 A.3d at 133–34.

act,"[37] the primary import of the relevant case law she discusses relates to whether the culpable mental state governing the results of the target offense must be elevated to one of "intent" when charged as an attempt. So, for example, while proof of recklessness as to the alternative results of second-degree child cruelty[38]—actually harming a child or creating a grave risk of harm to a child—will suffice to satisfy the completed offense, must the government prove an intent to cause such harm or, at the very least, an intent to create a risk of such harm in order to secure a conviction for attempted second-degree child cruelty?[39]

Second, although DCCA case law points in different directions on this issue, the reading that best synthesizes the relevant authorities is that a principle of culpable mental state elevation applies to attempts, but that this principle is subject to an exception when the government proceeds on a theory that the offense attempted was actually completed. In support of this reading is the fact that the reported opinions that involve traditional attempt prosecutions (i.e., decisions implicating conduct that falls short of completion)—what Judge Beckwith refers to as the *Wormsley-Brawner-Dauphine* line of cases—seem to favor a principle of culpable mental state elevation, while the conflicting reported opinions—what Judge Beckwith describes as the *Smith-Evans* line of cases—involve attempt prosecutions premised upon proof that the target offense was actually completed.[40]

In the latter context, it is not surprising that the DCCA has held that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime."[41] "To hold otherwise," after all, "would create the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime."[42] What the *Smith-Evans* line of cases does not discuss, however, are the consequences of this position—separate and apart from ensuring that "a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'"[43]

For example, if the culpable mental state requirement governing the results of an attempt is identical to that of the target offense, then it means that the government may charge, and a defendant may be convicted of, reckless or negligent attempts—such as, for

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[37] *Jones*, 124 A.3d at 132-33 (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)).
[38] *See* D.C. Code § 22-1101(b)(1) ("A person commits the crime of cruelty to children in the second degree if that person intentionally, knowingly, or recklessly . . . Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child . . . .").
[39] *See generally Smith v. United States*, 813 A.2d 216 (D.C. 2002).
[40] *Compare Jones*, 124 A.3d at 134 n.4 ("As the elements of a crime are determined by what offense the government charges, not by what evidence it presents at trial, *Evans* and *Smith* cannot be distinguished from *Wormsley, Brawner,* and *Dauphine* on the ground that the government proved a completed offense in the former cases and an attempted offense in the latter."), *with* 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."). For further discussion of the relevant issues, see *infra* Commentary on RCC § 22E-301(b).
[41] *Smith*, 813 A.2d at 219.
[42] *Id.*; *see, e.g.*, *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Jones*, 124 A.3d at 129-31.
[43] *Evans,* 779 A.2d at 894 (quoting *Ray,* 575 A.2d at 1199).

example, attempted depraved heart murder, attempted involuntary manslaughter, or attempted vehicular homicide. (Indeed, under the *Smith-Evans* view, wherein the government need only prove that the defendant "intended to commit the acts" that would constitute the offense, even strict liability attempts would seem to provide a viable basis for liability.[44]) However, one does not see such theories of liability, which would entail proof that the defendant recklessly or negligently attempted to kill, being raised by the government or accepted by District courts—indeed, the *Jones* court itself appears to tacitly disclaim offenses such as "attempted involuntary manslaughter or attempted negligence."[45]

Perhaps this explains why, in those cases that involve traditional attempt prosecutions, one sees the DCCA articulating a principle of culpable mental state elevation as to results. Illustrative is *Brawner v. United States*.[46]

At issue in *Brawner* was the culpable mental state governing the result of *attempted* prison escape, the departure from physical confinement. This issue was central to the case "[b]ecause appellant was apprehended within the jail, as opposed to outside the facility," thereby requiring "the government [to proceed] on an attempted escape theory."[47] At trial, "[t]he defense's theory of the case was that appellant lacked the intent to escape and so could not be convicted of attempted escape."[48] On appeal, the defendant "argue[d] that the trial court's failure to instruct the jury that the government was required to prove [t]his intent to leave the jail warrant[ed] reversal."[49]

In adjudicating this claim, the *Brawner* court determined that the culpable mental state requirement governing *attempted* prison escape was "distinguishable" from that of the completed offense. "[A]ttempted escape, like other inchoate offenses, requires the mental state of intending to commit the underlying offense."[50] Therefore, the DCCA

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[44] *Smith*, 813 A.2d at 219. As discussed in the Commentary on RCC § 22E-205(a), an intent to engage in conduct is synonymous with voluntarily having engaged in an act or omission. Robinson, *supra* note 2, at 864. However, requiring proof of voluntary conduct, and nothing more, is entirely consistent with strict liability. *See, e.g., Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J., concurring) (noting that the "intent to act" interpretation of simple assault, if taken literally, would allow "the prosecution of individuals for criminal assault for actions taken with a complete lack of culpability"). Consider, for example, how the intent-to-act interpretation suggested in *Smith* would play out in the context of an attempted aggravated assault prosecution premised on the following facts. Imagine that D's plan is to fire a paintball gun into what appears to be an abandoned building to impress his friends. Although D *reasonably believes* the building to be unoccupied, it is actually occupied by a family. If D fires the paintball gun into the building and causes serious bodily injury to someone inside, he couldn't be convicted of aggravated assault, D.C. Code § 22-404.01, since he does not *consciously disregard* an extreme risk of death or serious bodily injury, see *Perry v. United States*, 36 A.3d 799, 816 (D.C. 2011). Nevertheless, the intent-to-act interpretation suggested in *Smith* would appear to indicate that a conviction for *attempted aggravated assault* would be appropriate in this situation—after all, D surely "intended to engage in the acts that caused the serious bodily injury."

[45] *See Jones*, 124 A.3d at 130 (apparently agreeing with the defendant that "[i]t makes no sense to speak of attempted involuntary manslaughter or attempted negligence," but noting that "[t]his maxim is irrelevant here because the misdemeanor offense of threats *does* require intent to act—intent to utter statements that constitute a threat").

[46] 979 A.2d 1191 (D.C. 2009).

[47] *Id.* at 1193.

[48] *Id.*

[49] *Id.* at 1192.

[50] *Id.* at 1194.

concluded, "in a trial for attempted escape," that "the government must prove what the defendant was attempting to do, and, therefore, must prove intent to escape."[51]

The third, and final, point is that the precise contours of the principle of culpable mental state elevation supported by the *Wormsley-Brawner-Dauphine* line of cases is unclear in an important sense—namely, what does "intent" mean? For example, "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of belief that one's conduct is practically certain to cause a result.[52] That said, intent is also sometimes used as a synonym for purpose, in which context proof of a practically certain belief *would not* provide an adequate basis for liability.[53]

Although the DCCA's understanding of intent (frequently referred to as "specific intent") is generally ambiguous,[54] the interpretation most consistent with the case law is the traditional understanding, namely, that "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts."[55]

The DCCA's robust but conflicting body of case law on the culpable mental state requirement applicable to the results of an attempt stands in contrast with the small, but essentially uniform, body of District authority on circumstances. In this context, the relevant authorities indicate that a principle of culpable mental state equivalency applies to the circumstances of an attempt.

For example, the DCCA's recent decision in *Hailstock v. United States* clarifies that the culpable mental state requirement governing the circumstance of attempted misdemeanor sexual abuse (MSA), absence of permission, is no different than that applicable to the completed version of the offense—both can be satisfied by proof of something akin to negligence[56]

Likewise, the DCCA's recent decision in *Fatumabahirtu v. United States* suggests the same is true with respect to the circumstance of illegal use under the District's sale of drug paraphernalia (SDP) offense—whether charged as an attempt or as a completed offense, the relevant circumstance can be satisfied by proof of something akin to negligence regarding the relevant circumstance.[57]

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[51] *Id.*

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

[53] *See* LAFAVE, *supra* note 16, at 1 SUBST. CRIM. L. § 5.2.

[54] *See, e.g.*, *Wormsley*, 526 A.2d at 1375; *Brawner*, 979 A.2d at 1194 (discussing *United States v. Bailey*, 444 U.S. 394, 405 (1980) and Model Penal Code § 2.02, cmt. at 125); *Wilson-Bey v. United States*, 903 A.2d 818, 833-34 (D.C. 2006) (*en banc*); *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984); *Perry v. United States*, 36 A.3d 799, 816-17 (D.C. 2011).

[55] *Tison*, 481 U.S. at 150.

[56] *Hailstock v. United States*, 85 A.3d 1277, 1282 (D.C. 2014). That is, both MSA and attempted MSA can be satisfied by proof that the defendant "knew or should have known that he did not have the complainant's permission to engage in the sexual act or sexual contact." *Id.*

[57] *Fatumabahirtu v. United States*, 26 A.3d 322, 336 (D.C. 2011). That is, both SDP and attempted SDP can be satisfied by proof that the defendant "knew or reasonably should have known that the buyer would use these items to inject, ingest, or inhale a controlled substance." *Id.*

The District's statutory scheme applicable to child sex abuse offenses similarly support the conclusion that circumstances are not subject to a rule of culpable mental state elevation.[58] For example, whether prosecuted as an attempt or as a completed offense, "mistake of age" is not a defense to sex crimes involving children.[59] In practical effect, this means that the circumstance of age remains a matter of strict liability even when an attempt to commit a child sex abuse offense is charged.[60]

In accordance with the above analysis of District law, RCC § 22E-301(a) and (b) codify the culpable mental state requirement of attempt as follows. RCC § 22E-301(a) establishes that the culpable mental state requirement governing an attempt necessarily incorporates "the culpability required by the target offense." Pursuant to this principle, a defendant may not be convicted of a criminal attempt absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any other broader aspect of culpability—governing the results and circumstances required to establish that offense.

Thereafter, RCC § 22E-301(b) codifies a general principle of culpable mental state elevation, rooted in the *Wormsley-Brawner-Dauphine* line of cases, applicable to results.[61] At the same time, RCC § 22E-301(b) also fills in a key ambiguity left unresolved by the *Wormsley-Brawner-Dauphine* line of cases—what level of elevation is required for results. This provision establishes that acting with the intent to cause any results will suffice.

Finally, the absence of a comparable provision governing circumstances, when viewed in light of RCC § 22E-301(a), clarifies that circumstances are *not* subject to a comparable principle of culpable mental state elevation, but rather, are subject to the principle of culpable mental state equivalency reflected in pertinent District authorities.

<u>RCC § 22E-301(a)(3)(A): Relation to Current District Law on Incomplete Attempts</u>. Subparagraph (a)(3)(A) codifies, clarifies, and fills in gaps reflected in District law governing incomplete attempts.

It is well-established under District law that a person who plans to commit an offense must do more than "mere[ly] prepar[e]" to commit an offense; further progress toward a criminal objective is required to prove an attempt.[62] It is also clear, moreover, that once a person has carried out her criminal plans and all that remains to be seen is whether her efforts were successful (i.e., engaged in a complete attempt), liability may attach.[63] Less clear, however, is the point at which the line between mere preparation and

[58] D.C. Code §§ 22-3008 to 22-3010.01.

[59] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.");

[60] *See In re E.F.*, 740 A.2d 547, 550 (D.C. 1999) ("Nothing in the present statutory scheme implies that the Council of the District of Columbia, in revising the definition of sexual crimes against children, meant to impose a knowledge requirement not theretofore in existence.").

[61] The primary concern addressed by the *Evans-Smith* line of cases—avoiding "the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime," *Smith,* 813 A.2d at 219—is explicitly addressed by RCC § 22E-301(c), discussed *infra.*

[62] *See, e.g.*, *Johnson v. United States*, 756 A.2d 458, 463 n.3 (D.C. 2000); *Dauphine v. United States*, 73 A.3d 1029, 1033 (D.C. 2013).

[63] *See, e.g., Washington v. United States*, 965 A.2d 35, 43 n.24 (D.C. 2009); *Riley v. United States*, 647 A.2d 1165, 1172 (D.C. 1994).

actual perpetration has been crossed, such that police intervention prior to completion may lead to an attempt charge. On this issue of an incomplete attempt, the DCCA has, over the years, articulated a variety of standards. However, viewed as a whole and in relevant context, DCCA case law indicates that the dangerous proximity standard reflects current District law. Paragraph (a)(3) incorporates that standard into the RCC.

The earliest incomplete attempt standard endorsed by a local District court is the so-called probable desistance test. Originally adopted in the Municipal Court of Appeals for the District of Columbia's decision in *Sellers v. United States*, this test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime."[64]

Although the *Sellers* decision predates the creation of the DCCA, the probable desistance standard enunciated has been referenced by the DCCA on multiple occasions.[65] At the same time, the DCCA has also "often noted [that the probable desistance] formulation . . . is imperfect."[66] The DCCA's critique of this standard is understandable when viewed in relevant context: not only does the probable desistance test improperly suggest that "failure is . . . an essential element of criminal attempt,"[67] but, as a variety of legal authorities have observed, there simply "exists no basis for making . . . judgments [of] when desistance is no longer probable or when the normal citizen would stop."[68] In practice, then, the closeness of the actor's conduct to completion is ultimately the only foundation for making the threshold determination of the likelihood of desistance.[69]

Proximity of this nature is, in turn, more explicitly addressed by the second incomplete attempt standard reflected in District authorities, the dangerous proximity test. Originally adopted by the DCCA in *Jones v. United States*, this standard requires proof of an "act [that goes] beyond mere preparation and [which carries] the criminal venture forward to within dangerous proximity of the criminal end sought to be attained."[70]

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[64] *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957) (emphasis added). At issue in *Sellers* was whether the defendant had committed an attempt to arrange prostitution services on the following facts: (1) the defendant had "originated [a] proposition" to two MPD officers; (2) "specified the price per girl and the amount of [the defendant's] commission": and (3) "secured an acceptance" on that commission. *Id.* The *Sellers* court further noted, in setting forth the probable desistance standard, that whether "preparation . . . progress[es] to the point of attempt . . . is a question of degree which can only be resolved on the basis of the facts in each individual case." *Id.* at 301.

[65] *See, e.g.*, *Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers*, 131 A.2d at 301).

[66] *In re Doe*, 855 A.2d 1100, 1107 n.11 (D.C. 2004). This may explain the fact that the standard is omitted from the District's jury instructions on criminal attempts. *See* D.C. Crim. Jur. Instr. § 7.101.

[67] *In re Doe*, 855 A.2d at 1107 n.11 (citing *Evans*, 779 A.2d at 894).

[68] LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.4 (collecting authorities).

[69] *See id.* As the drafters of the Model Penal Code observe: "[I]n actual operation the probable desistance test is linked entirely to the nearness of the actor's conduct to completion, this being the sole basis of unsubstantiated judicial appraisals of the probabilities of desistance. The test as applied appears to be little more than the physical proximity approach." Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 589 (1961).

[70] *Jones*, 386 A.2d at 312 (quoting D.C. Crim. Jur. Instr. § 4.04 (2d ed. 1978)). At issue in *Jones* was whether to uphold an attempted robbery conviction against multiple defendants that had planned a bank robbery, but were stopped by police prior to execution of their plan. The defendants in the case "had made

Since *Jones*, the dangerous proximity test seems to have become the most authoritative standard reflected in District law. For example, this standard is routinely relied upon by the DCCA.[71] And it is also central to the District's jury instructions on criminal attempts, which, apart from the general statement that the accused "must have done more than prepare to commit" the target offense, makes the dangerous proximity standard the District's sole approach to dealing with incomplete attempts.[72]

Jury instructions aside, there is one additional conduct requirement that is occasionally referenced in District case law, the substantial step test. Originally developed by the drafters of the Model Penal Code to expand attempt liability beyond that provided for under the proximity-based standards, this test would allow for an attempt conviction to rest upon proof of a "substantial step in a course of conduct planned to culminate in his commission of the crime."[73]

The earliest reference to the substantial step test was made in the 2004 case of *In Re Doe*, where the DCCA observed by way of dicta in a footnote that "the day may come when we reexamine and, perhaps, reformulate, the way we speak of the kind of 'act' that is required for a criminal attempt," in adherence to "the formulation favored by the Model Penal Code and adopted in a number of jurisdictions . . . ."[74] Thereafter, a decade later, the DCCA specifically referenced the substantial step test in the course of formulating the standard governing an incomplete attempt in a pair of 2014 decisions,

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careful plans as to the role of each in the robbery, including the nature of each of their disguises, and had conducted a dry run on the preceding day." *Id* Thereafter, they "launched their plans [at the appointed time], going their respective ways toward the location of the bank in three cars[,] . . . armed with shotguns and other weapons as they entered a busy downtown area in the middle of a business day, and had disguised themselves as construction workers." *Id.* at 312-13. At the point in which the defendants were apprehended, one defendant was "approaching the target bank and was but a block away when the police intervened," while another "was proceeding toward the bank according to plan and was no further than four blocks away, turning back only when he heard police sirens and concluded that something had gone wrong." *Id.* at 313. Applying the dangerous proximity test, the DCCA determined that an attempt had occurred. *See id*. The *Jones* court further clarified that this test "does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended." *Id.* at 312.

[71] *See, e.g.*, *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992); *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005); *Nkop v. United States*, 945 A.2d 617, 620 (D.C. 2008); *Johnson*, 756 A.2d at 463 n.3; *Euceda v. United States*, 66 A.3d 994, 1000 (D.C. 2013); *Fortune v. United States*, 59 A.3d 949, 960 (D.C. 2013); *Gee v. United States*, 54 A.3d 1249, 1271 (D.C. 2012).

[72] As section 7.101 of the District's criminal jury instructions reads:

> The elements of the crime of attempted [specify crime], each of which the government must prove beyond a reasonable doubt, are that . . . . [Name of defendant] did an act reasonably adapted to accomplishing the crime of [specify crime]. [Name of defendant] must have done more than prepare to commit [specify crime]. **His/her act must have come dangerously close to committing the crime.** [You may convict the defendant of an attempt to commit a crime even if the evidence shows the crime was completed.]

For discussion of the requirement of reasonable adaptation, see *infra*, Relation to Current District Law on Impossibility.

[73] Model Penal Code § 5.01(1)(c).

[74] 855 A.2d at 1107 n.11.

Hailstock v. United States[75] and *Mobley v. United States*.[76] However, neither of these references appears to have changed District law's reliance on the dangerous proximity test.

Perhaps most notable is the fact that both of these decisions reference the substantial step test in the context of *defining the dangerous proximity test*. For example, in *Hailstock*, the DCCA explained that:

> [t]he test of dangerous proximity of completing a crime is met where, except for some interference, a defendant's overt acts would have resulted in commission of the completed crime . . . or where the defendant has taken a substantial step toward commission of the crime[.][77]

Thereafter, the DCCA in *Mobley* articulated precisely the same standard quoting from *Hailstock*.[78]

The intended meaning of the hybrid formulation announced in *Hailstock* and *Mobley*—which appears to be a novelty both inside and outside of the District—is far from clear. Traditionally, for example, the dangerous proximity test and substantial step test are understood to constitute distinct and competing approaches to resolving the same issue.[79]

At minimum, it is unlikely that either decision intended to supplant the dangerous proximity test with the substantial step test. It is well established under District law, for example, that the DCCA does not "give opinions upon moot questions or abstract propositions, or . . . declare principles or rules of law which cannot affect the matter in issue in the case before it."[80] Yet the relevant conduct in both *Hailstock*[81] and *Mobley*[82]

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[75] *Hailstock v. United States*, 85 A.3d 1277, 1283 (D.C. 2014).
[76] *Mobley v. United States*, 101 A.3d 406, 425 (D.C. 2014).
[77] *Hailstock*, 85 A.3d at 1282-83.
[78] *Mobley*, 101 A.3d at 424-25.
[79] *See, e.g.*, Model Penal Code § 5.01 cmt. at 329; PETER W. LOW, CRIMINAL LAW 459 (3d ed. 2009).
[80] *In re D.T.,* 977 A.2d 346, 352 (D.C. 2009) (quoting *Alpert v. Wolf*, 73 A.2d 525, 528 (D.C. 1950)).
[81] At issue in *Hailstock* was, *inter alia*, whether the evidence supported a finding of attempted sexual contact in a situation where "[a]ppellant entered the bedroom where [the victim] was resting and got onto the bed with her," and, "[e]ven after [the victim] said 'no' to appellant's expressed intent to 'get down' with her and even after she pushed him away, appellant continued in his efforts, pulling on her robe and touching her breast in the process." 85 A.3d at 1283. On these facts, the defendant came dangerously close to "engag[ing] in a sexual act or sexual contact" with the victim under circumstances in which the defendant "should have [had] knowledge or reason to know that the act was committed without [the victim's] permission," D.C. Code § 22-3006. *See Hailstock*, 85 A.3d at 1283 ("The evidence in this case satisfied these tests.").
[82] At issue is *Mobley* was, *inter alia*, whether the evidence supported a finding of attempted tampering in a situation where appellant, after speaking with a co-defendant spoke over the phone about the specific location of a gun that had been used in the commission of multiple crimes and was thereafter tossed away in the vicinity of a housing complex, went to the spot and expended significant effort searching for the gun with the intent of disposing of it. 101 A.3d at 424-25. On these facts, the defendant was dangerously close to "alter[ing], destroy[ing], mutilat[ing], conceal[ing], or remov[ing]" the gun "with intent to impair its integrity or its availability for use in the official proceeding," D.C. Code § 22-723—assuming, at least, the situation was as the person perceived it, see *Mobley*, 101 A.3d at 425 ("[R]easonable jurors could infer that except for Mr. Bartlett finding a gun, Mr. Thompkins's act of searching for it in the spot where it was thrown would have been successful.")

appears to easily satisfy the traditional understanding of the dangerous proximity test reflected in prior case law. Therefore, neither decision seems appropriately situated to supplant that test with a broader standard.

Finally, any inference that the foregoing references to the substantial step test were intended to change District law is belied by more recent decisions, which clearly endorse the standard articulation of dangerous proximity test—without reference to the substantial step test—as reflecting current District law.[83]

Consistent with the foregoing analysis of District authorities, the dangerous proximity test appears to most accurately reflect current District law. It is directly codified by paragraph (a)(3).

RCC § 22E-301(a)(3)(B): Relation to Current District Law on Impossibility. Paragraph (a)(3) and subparagraph (a)(3)(B) codify, clarify, and fill in gaps reflected in District law governing impossible attempts.

Under District law, two basic propositions concerning the limits of attempt liability seem clear. First, impossibility is generally not a defense to an attempt charge—i.e., the fact that a criminal undertaking fails because of a defendant's mistaken beliefs concerning the situation in which he or she acts is generally irrelevant for purposes of attempt liability. Second, there is a requirement that a person's conduct must be reasonably adapted to completion of the target offense in order to support attempt liability. Paragraph (a)(3) and subparagraph (a)(3)(B) codify both of these principles.

The most significant decision on impossibility is the DCCA's opinion in the 2004 case of *In re Doe*, where the court rejected the applicability of an impossibility defense to the offense of attempted enticement of a child through an exceptionally circuitous route.[84] Procedural issues aside, at the heart of the case is the defendant's argument that

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[83] For example, the DCCA in *Corbin v. United States* recently explained that the court has "adopted the 'dangerous proximity' theory of attempt," summarizing the current state of District law as follows:

> An attempt consists of an act which is done with the intent to commit a particular crime and is reasonably adapted to the accomplishment of that end. The act must go beyond mere preparation and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained. This "dangerous proximity" test, formulated by Justice Holmes, does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended. *Jones v. United States,* 386 A.2d 308, 312 (D.C. 1978) (footnote omitted). "[M]ere preparation is not an attempt, but preparation may progress to the point of attempt. Whether it has is a question of degree which can only be resolved on the basis of the facts in each individual case." *Id.* at 313 n.2. It is sufficient for the government to prove that "except for some interference," defendant's "overt act done with the intent to commit a crime . . . would have resulted in the commission of the crime." *Evans v. United States,* 779 A.2d 891, 894 (D.C. 2001).

120 A.3d 588, 602 n.20 (D.C. 2015).

[84] 855 A.2d 1100, 1101 (D.C. 2004). At issue in *In re Doe* was whether the trial court's determination that the accused had to register as a sex offender under the District of Columbia's Sex Offender Registration Act of 1999 ("SORA") was appropriate. *Id.* at 1106. This determination, in turn, was based upon the court's assessment that the accused's earlier conviction in federal court for violating 18 U.S.C. § 2423(b) by traveling in interstate commerce for the purpose of engaging in a sexual act with a person under

it is "legally impossible" to commit attempted enticement of a child under District law where the intended victim is (unbeknownst to the perpetrator) not a child.[85]

In resolving the appellant's claim, the *In re Doe* court was careful to distinguish, at the outset, between "factual impossibility," which arises where "the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant," and "legal impossibility," which "arises only when the defendant's objective is to do something that is not a crime."[86] Whereas the former claim is "not a defense" to an attempt charge, the latter claim "remains a defense to an attempt offense."[87] (It is important to point out, however, that this narrow construal of legal impossibility does little more than protect defendants from being convicted of attempts to commit imaginary crimes.[88])

Consistent with the foregoing classification scheme, the *In re Doe* court noted that the defendant's argument raised an issue of factual impossibility (albeit one with a legal dimension): where the actor intends to commit enticement of a child, but commission of the offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance (here, the age of the victim), should that mistake provide grounds for exoneration?

The DCCA answered this question in the negative, stating that—consistent with the general rule governing factual impossibility—the court had "no reason to think that it would be a defense in the District of Columbia to a charge of attempted enticement of a child that the defendant was fooled because his target was in reality an undercover law enforcement officer."[89] After all, as the *In re Doe* court reasoned, "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same."[90]

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eighteen years of age "involved conduct that would constitute" or was "substantially similar" to District offense that would require registration under SORA. *Id.* at 1102; *see* D.C. Code § 22-4001(6) & (8). Notably, however, the accused's prior federal conviction arose from a sting operation: he sought to rendezvous with an undercover officer posing as a fourteen-year-old girl. *In re Doe*, 855 A.2d at 1102. Notwithstanding this wrinkle, CSOSA and the Superior Court nevertheless determined that the federal offense involved conduct that was "substantially similar" to the conduct described by, *inter alia*, the registration offense of attempted enticement of a child in violation of D.C. Code § 22-3010 and D.C. Code § 22-3018. *Id.* at 1104. Under that District offense, a person attempts to entice a "child"—defined as "a person who has not yet attained the age of 16 years," D.C. Code § 22-3001(3)—when that person, "being at least 4 years older than a child, [attempts to] take[] that child to any place, or entices, allures, or persuade[] a child to go to any place for the purpose of committing" an act of sexual abuse, D.C. Code § 22-3010.

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

[86] *Id.* (citing *German v. United States*, 525 A.2d 596, 606 n.20 (D.C. 1987) and LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5).

[87] *In re Doe*, 855 A.2d at 1106. These principles are also recognized in the commentary to § 7.101 of the District's criminal jury instructions, which observes that "factual impossibility, where the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant, is not a defense" under District law, while "legal impossibility"—that is, "where a defendant's objective 'is to do something that is not a crime'"—is the only form of impossibility that may constitute an offense under District law.

[88] *See supra* notes 16-21 and accompanying text.

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

[90] *Id.*

The broad rejection of an impossibility defense reflected in *In re Doe* is similarly in accordance with older DCCA case law construing drug statutes. For example, in *Seeney v. United States*, the DCCA clarified that "the defense of impossibility is not available to one charged with the crime of attempted [narcotics offenses] under the District of Columbia Code."[91] Which is to say, as the DCCA further clarified in *Fields v. United States*, that proof of "the defendant's belief that he was dealing in controlled substances," rather than proof that the substances implicated are in fact controlled substances, will suffice to establish an attempt conviction in this context.[92]

Also consistent with a broad rejection of an impossibility defense under District law are two District statutes, trafficking in stolen property (TSP) and receiving stolen property (RSP), which seem to legislatively endorse a similar approach to that reflected in the foregoing cases.[93] More specifically, under each statute, convictions for the completed offenses of TSP and RSP may rest on a mistaken belief that property at issue was stolen, even if it wasn't stolen (as is the case in sting operations), and, therefore, consummation of the target harm was practically impossible. This is articulated, *inter alia*, through identical provisions clarifying that for each offense "[i]t shall not be a defense . . . [that] the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be."[94]

It's important to note that while the foregoing authorities indicate that District law reflects what the DCCA has deemed "[t]he modern and better rule . . . [that] impossibility is not a defense when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law,"[95] there is one aspect of District law that potentially complicates the foregoing analysis. This is the well-established requirement of reasonable adaptation.

Originally articulated by the DCCA in *Jones v. United States* alongside the court's endorsement of the dangerous proximity test, this requirement entails proof that the defendant's conduct have been "reasonably adapted to the accomplishment of [the target offense]."[96] Since *Jones*, this "reasonably adapted" language has been recited in

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[91] 563 A.2d 1081, 1083 (D.C. 1989).

[92] 952 A.2d 859, 865 (D.C. 2008).

[93] *See* D.C. Code § 22-3231(b) ("A person commits the offense of trafficking in stolen property if, on 2 or more separate occasions, that person traffics in stolen property, knowing or having reason to believe that the property has been stolen"); D.C. Code § 22-3232(a) ("A person commits the offense of receiving stolen property if that person buys, receives, possesses, or obtains control of stolen property, knowing or having reason to believe that the property was stolen.").

[94] D.C. Code § 22-3231(c); D.C. Code § 22-3232(b); *see also German*, 525 A.2d at 607 (noting that, with respect to RSP, the "same acts could be punished under [the District's general] attempt statute" even without the foregoing subjective specification reflected in D.C. Code § 22-3232(b), on the grounds that impossibility is not a defense to an attempt charge).

[95] *In re Doe*, 855 A.2d at 1106 (quoting LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5).

[96] More specifically, the DCCA in *Jones v. United States* endorsed the formulation provided in "Criminal Jury Instructions for the District of Columbia, No. 4.04 (2d ed. 1972)" which read:

> An attempt consists of an act which is done with the intent to commit a particular crime and is reasonably adapted to the accomplishment of that end. The act must go beyond mere preparation and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained.

many DCCA attempt opinions.[97] And it is also a central part of the District's jury instructions on attempts.[98]

Notwithstanding its pervasiveness, however, neither any published DCCA opinion nor the commentary to the District's criminal jury instructions appears to explain the significance of the requirement. Instead, all that District authority reveals is that: (1) the reasonable adaptation requirement seems to be part of the conduct requirement of an attempt; and (2) that it is most important where impossibility—such as, for example, attempted drug prosecutions premised upon the defendant's belief that the object possessed was a controlled substance—is at issue.[99]

Both of the foregoing general propositions are consistent with common law authorities, which more clearly describe the requirement as a limitation on the general rejection of a factual impossibility defense to an attempt charge. As one commentator summarizes the common law approach: where "the means employed are not reasonably adapted to carry out" the actor's intent to commit a crime, an attempt conviction is not

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386 A.2d 308, 312 (D.C. 1978).

[97] *See, e.g., Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Robinson*, 608 A.2d at 116; *Johnson*, 756 A.2d at 464; *Thompson v. United States*, 678 A.2d 24, 27 (D.C. 1996); *Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *Doreus v. United States*, 964 A.2d 154, 158 (D.C. 2009); *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015)

[98] As section 7.101 of the District's criminal jury instructions reads:

> The elements of the crime of attempted [specify crime], each of which the government must prove beyond a reasonable doubt, are that . . . . **[Name of defendant] did an act reasonably adapted to accomplishing the crime of [specify crime].**

[99] For example, in *Seeney v. United States*, the DCCA determined that the "defense of impossibility is not available to one charged with the crime of attempted possession with intent to distribute controlled substances under the District of Columbia Code." 563 A.2d at 1083. Which in turn led the court to hold the following:

> With respect to the offense of *attempted* possession with intent to distribute . . . it is not necessary to establish that the substance a defendant attempted to possess was the proscribed substance. The government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime of possession of the proscribed substance, and the requisite criminal intent.

Id. Thereafter, in *Thompson v. United States* the DCCA held that:

> [The foregoing] rule, applied in *Seeney* to attempted PWID, is equally applicable to a case involving attempted distribution . . . In an attempt case involving a purported illegal drug, what *Seeney* teaches is that the government is not required to prove the identity of the substance in question, but rather conduct by the defendant that is reasonably adapted to the accomplishment of the crime of [distribution] and the requisite criminal intent . . . This is no different from what must be proved in any case in which the defendant is charged with an attempt to commit a crime: an intent to commit the crime and the performance of some act toward its commission.

678 A.2d at 27.

justified "for in such case there can be no damage or danger of damage."[100] This means, for example, that if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result."[101] Nor, according to the same reasoning, can "[s]triking a man with a small switch [] constitute an attempt to murder him."[102]

To be sure, there's no DCCA case law specifically addressing these kinds of issues. However, this is not surprising since attempt prosecutions premised upon "inherently impossible" attempts of this nature "seldom confront the courts."[103] Nevertheless, the DCCA has affirmatively upheld attempt convictions in impossibility cases based upon the premise that the defendant's conduct *was* reasonably adapted to completion of an offense.[104] The implication, then, is that where a defendant's conduct is *not* reasonably adapted to completion of an offense—as would be the case with attempted murder by means of witchcraft—attempt liability could not attach.[105]

Paragraph (a)(3) codifies the foregoing District authorities in a manner that better clarifies the interrelationship of the relevant principles. First, paragraph (a)(3) places an important, if narrow, limitation on the dangerous proximity requirement: the person's conduct must, at minimum, be "reasonably adapted to completion of the offense." Consistent with relevant DCCA case law and the common law underpinnings of the reasonable adaptation requirement, this language demands that there exist some minimum relationship between the accused's criminal plans and the objective sought to be achieved. Where, in contrast, this relationship is lacking—such as where the defendant has engaged in an inherently impossible attempt—liability cannot attach.

Second, subparagraph (a)(3)(B) incorporates what the DCCA has deemed "[t]he modern and better" approach to impossibility, namely, to recognize that "impossibility is not a defense [to a charge of criminal attempt] when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law."[106] It does so, however, in an accessible and simple manner: rather than relying on confusing classification-based distinctions between legal and factual impossibility, the critical issue is whether the person's conduct satisfied the dangerous proximity standard when the situation is viewed as the actor perceived it.

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[100] Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954).
[101] *Id.* at 470 (collecting citations).
[102] *Id.*
[103] LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5.
[104] *See, e.g., Seeney*, 563 A.2d at 1083; *Thompson*, 678 A.2d at 27.
[105] This conclusion is also consistent with the DCCA's policy rationale for generally rejecting impossibility defenses. For example, in *In re Doe*, the DCCA rejected an impossibility defense on the rationale that "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same." 855 A.2d at 1106. Where, however, a person attempts to commit a crime by means not otherwise reasonably adapted to commission of the target offense—for example, where the defendant's sole means of enticing a child is by performing a witchcraft ceremony in his own home—this rationale does not hold since the person's conduct and dangerousness seem qualitatively different.
[106] *In re Doe*, 855 A.2d at 1106 (quoting LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.5).

RCC § 22E-301(c): Relation to Current District Law on Relationship Between Completed Offense and Attempt. Subsection (c) codifies, clarifies, and fills in a gap reflected in District law governing the relationship between a completed offense and a criminal attempt.

The D.C. Code is silent on the relationship between the elements of an attempt and the elements of a completed offense, which has effectively submitted the topic to the discretion of the DCCA.[107] The relevant case law establishes that the government may secure an attempt conviction based upon proof that the target offense was actually completed. Subsection (c) expressly codifies this legal proposition.

Under DCCA case law, it is well-established that "a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'"[108] This policy, as promulgated by the DCCA, is understood to rest on two basic underlying principles: (1) "failure is not an essential element of criminal attempt"[109]; and (2) "[a]n attempt is a lesser-included offense of the completed crime."[110]

The DCCA's general policy of allowing proof of a completed offense to substitute for proof of an attempt is widely accepted in other jurisdictions.[111] So too is the first rationale offered by the DCCA in support of this policy; it is well established that proof of failure is not a necessary element of an attempt.[112] More problematic, however, is the DCCA's second rationale: that proof of a completed offense may substitute for proof of an attempt *because* an attempt is a lesser-included offense (LIO) of the completed crime

At the heart of the issue is the legal standard by which the DCCA determines when one offense is an LIO of another offense, the so-called elements test. [113] Under the elements test, the DCCA analyzes "whether the statutory elements of the lesser offense are contained within those of the greater charged offense."[114] Which is to say that one offense is an LIO of another offense when (and only when) "the greater offense cannot be committed without also committing the lesser."[115] In practice, "the determination [of] whether an offense is a 'lesser included' offense of an allegedly 'greater' offense is made

[107] Note, however, that D.C. Super. Ct. R. Crim. P. 31(c) establishes that: "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."
[108] *Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001); *see, e.g., United States v. Fleming,* 215 A.2d 839 (D.C. 1966); *Ray v. United States*, 575 A.2d 1196, 1199–200 (D.C. 1990).
[109] *Evans,* 779 A.2d at 894; *see, e.g., In re Doe*, 855 A.2d 1100, 1107 (D.C. 2004); *Ray*, 575 A.2d at 1199–200 (citing *United States v. Dupree*, 544 F.2d 1050, 1052 (9th Cir.1976) and *United States v. Jacobs,* 632 F.2d 695, 697 (7th Cir. 1980)).
[110] *Evans,* 779 A.2d at 894; *see, e.g., Ray*, 575 A.2d at 1199; *Washington v. United States*, 965 A.2d 35, 42 (D.C. 2009).
[111] *See* authorities cited *supra* note 27.
[112] *See* authorities cited *supra* note 27.
[113] *See, e.g., Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001); *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997); *see Schmuck v. United States*, 489 U.S. 705, 716 (1989).
[114] *Mungo*, 772 A.2d at 245.
[115] *Warner v. United States*, 124 A.3d 79, 85 (D.C. 2015).

by comparing the statutory elements of the two offenses," without regard to the facts of a case.[116]

Viewed through the elements test, an attempt often will be an LIO of the completed offense, but not always, assuming it is subject to a principle of culpable mental state elevation. Under this principle, the government must prove that the accused acted with the intent to cause any result required by the target offense, regardless of whether a lower culpable mental state, such as recklessness or negligence, will suffice to establish the completed offense.[117] Based solely on a comparison of statutory elements, then, it is not always the case that an attempt—occasionally subject to a higher culpable mental state—is an LIO of the completed offense under a principle of culpable mental state elevation.[118]

In accordance with the following analysis, the DCCA's reliance on the elements test has produced a line of cases that appear to reject a principle of culpable mental state elevation applicable to attempts in the interests of ensuring that proof of a completed offense can substitute for proof of an attempt.[119]

Illustrative is *United States v. Smith*.[120] The defendant in *Smith* was prosecuted for attempted second-degree child cruelty on a theory that the defendant recklessly committed the *completed* offense.[121] On appeal, the defendant argued that, in light of the fact that an attempt was charged, "the government was required, but failed, to prove that he specifically intended to injure his child" pursuant to a principle of culpable mental state elevation.[122] The DCCA ultimately rejected this argument, deeming that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime."[123] "To hold otherwise," after all, would "create the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime."[124]

Viewed in context, the holding in *Smith* (and comparable cases) is not surprising.[125] Assuming the practice of allowing proof of the completed offense to suffice for an attempt rests upon a strict comparison of the statutory elements alone, then application of a principle of culpable mental state elevation would indeed be problematic. At the same time, however, application of the principle of *culpable mental state*

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[116] *Id.*; *see also Mungo*, 772 A.2d at 245 ("Although simple assault is not defined by the statute, analysis under the 'elements" test for lesser-included offenses is still appropriate and the elements to be examined are those found in the common law definition of assault.")
[117] *See supra* Commentary on RCC §§ 301(a)(1)-(2): Explanatory Note.
[118] *See, e.g.,* WAYNE R. LAFAVE & GERALD ISRAEL, 6 CRIM. PROC. § 24.8(e) (4th ed. Westlaw 2017).
[119] *See supra* RCC §§ 301(a) and (b): Relation to Current District Law on Culpable Mental State Requirement.
[120] 813 A.2d 216, 219 (D.C. 2002).
[121] *See id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] The DCCA has likewise relied on similar reasoning to uphold convictions for attempts to commit so-called general intent crimes, such as simple assault and threats, based upon facts indicating that the completed offense had been committed—but in the absence of proof of an elevated mental state beyond the "general intent" necessary for the underlying offense. *See Ray v. United States*, 575 A.2d 1196, 199 (D.C. 1990); *Jones v. United States*, 124 A.3d 127, 129-31 (D.C. 2015).

equivalency implied in these cases in a broader context is even more problematic. Were it true, for example, that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime,"[126] regardless of the situation, then attempt charges premised on theories of recklessness, negligence, or even strict liability would be viable in the District. And this in turn would provide for expansive liability in derogation of both DCCA case law and nearly universal national legal trends.[127]

Fortunately, the foregoing tension is easily resolvable by adopting a statutory provision clarifying that proof of the completed offense is an explicitly authorized means of proving an attempt. By establishing that the elements of the completed offense constitute a viable alternative basis for establishing attempt liability, this kind of legislative statement obviates the relevant LIO-related complications arising in cases where the government seeks to prove an attempt—otherwise subject to a generally applicable principle of culpable mental state elevation, see RCC § 22E-301(b)—with evidence of the completed offense. Consistent with the interests of clarity, consistency, and the preservation of current District law, then, subsection (c) provides this legislative statement.

RCC § 22E-301(d): Relation to Current District Law on Attempt Penalties.

Subsection (d) establishes a uniform and proportionate grading scheme for criminal attempts, which clarifies, simplifies, and changes District law.

The D.C. Code's general attempt penalty statute, D.C. Code § 22-1803, establishes a default penalty framework for attempt offenses comprised of two basic rules.[128] First, attempts to commit offenses other than "crimes of violence" are punishable by a maximum of 180 days incarceration, $1000 fine, or both.[129] And second, attempts to commit "crimes of violence"[130] are punishable by a maximum of 5 years incarceration, $12,500 fine, or both.[131]

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[126] *Evans*, 779 A.2d at 894.

[127] *See, e.g.,* Model Penal Code § 5.01, cmt. at 304 ("[T]he scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility."); Michaels, *supra* note 25, at 1033 (observing that such treatment would open the "floodgates to attempt liability"); LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 11.3 ("Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed."); Commentary on Haw. Rev. Stat. § 705-500 ("Reckless driving . . . does not constitute attempted manslaughter."); *State v. Holbron*, 904 P.2d 912, 920, 930 (Haw. 1995) ("We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter.").

[128] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both.").

[129] *See* D.C. Code § 22-3571.01(4) (setting fines at "$1,000 if the offense is punishable by imprisonment for 180 days, or 6 months, or less but more than 90 days").

[130] D.C. Code § 23-1331(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;

The District's general attempt penalty statute also explicitly recognizes an exception to these two default rules: any attempt offense "made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901" (hereafter, "1901 Code") is subject to the penalties specified in the relevant statutory provisions.[132] This reflects the fact that the 1901 Code explicitly made several kinds of attempts punishable in a manner different from the default penalty, which at the time was set at one-year imprisonment or a $1,000 fine, or both.[133]

For example, two common felonies in the 1901 Code were defined in a manner that effectively punished attempted versions of the offense the same as completed versions of the offense, namely, attempted arson,[134] and attempted malicious destruction of property.[135] And attempted robbery had its own statutory provision subject to a penalty in derogation from the default rule.[136] Accompanying these three explicit exceptions to the 1901 Code's default penalty rule for criminal attempts were three implicit exceptions: "assault-with-intent to" (AWI) crimes,[137] which were enacted to

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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.").

[131] *See* D.C. Code § 22-3571.01(6) (setting fines at "$12,500 if the offense is punishable by imprisonment for 5 years or less but more than one year").

[132] D.C. Code § 22-1803.

[133] *See* D.C. Code § 906 (1901); Act of March 3, 1901, ch. 19, § 906, 31 Stat. 1321, 1337 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by this chapter [Chapter 19], shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both."). Since being enacted in 1901, the District's general attempt penalty statute has undergone two substantive policy revisions. Most importantly, in 1994, the D.C. Council amended it to establish separate default penalty rules for attempts to commit non-violent crimes—subject to a maximum of 180 days incarceration and/or a $1000 fine—and for attempts to commit violent crimes—subject to a maximum 5 years incarceration and/or a $5,000 fine. *See* OMNIBUS CRIMINAL JUSTICE REFORM AMENDMENT ACT OF 1994, 1994 District of Columbia Laws 10-151 (Act 10–238), sec. 105, § 906 (1994). These changes occurred as part of a larger effort to increase judicial case processing by reducing the penalties for more than 40 offenses to make them non-jury demandable (i.e., subject only to a bench trial by a judge rather than a jury) under D.C. Code § 22-705. *See* CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY, JAMES E. NATHANSON, *Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994*, at 3-4 (January 26, 1994) [hereinafter *Judiciary Committee Report*]. Supported by both the D.C. Superior Court and Office of the United States Attorney, the 1994 Act was intended to "relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow for more felony cases to be scheduled at an earlier date." *Id.* Subsequently, in 2012, the D.C. Council raised the maximum fine for attempts to commit violent crimes from $5,000 to $12,500 consistent with the Criminal Fine Proportionality Amendment Act. *See* CRIMINAL FINE PROPORTIONALITY AMENDMENT ACT of 2012, 2012 District of Columbia Laws 19-317 (Act 19-641), sec. 101 (2012); *see also* D.C. Code § 22-1803; D.C. Code § 22-3571.01.

[134] D.C. Code § 820 (1901); Act of March 3, 1901, ch. 19, § 820.

[135] D.C. Code § 848 (1901); Act of March 3, 1901, ch. 19, § 848; *see also* D.C. Code § 824 (1901); Act of March 3, 1901, ch. 19, § 824 (unlawful entry of property).

[136] D.C. Code § 811 (1901); Act of March 3, 1901, ch. 19, § 811.

[137] *See* D.C. Code §§ 804-06 (1901); Act of March 3, 1901, ch. 19, §§ 804-06.

allow "a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end."[138]

The 1901 Code's explicit and implicit statutory exceptions to the default penalty for attempts have undergone little or no change to date.[139] At the same time, many other offense-specific exceptions to the general attempt penalty statute have been added to the D.C. Code over the last century.

Some of these exceptions are communicated through the penalty provisions governing attempts to commit individual or certain groupings of offenses. Illustrative provisions include the D.C. Code provisions setting forth penalties for attempts to commit: (1) various human trafficking related offenses[140]; (2) various sexual abuse-related offenses[141]; (3) various drug-related offenses[142]; (4) manufacture or possession of

[138] *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011). These AWI offenses effectively created a complementary form of attempt liability, which subjected actors to greater punishment for unconsummated conduct that reached the point of an assault. Both AWIs and criminal attempts punish an unconsummated intent to commit a criminal offense; the only difference is that, whereas a criminal attempt requires proof of conduct that is dangerously close to committing that offense, an AWI offense requires proof of a simple assault.

[139] Like the 1901 Code's attempted arson, malicious destruction of property, and robbery provisions, the 1901 Code's AWI offenses also still "remain on the books to this day" in essentially the same form. *Perry*, 36 A.3d at 810-11. First, there is D.C. Code § 22-401—the current version of § 803 of the 1901 Code—which subjects "any assault with intent to kill or to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery . . . . to imprisonment for not less than 2 years or more than 15 years." Second, there is D.C. Code § 22-402—the current version of § 804 of the 1901 Code—which subjects any "assault with intent to commit mayhem . . . . to imprisonment for not more than 10 years." And third, there is D.C. Code § 22-403—the current version of § 805 of the 1901 Code—which subjects an "assault[] with intent to commit any other offense . . . . [to] not more than 5 years." Only minor modifications have been made to these offenses since their enactment. For example, §§ 804 and 805 of the 1901 Code are essentially identical to §§ 22-402 and 403 of the current D.C. Code. And § 803 of the 1901 Code, currently reflected in D.C. Code § 22-401, has only been lightly revised: the offense of assault with intent to commit "rape" has been replaced with the related offenses of assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, and assault with intent to commit child sexual abuse. Other than that, the AWI offenses currently contained in Title 22 are substantively the same as those enacted in 1901.

[140] *See* D.C. Code § 22-1837(d) ("Whoever attempts to violate § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 shall be fined not more than 1/2 the maximum fine otherwise authorized for the offense, imprisoned for not more than 1/2 the maximum term otherwise authorized for the offense, or both.")

[141] *See* D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.")

[142] *See* D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

a weapon of mass destruction[143]; and (5) use, dissemination, or detonation of a weapon of mass destruction.[144]

Other exceptions to the general attempt penalty statute are communicated through incorporation of the term "attempts" into the definition of a given offense, effectively providing that an attempt to commit that offense is subject to the same punishment as the completed offense.[145] Illustrative provisions in the D.C. Code include the statutory definitions of (1) enticing a child or minor,[146] (2) voter fraud,[147] and (3) public assistance fraud.[148]

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[143] *See* D.C. Code § 22-3154(b) ("A person who attempts or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.")

[144] *See* D.C. Code § 22-3155(b) ("A person who attempts or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.").

[145] These fully inchoate attempt offenses are to be distinguished from the District's partially inchoate attempt offenses, which incorporate the term "attempt" into a statutory definition, but apply it to only some of the elements in that offense, such as the District's carjacking statute. *See* D.C. Code § 22-2803 (a)(1) ("A person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy 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."); *see also Corbin v. United States*, 120 A.3d 588 (D.C. 2015) (interpreting the phrase "or attempts to do so" to apply only to the force or violence requirement, such that proof that the defendant actually took the vehicle is necessary for a conviction brought under this statute (rather than attempted carjacking, brought under the District's general attempt statute)). Other statutes potentially subject to this kind of partially inchoate reading include: D.C. Code § 22-851 (Protection of district public officials); D.C. Code § 22-1211 (Tampering with a detection device); D.C. Code § 22-1404 (Falsely impersonating public officer or minister); D.C. Code § 22-1409 (Use of official insignia; penalty for unauthorized use); D.C. Code § 22-1713 (Corrupt influence in connection with athletic contests); D.C. Code § 22-1835 (Unlawful conduct with respect to documents in furtherance of human trafficking); D.C. Code § 22-1836 (Benefitting financially from human trafficking); D.C. Code § 22-2707 (Procuring; receiving money or other valuable thing for arranging assignation); D.C. Code § 22-3237.02 (Identity theft); D.C. Code § 22-3251 (Extortion); D.C. Code § 22-3535(f) (Voyeurism); and D.C. Code § 50-2201.05b (Fleeing from law enforcement).

[146] *See* D.C. Code § 22-3010(a) ("Whoever, being at least 4 years older than a child or being in a significant relationship with a minor . . . seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both."); D.C. Code § 22-3010(b)("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact . . . shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.").

[147] *See* D.C. Code § 1-1001.14(a) ("Any person who shall register, or attempt to register, or vote or attempt to vote under the provisions of this subchapter and make any false representations as to his or her qualifications for registering or voting or for holding elective office, or be guilty of violating § 1-1001.07(d)(2)(D), § 1-1001.09, § 1-1001.12, or § 1-1001.13 or be guilty of bribery or intimidation of any voter at an election, or being registered, shall vote or attempt to vote more than once in any election so held, or shall purloin or secrete any of the votes cast in an election, or attempt to vote in an election held by a political party other than that to which he or she has declared himself or herself to be affiliated, or, if employed in the counting of votes in any election held pursuant to this subchapter, knowingly make a false report in regard thereto, and every candidate, person, or official of any political committee who shall

Collectively, the District's "patchwork of attempt statutes"[149] presents two main problems: (1) it lacks a consistent grading principle; and (2) it is confusingly communicated. With respect to the first problem, at least three fundamentally different grading patterns appear to be reflected in the penalties governing attempts to commit both crimes of violence and non-violent crimes under the D.C. Code.

The first grading pattern, which might be referred to as a "substantial punishment discount," is reflected in the numerous District attempt offenses subject to statutory maxima that are many orders of magnitude below the statutory maxima governing the completed offense. Most often, this kind of substantial punishment discount is produced by a straightforward application of the general attempt penalty statute's default rules.[150]

A substantial penalty discount is perhaps most clearly reflected in the grading of attempts to commit various non-violent crimes. For example, whereas the statutory maxima for felony property offenses such as first degree theft,[151] first[152] and second degree[153] fraud, first degree receiving stolen property,[154] first degree financial

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knowingly make any expenditure or contribution in violation of subchapter I of Chapter 11 of this title, shall, upon conviction, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.").

[148] *See* D.C. Code § 4-218.01(a) ("Any person who, with the intent to defraud, by means of false statement, failure to disclose information, or impersonation, or by other fraudulent device, obtains or attempts to obtain or any person who knowingly aids or abets such person in the obtaining or attempting to obtain: (1) any grant or payment of public assistance to which he is not entitled; (2) a larger amount of public assistance than that to which he or she is entitled; (3) payment of any forfeited grant of public assistance; or (4) a public assistance identification card; or any person who with intent to defraud the District aids or abets in the buying or in any way disposing of the real property of a recipient of public assistance shall be guilty of a misdemeanor and shall be sentenced to pay a fine of not more than $500, or to imprisonment not to exceed one year, or both.").

[149] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

[150] As noted above, the relevant legislative history underlying the Omnibus Criminal Justice Reform Amendment Act of 1994 indicates that the default rule for non-crimes of violence was set at 180 days to ensure they were non-jury demandable, and, therefore, to increase judicial efficiency. *See Judiciary Committee Report*, *supra* note 133, at 3-4 (noting that the act was intended to "relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow for more felony cases to be scheduled at an earlier date"). At first glance, this seems to explain the substantial punishment discount applied to grade attempts to commit non-crimes of violence. As discussed below, however, the penalties governing many attempts to commit non-crimes of violence under the D.C. Code reflect fundamentally different grading patterns—namely, a proportionate punishment variance or equalized punishment. Likewise, the penalties governing attempts to commit crimes of violence under the D.C. Code also reflect all three of these fundamentally different grading patterns.

[151] 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.").

[152] D.C. Code § 22-3221(a)(1) ("Any person convicted of fraud in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property obtained or lost, whichever is greater, or imprisoned for not more than 10 years, or both, if the value of the property obtained or lost is $1,000 or more . . . .").

[153] D.C. Code § 22-3221(b)(1) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property which was the object of the scheme or systematic course of conduct, whichever is greater, or imprisoned for not more than 3 years, or both, if the value of the property which was the object of the scheme or systematic course of conduct is $1,000 or more . . . .").

exploitation of a vulnerable adult or elderly person,[155] unauthorized use of a motor vehicle,[156] and blackmail[157] (not involving a threat of violence[158]) range between 5 and 10 years, an attempt to commit any of those offenses is subject to the 180 day default rule governing attempts to commit non-crimes of violence under the general attempt penalty statute.[159] Likewise, the 10 year statutory maxima applicable to second degree cruelty to children[160] as well as the 20 year statutory maximum applicable to felony threats[161] are also reduced to 180 days under the first default rule.[162] (Neither of these offenses is a crime of violence.[163])

A pattern of substantial punishment discounting also can be seen in the penalties governing a wide range of attempts to commit crimes of violence. For example, whereas first-degree murder[164] and second-degree murder[165] are both potentially subject to a sentence of life in prison under the D.C. Code, an attempt to commit either of those offenses is subject to 5 year default rule governing attempts to commit crimes of violence under the general attempt penalty statute.[166] Likewise, the 30 year statutory maxima applicable to kidnapping[167] and first degree burglary,[168] as well as the 15 year statutory

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[154] D.C. Code § 22-3232(c)(1) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 7 years, or both, if the value of the stolen property is $1,000 or more.").

[155] D.C. Code § 22-936.01(a) ("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . When the value of the property or legal obligation is $1,000 or more, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 10 years, or both.").

[156] D.C. Code § 22-3215(d)(1) ("[A] person convicted of unauthorized use of a motor vehicle under subsection (b) of this section shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both.").

[157] D.C. Code § 22-3252 (b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[158] *See* D.C. Code § 23-1331(4).

[159] D.C. Code § 22-1803.

[160] D.C. Code § 22-1101(b)(2) ("Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").

[161] D.C. Code § 22-1810 ("Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.").

[162] *See* D.C. Code § 22-1803.

[163] *See* D.C. Code § 23-1331(4).

[164] D.C. Code § 22-2104(a)("The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release . . . .").

[165] D.C. Code § 22-2104(c) ("Whoever is guilty of murder in the second degree shall be sentenced to a period of incarceration of not more than life . . . .").

[166] *See* D.C. Code § 22-1803. Note, however, that the District's most severe AWI statute partially softens this discount by applying a 15 year statutory maximum to attempted murders that progress to the point of an assault. *See* D.C. Code § 22-401.

[167] D.C. Code § 22-2001 ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years.").

maxima applicable to first degree cruelty to children[169] and second degree burglary[170] are also reduced to 5 years under the second default rule.[171] And the District's stand-alone attempted robbery statute effectively reduces the 15 year statutory maximum applicable to the completed offense[172] to 3 years for an attempt.[173]

These substantially discounted attempt penalties are to be contrasted with those that reflect a grading pattern that might be referred as "equal punishment," namely, they subject attempts to the same statutory maximum governing the completed offense. The D.C. Code is comprised of numerous attempt offenses that effectively equalize the sanction for attempts, though the D.C. Council has authorized this outcome in a variety of ways.

Most explicit is the District's semi-general penalty provision for drug crimes, D.C. Code § 48-904.09, which broadly states that all attempted drug crimes may be punished as seriously as completed drug crimes.[174] In practical effect, this means that, *inter alia*, an attempt to manufacture, distribute, or possess, with intent to manufacture or distribute, a Schedule I or II controlled substance is subject to the same 30 statutory maximum governing the completed offense.[175]

A pattern of equal punishment is also apparent in those District offenses that statutorily incorporate the term "attempts" into their statutory definition. This includes property offenses such as arson[176] malicious destruction of property,[177] and extortion[178]

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[168] D.C. Code § 22-801(a) ("Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.").

[169] D.C. Code § 22-1101(c)(1) ("Any person convicted of cruelty to children in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 15 years, or both.").

[170] D.C. Code § 22-801(b) ("Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.").

[171] *See* D.C. Code § 22-1803.

[172] D.C. Code § 22-2801 ("Whoever 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, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[173] D.C. Code § 22-2802 ("Whoever attempts to commit robbery, as defined in § 22-2801, by an overt act, shall be imprisoned for not more than 3 years or be fined not more than the amount set forth in § 22-3571.01, or both.").

[174] D.C. Code § 48-904.09 ("Any person who attempts . . . to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt . . . .")

[175] *See* D.C. Code § 48-904.01(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[176] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than 1 year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[177] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own,

all of which, by virtue of incorporating the term attempts into their offense definition, subject attempts to the same 10 year statutory maximum applicable to the completed offense.[179] It also includes prison escape[180] and enticing a child[181] which ensure, through similar means, that attempts to commit those offenses are subject to the same 5 year statutory maxima governing the completed versions of those offenses.[182]

A great many other District attempt offenses exhibit a pattern of equal punishment through more convoluted means. For example, the District's while armed enhancement applies the same flat 30 year statutory maximum add-on to numerous crimes, without regard to whether the underlying crime is completed or merely attempted, through the D.C. Code's definition of "crimes of violence" and "dangerous crimes."[183] In addition,

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of the value of $1,000 or more, shall be fined not more than the amount set forth in § 22-3571.01 or shall be imprisoned for not more than 10 years, or both, and if the property has some value shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

[178] D.C. Code §§ 22-3251(a)-(b) ("A person commits the offense of extortion if . . . That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or . . . That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right . . . Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.").

[179] Arson is a crime of violence, MDP is not a crime of violence, and extortion is sometimes a crime of violence. *See* D.C. Code § 23-1331(4).

[180] D.C. Code §§ 22-2601(a)-(b) ("No person shall escape or attempt to escape from [specified institutions] . . . . Any person who violates subsection (a) of this section shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both . . . .").

[181] D.C. Code § 22-3010(a) ("Whoever, being at least 4 years older than a child or being in a significant relationship with a minor, (1) takes that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02, or (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both."); D.C. Code § 22-3010(b) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact, or (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.").

[182] *See also* D.C. Code § 22-3302(a)(1) ("Any person who, without lawful authority, shall enter, or attempt to enter, any private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than the amount set forth in § 22-3571.01, imprisonment for not more than 180 days, or both.").

[183] More specifically, D.C. Code § 22–4502(a)(1) establishes that anyone who commits a violent or dangerous crime:

> 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

attempts to commit the least severe forms of theft,[184] fraud,[185] receiving stolen property,[186] financial exploitation of a vulnerable adult or elderly person,[187] and assault[188] are all subject to the same penalty as the completed offense by virtue of the default 180 day rule applicable to non-violent crimes in the general attempt statute.[189] And similarly, an attempt to commit blackmail[190]—when committed in a manner so as to render it a crime of violence[191]—is subject to the same statutory maximum applicable to the completed offense pursuant to the 5 year default rule governing crimes of violence under the general attempt statute.[192]

Perhaps most confusingly and contradictory, however, is that equal punishment appears in a handful of District statutes which, textually speaking, authorize attempts to be punished *more severely* than the completed offense. For example, whereas the completed version of assault with significant bodily injury is subject to a 3 year statutory maximum,[193] an attempt to commit that offense appears to be subject to a statutory maxima of 5 years pursuant to the general attempt penalty statute's default rule for crimes

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> armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years . . . .

See also 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.").

[184] D.C. Code § 22-3212(b) ("Any person convicted of theft in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property obtained or used has some value.").

[185] D.C. Code § 22-3222(b)(2) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property that was the object of the scheme or systematic course of conduct has some value.").

[186] D.C. Code § 22-3232(c)(2) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both, if the stolen property has some value.").

[187] D.C. Code § 22-936.01(a)("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . .

When the property or legal obligation has some value, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 180 days, or both.").

[188] D.C. Code § 22-404 ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[189] *See* D.C. Code § 22-1803.

[190] D.C. Code §§ 22-3252(a)-(b) ("A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens [to do one of three kinds of acts] . . . . Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[191] *See* D.C. Code § 23-1331(4).

[192] *See* D.C. Code § 22-1803.

[193] DC. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

of violence.[194] And whereas the completed versions of unlawful entry of a motor vehicle[195] and taking property without right[196] are subject to 90 days in prison, an attempt to commit either of those offenses appears to be subject to the 180 day default rule for non-violent crimes under the general attempt penalty statute.[197] Notwithstanding these textual anachronisms, however, District case law appears to preclude a defendant from receiving a sentence for an attempt greater than that authorized for the completed offense.[198] Consequently, these statutes also reflect a pattern of equal punishment.

The District's attempt statutes manifest one other important grading pattern, which is both harsher than a substantial punishment discount but more lenient than equal punishment—what might be referred to as a "proportionate punishment discount." This pattern is reflected in many of the District's more recent attempt offenses, which are subject to a statutory maximum that is pegged to, and is half as severe as, the statutory maximum applicable to the completed offense.

One illustrative example is the semi-general attempt penalty provision incorporated into the Anti-Sexual Abuse Act of 1994,[199] which sets attempt penalties at "1/2 of the maximum prison sentence authorized for the [completed] offense."[200] In practical effect, this applies a proportionate punishment discount to a wide range of sex offenses, including second,[201] third,[202] and fourth degree sexual abuse,[203] second degree child sexual abuse,[204] first[205] and second degree[206] sexual abuse of a minor, and first[207] and second degree[208] sexual abuse of a secondary education student.

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[194] *See* D.C. Code § 22-1803.

[195] D.C. Code § 22-1341 ("It is unlawful to enter or be inside of the motor vehicle of another person without the permission of the owner or person lawfully in charge of the motor vehicle. A person who violates this subsection shall, upon conviction, be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both.").

[196] D.C. Code § 22-3216 ("A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so. A person convicted of taking property without right shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 90 days, or both.").

[197] *See* D.C. Code § 22-1803.

[198] In *United States v. Pearson*, the D.C. Municipal Court of Appeals indicated that where the maximum statutory penalty for attempt is higher than the penalty for the completed crime, the court cannot *sentence* the defendant to a penalty higher than the statutory maximum penalty for the completed offense. *United States v. Pearson*, 202 A.2d 392, 393-94 (D.C. 1964). Specifically, the court held that a defendant convicted of attempted petit larceny could not be sentenced to a higher penalty than the maximum penalty for the completed offense. The court declined to declare the attempt statute invalid but suggested that Congress may want to rewrite the penalties and suggested the statute's validity may come into question only where, unlike in *Pearson,* a defendant is sentenced to a greater penalty than the maximum for the completed offense. *Id.*

[199] *See* ANTI-SEXUAL ABUSE OF 1994, D.C. Law 10-257, § 217, 42 DCR 53 (May 23, 1995).

[200] *See* D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.")

[201] *See* D.C. Code § 22–3003.

[202] *See* D.C. Code § 22–3004.

[203] *See* D.C. Code § 22–3005.

[204] *See* D.C. Code § 22–3009.

[205] *See* D.C. Code § 22–3009.01.

Another illustrative example is the similar semi-general attempt penalty provision incorporated into the Prohibition Against Human Trafficking Amendment Act of 2010.[209] That provision also sets attempt penalties at "1/2 the maximum term otherwise authorized for the [completed] offense."[210] In practical effect, this applies a proportionate penalty discount to a wide range of human trafficking offenses, including attempts to commit forced labor,[211] trafficking in labor or commercial sex acts,[212] sex trafficking of children,[213] unlawful conduct with respect to documents in furtherance of human trafficking,[214] and benefitting financially from human trafficking.[215]

The D.C. Council has also, on occasion, applied a proportionate punishment discount to individual offenses through specific attempt penalty provisions. For example, the District's aggravated assault statute—enacted in 1994 as part of the Omnibus Criminal Justice Reform Amendment Act[216]—contains a specific attempt penalty provision halving the 10 year statutory maximum governing the completed offense to 5 years.[217]

Viewed as a whole, then, the District's approach to grading criminal attempts does not reflect any consistent principle of punishment: the D.C. Code manifests at least three fundamentally different patterns in how it grades attempts, without any discernible rationale for the variances. In practical effect, this produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

At the same time, these potential disproportionalities are not immediately apparent given the second fundamental flaw reflected in the District law of attempts, namely, its disorganized approach to codification. For example, notwithstanding the fact that the District's general attempt statute is worded in a way which suggests that the 1901 attempt penalty exceptions remain the only exceptions to the current default penalty rules, the reality is that the D.C. Code is littered with statutory attempt provisions that establish penalties in derogation from these rules. Further, the manner in which these

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[206] *See* D.C. Code § 22–3009.02.
[207] *See* D.C. Code § 22–3009.03.
[208] *See* D.C. Code § 22–3009.04.
[209] *See* PROHIBITION AGAINST HUMAN TRAFFICKING AMENDMENT ACT of 2010, D.C. Law 18-239, § 107, 57 DCR 5405 (October 23, 2010).
[210] *Compare* D.C. Code § 22-1837(a)(1) ("[W]hoever violates § 22-1832, § 22-1833, or § 22-1834 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 20 years, or both.") *with* D.C. Code § 22-1837(d) ("Whoever attempts to violate § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 shall be fined not more than 1/2 the maximum fine otherwise authorized for the offense, imprisoned for not more than 1/2 the maximum term otherwise authorized for the offense, or both.")
[211] *See* D.C. Code § 22–1832.
[212] *See* D.C. Code § 22–1833.
[213] *See* D.C. Code § 22–1833.
[214] *See* D.C. Code § 22–1835.
[215] *See* D.C. Code § 22–1836.
[216] *See Perry v. United States*, 36 A.3d 799, 814 (D.C. 2011) (citing OMNIBUS CRIMINAL JUSTICE REFORM AMENDMENT ACT OF 1994, D.C. Law 10–151 (Aug. 20, 1994)).
[217] *Compare* 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.") *with* 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.").

exceptions are communicated is quite inconsistent: some are communicated through individual penalty provisions incorporated into a single offense; others are communicated through semi-general attempt penalty provisions that apply to groups of offenses; and still other exceptions are communicated by including the word "attempt" in the definition of the offense. And on top of all of this complexity rests the District's AWI offenses, which add yet another "unnecessary" layer of confusion to the grading of criminal attempts provided by the D.C. Code.[218]

RCC § 22E-301(d) endeavors to remedy these issues by establishing a clear and consistent approach to grading attempts, which renders offense penalties more proportionate. First, paragraph (d)(1) adopts a single generally applicable grading principle: a proportionate penalty discount under which the statutory maximum and fine for an attempt is set at one-half of the statutory maximum and fine of the completed offense.[219] This general principle is supplemented by paragraph (d)(2), which expressly recognizes the possibility of offense-specific exceptions to be clearly articulated in a single general provision incorporated into the General Part.

The effect of this penalty scheme on current District law varies depending on the scope, gradations, and classifications applied to individual revised offenses. In some instances, the attempt penalties reflected in the RCC are more severe than those applied by the current D.C. Code for comparable conduct.[220] In other instances, however, the penalties are less severe.[221] And in still other offenses, the penalties are approximately similar.[222]

For those current District attempt offenses subject to a substantial punishment discount, the RCC penalty scheme allows for the imposition of sentences for criminal attempts that are significantly greater than those presently authorized under current District law. Illustrative are attempts to commit various non-violent offenses such as first degree theft, first and second degree fraud, first degree receiving stolen property, first degree financial exploitation of a vulnerable adult or elderly person which are, under current District law, misdemeanors subject to statutory maxima of 180 days. Under RCC § 22E-301(d)(1), in contrast, the authorized sentence must be measured in years, particularly where the target property is valuable.[223]

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[218] As the DCCA observed in *Perry v. United States*, AWI offenses have been rendered "unnecessary" by the "[m]odern grading of attempt according to the gravity of the underlying offense." *Perry*, 36 A.3d at 825 (citation and quotation omitted). Specifically, AWI offenses were originally created to supplement the "relatively trivial sanctions" afforded by criminal attempt offenses employed at common law. Model Penal Code § 211.1 cmt. at 181-82. Since then, however, the District, along with every other jurisdiction in America, has come to realize that attempts can themselves be graded more seriously, contingent upon the severity of the target offense. LAFAVE, *supra* note 16, at 2 SUBST. CRIM. L. § 16.2.

[219] The Explanatory Note, *supra*, further clarify that, for purposes of paragraph (d)(1) punishment means: "(1) imprisonment and fine if both are applicable to the target offense; (2) imprisonment only if a fine is not applicable to the target offense; or (3) fine only if imprisonment is not applicable to the target offense."

[220] [RESERVED].

[221] [RESERVED].

[222] [RESERVED]. Notably, under both D.C. Code § 22-3571.01 and RCC § 22E-804, fines are generally cut in half whenever penalties are cut in half. Therefore, the halving of fines provided for in RCC § 22E-301(c)(1) is consistent with, and generally reflects, current District law.

[223] [RESERVED].

This increase in authorized punishment will also apply to attempts to commit various violent offenses that are currently subject to a substantial punishment discount under District law. Illustrative are attempts to commit first-degree murder and second-degree murder, which, under current District law, are subject to a statutory maxima of 5 years under D.C. Code § 22-1803.[224] Under RCC § 22E-301(d)(1), in contrast, the authorized punishments for attempts to commit these offenses will be increased significantly.[225]

By contrast, the penalties for current District attempt offenses subject to equal punishment would be lower under RCC § 22E-301(d)(1). This decrease in punishment applies to attempts to commit various non-violent offenses, such as malicious destruction of property and simple assault, which now penalize attempts the same as completed offenses.[226] And it also applies to attempts to commit various violent offenses, such as attempted arson and assault with significant bodily injury. Under RCC § 22E-301(d)(1), in contrast, the maximum authorized punishment for these attempt offenses is effectively cut in half.

To the extent the RCC penalty scheme changes current District law, the changes enhance the proportionality of the District's statutorily authorized punishments. These changes also generally accord with nationwide legal trends.[227] And to the extent that the D.C. Council has, in many of its more recently enacted statutes, applied a proportionate punishment discount, they are supported by current District law. Finally, under RCC § 22E-301(d)(2), exceptions to the consistent punishment of criminal attempts are clearly stated.[228]

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[224] [RESERVED]. Note, however, that the District's most severe AWI statute partially fills this gap by applying a 15 year statutory maximum to attempted murders that progress to the point of an assault. *See* D.C. Code § 22-401. Importantly, though, many attempted murders may not reach that level of progress. 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. 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.

Hardy v. State, 482 A.2d 474, 477 (1984).

[225] [RESERVED]. Practically speaking, the severity of this increase would be mitigated by the repeal of AWI offenses, which afford a more serious penalty to what practically amounts to an attempt to commit some of these offenses.

[226] [RESERVED].

[227] *See supra* note 29.

[228] Which is also consistent with national legal trends. *See supra* note 30.

RCC § 22E-302. Criminal Solicitation.

Explanatory Note. RCC § 22E-302 provides a comprehensive statement of general solicitation liability under the RCC.[1] This statement: (1) establishes the culpable mental state requirement and conduct requirement of a criminal solicitation; (2) addresses the import of an uncommunicated solicitation; and (3) specifies the penalties applicable to a criminal solicitation. § 22E-302 replaces the District's current general solicitation statute, D.C. Code § 22-2107.

The prefatory clause of subsection (a) establishes that a criminal solicitation necessarily incorporates "the culpability required for [the target] offense."[2] Pursuant to this principle, a defendant may not be convicted of a criminal solicitation absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any broader aspect of culpability[3]—required to establish that offense.[4]

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[1] Many of the same conceptual and policy issues addressed in this commentary entry are also discussed—sometimes more comprehensively—in the commentary accompanying criminal conspiracy, RCC § 22E-303.

[2] *See, e.g.,* Model Penal Code § 5.02(1) (government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime"); *Mizrahi v. Gonzales*, 492 F.3d 156, 160–61 (2d Cir. 2007) ("[Culpability] of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(a) (3d ed. Westlaw 2019) ("[W]here the prohibited result involves special circumstances as to which a *mens rea* requirement is imposed, the solicitor cannot be said to have intended that result unless he personally had this added mental state.") (citing *Porter v. State*, 455 Md. 220, 166 A.3d 1044 (2017) (because murder requires proof of malice, solicitation of murder also requires proof of malice)).

[3] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(d) (culpability requirement defined). For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, solicitation liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(d)(1) (voluntariness requirement also part of culpability requirement).

[4] This derivative culpable mental state requirement, which is drawn from the target offense, is to be distinguished from the independent culpable mental state requirement governing the command, request, or efforts at persuasion (hereinafter, "request") at issue in all solicitation prosecutions. *See infra* notes 18-24 and accompanying text.

Generally speaking, solicitation liability entails proof that the accused: (1) "intended," by his or her request, to have the solicitee engage in conduct planned to culminate in an offense; and (2) "intended," through that request, to bring about any result elements or circumstance elements that comprise the target offense. *See, e.g.,* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 754–55 (1983); *State v. Garrison*, 40 S.W.3d 426, 432-34 (Tenn. 2000) (discussing dual intent requirements of solicitation).

To illustrate how these "dual intent" requirements fit together, consider the following scenario. Police receive a report that a janitor working at a District of Columbia government building, S, intends to murder a plain-clothes police officer, V, who is standing immediately outside the building's uncovered loading dock area conducting investigative work. According to this tip, S's plan is to have a large object thrown off the back end of the thirtieth floor balcony, thereby killing V upon impact. Soon thereafter, two officers arrive at the thirtieth floor balcony, at which point they hear S instruct a more junior janitor, X, to drop an old, out-of-use television off the right side of the balcony. Given that V is, in fact, located immediately below the right side of the balcony, the police immediately intercede, thereby preventing X

Paragraph (a)(1) establishes the nature of the act required for general solicitation liability.[5] In so doing, it recognizes three types of attempted influence, each of which may satisfy section 302.[6] The first, and strongest, is a "command,"[7] which implies an order or direction, commonly by one with some authority over the other.[8] Less strong,

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from engaging in conduct that would result in death to V. If S later finds himself in D.C. Superior Court charged with soliciting the murder of a police officer, can he be convicted? The answer to this question depends upon whether S's state of mind fulfills both of the dual intent requirements governing general solicitation liability.

For example, if S had misspoken, and meant to instruct X to drop the old, out-of-use television off the *left* (rather than *right*) side of the balcony, below which there is an unaccompanied trash receptacle, then neither requirement is met: S did not intentionally request that X engage in conduct, which, if carried out, would have resulted in V's death; nor did S act with the intent that, through his request, anyone be killed, let alone a police officer.

Alternatively, if S did mean to ask X to drop the TV off the right side of the balcony, but was completely unaware that V (or any other person) was located below the drop point (e.g., because S believed another unaccompanied trash receptacle was located below the right side, too), then the first requirement is met: S intentionally requested that X engage in conduct, which, if carried out, would have resulted in V's death. But the second requirement is not met: S did not intend, through his request, to cause the death of anyone, let alone a police officer.

Lastly, if S had asked X to drop the TV off the right side of the balcony, while aware of V's presence below, in order to seek retribution against the same officer responsible for disrupting a drug conspiracy S was involved with years ago, then S fulfills both requirements: S intentionally requested that X engage in conduct, which, if carried out, would have resulted in V's death; and S also intended, through that request, to actually kill a police officer. (Note: if S intended to kill V but lacked awareness that V was a police officer, then the second intent requirement would not be met—although S intended to kill someone, S did not intend to kill a *police officer*.)

[5] Over the years, "[c]ourts, legislatures and commentators have utilized a great variety of words to describe the required acts for solicitation." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1; *see, e.g.,* Model Penal Code § 5.02, cmt. at 372 n.25 (collecting different statutory formulations). That said, the essence of the crime is "trying to persuade another to commit a crime that the solicitor desires and intends to have committed." Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 29 (1989); *see* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 ("[T]he essence of the crime of solicitation is asking a person to commit a crime"); *People v. Nelson*, 240 Cal. App. 4th 488, 496 (2015) ("The essence of criminal solicitation is an attempt to induce another to commit a criminal offense.").

[6] These varying forms of influence may, in turn, be communicated directly or by an intermediary, through words or gestures, via threats or promises, and occur either before or at the actual time the crime is being committed. It is therefore, immaterial, for purposes of solicitation liability, whether the rational or emotional support is communicated orally, in writing, or through other means of expression. *E,g.,* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11 (well-established that "solicitation c[an] be committed by speech, writing, or nonverbal conduct); *State v. Johnson*, 202 Or. App. 478, 483-84 (2005) (rejecting "the proposition that the state must produce the actual words used by the solicitor (or, for that matter, that words must be used)"). Nor is proof of a "quid pro quo" between the solicitor and the party solicited necessary. *E,g.,* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1; *Johnson*, 202 Or. App. at 483-84 (2005) (rejecting "the proposition that the state must prove that the solicitor offered the solicitee a quid pro quo").

[7] *See, e.g,* Model Penal Code § 5.02(1) (basing solicitation liability on a "command[]"); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(c) n.88 (collecting statutes in accordance).

[8] Such as, for example, where S, the mob boss, orders X, the loyal lieutenant, to kill V for his failure to make good on an outstanding debt owed to S. Note that "command" does not entail any actual influence on the recipient, so it would be immaterial for purposes of section 302 that X declined to follow through on the order to kill V. *See also* RCC § 22E-302(c) (addressing uncommunicated solicitations).

but just as direct, is a "request,"[9] which occurs when one person explicitly asks another person to engage in specified conduct.[10] The third form of influence contemplated in paragraph (a)(1) is "tr[ying] to persuade,"[11] which covers less direct means of communication.[12]

Importantly, none of these forms of attempted influence entail proof that the solicitee *actually* agreed, consented, or was persuaded to engage in the solicited conduct,[13] let alone that any of the relevant parties (i.e., solicitor or solicitee) engaged in an overt act (or any other conduct) in furtherance of the solicitation.[14] Rather, under §

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[9] *See, e.g,* Model Penal Code § 5.02(1) (basing solicitation liability on a "request[]"); LAFAVE, *supra* note 2, , at 2 SUBST. CRIM. L. § 11.1(c) n.88 (collecting statutes in accordance).

[10] Such as, for example, where S, the loyal lieutenant, asks X, the mob boss, to order a hit on V for his failure to make good on an outstanding debt to S. Note that "request" does not entail any actual influence on the recipient, so it would be immaterial for purposes of section 302 that X declined to grant S's request to kill V. *See also* RCC § 22E-302(c) (addressing uncommunicated solicitations).

[11] *See, e.g.,* Colo. Rev. Stat. § 18-2-301(1) (basing solicitation liability on an "attempt[] to persuade another person"); *State v. Jensen*, 164 Wash. 2d 943, 951 (2008) ([T]he *actus reus* . . . solicitation is an *attempt* to persuade another to commit a specific offense."); 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 371 (1970) (attempt to persuade formulation should avoid liability in "equivocal situations too close to casual remarks or even to free speech"); *compare* Model Penal Code § 5.02(1) (basing solicitation liability on "encourage[ment]"); Model Penal Code § 5.02(1), cmt. at 372 ("'Encourages' is the most expansive of these terms and encompasses actors who bolster the fortitude of those who have already decided to commit crimes, so long as the encouragement is done with the requisite criminal purpose."); *id.* at 372 n.25 (collecting statutes in support of both formulations).

[12] Such as, for example, where S, the cousin of mob boss X, sends X a letter with a comprehensive and detailed list of reasons of why X should order a hit on V, but which does not expressly request or command X to do so. Note that "trying to persuade" (in contrast to "persuades") does not entail any actual influence on the recipient, so it would be immaterial for purposes of section 302 that X was not, in fact, persuaded by S's case for killing V. *See also* RCC § 22E-302(c) (addressing uncommunicated solicitations).

[13] It is therefore immaterial under section 302 that the solicitee rejects the solicitation, or verbally agrees but does not actually intend to commit the crime—such as, for example, where the solicitee is an undercover police officer feigning intent. *E.g.,* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012). This is to be contrasted with the bilateral understanding of conspiracy reflected in section 303, which requires proof that the defendant "and at least one other person" actually agree to commit a crime. RCC § 22E-303(a). For example, if S asks X to engage in or aid the planning or commission of criminal conduct, and X agrees, then a criminal conspiracy has been formed under section 303. But if X doesn't agree, then there's no conspiracy between S and X under the RCC's bilateral approach. However, S is guilty of solicitation under section 302. *Compare Allen v. State*, 91 Md.App. 705, 605 A.2d 960 (1992) (observing that a "solicitee's acquiescence to a solicitation, even if lawfully made by an undercover agent, does not make the *solicitee* guilty of solicitation").

[14] *See, e.g., People v. Cheathem*, 658 N.Y.S.2d 84, 85 (1997); *People v. Burt*, 288 P.2d 503, 505 (Cal. 1955). For this reason, a criminal solicitation is "the most inchoate of the anticipatory offenses." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Jensen*, 195 P.3d 512, 517 (Wash. 2008); *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015); Model Penal Code § 5.02 cmt. at 365-66. The following analysis is illustrative:

> Assume that *A* wishes to have his enemy *B* killed, and thus—perhaps because he lacks the nerve to do the deed himself—*A* asks *C* to kill *B.* If *C* acts upon *A*'s request and fatally shoots *B,* then both *A* and *C* are guilty of murder. If, again, *C* proceeds with the plan to kill *B*, but he is unsuccessful, then both *A* and *C* are guilty of attempted murder. If *C* agrees to *A*'s plan to kill *B* but the killing is not accomplished or even attempted, *A* and *C* are nonetheless guilty of the crime of conspiracy. But what if *C* immediately

22E-302, a solicitation is complete the moment the request, command, or efforts at persuasion has been expressed by the defendant.[15]

Paragraph (a)(1) also addresses three fundamental issues concerning the scope and applicability of general solicitation liability. The first relates to the relationship between solicitation and complicity, namely, whether soliciting another person to act as an accomplice provides the basis for general solicitation liability. Paragraph (a)(1) establishes, in relevant part, that general solicitation liability is appropriate under the RCC where the defendant asks another person to "aid the planning or commission" of criminal conduct.[16] This alternative formulation clarifies that solicitations to assist with or otherwise facilitate the planning or commission of a crime, no less than solicitations to directly engage in the requisite criminal conduct, provide an adequate basis for general solicitation liability, provided that the other requirements of section 302 are met.[17]

The second issue focuses on the relationship between the defendant's state of mind and the conduct being solicited.[18] Paragraph (a)(1) establishes, in relevant part, that

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> rejects *A*'s homicidal scheme, so that there is never even any agreement between *A* and *C* with respect to the intended crime? Quite obviously, *C* has committed no crime at all. *A,* however, because of his bad state of mind in intending that *B* be killed and his bad conduct in importuning *C* to do the killing, is guilty of the crime of solicitation.

LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1.

[15] *See infra* notes 39-42 and accompanying text (discussing treatment of uncommunicated solicitations under subsection (c)).

[16] *See, e.g.,* Model Penal Code § 5.02(1)("A person is guilty of solicitation to commit a crime if . . . he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or *would establish his complicity in its commission or attempted commission*.") (italics added); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 (It is "sufficient that A requested B to get involved in the scheme to kill C in any way which would establish B's complicity in the killing of C were that to occur.").

[17] In this sense, solicitation liability runs parallel with conspiracy liability under section 303, which similarly criminalizes agreements to aid in the planning or commission of a crime. RCC § 22E-303(a)(1)("Purposely agree to engage in *or aid the planning or commission of conduct* which, if carried out, will constitute that offense or an attempt to commit that offense") (italics added); *see, e.g.,* Model Penal Code § 5.03(1)(b) (conspiracy liability where one person "agrees to *aid* [an]other person or persons in the planning or commission of [a] crime") (italics added); *Salinas v. United States*, 522 U.S. 52, 65 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he *adopt the goal of furthering or facilitating the criminal endeavor*. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.") (italics added).

[18] The nature of this relationship "is crucial to the resolution of the difficult problems presented when a charge of [solicitation or conspiracy] is leveled against a person whose relationship to a criminal plan is essentially peripheral":

> Typical is the case of the person who sells sugar to the producers of illicit whiskey. He may have little interest in the success of the distilling operation and be motivated mainly by the desire to make the normal profit from an otherwise lawful sale. To be criminally liable, of course, he must at least have knowledge of the use to which the materials are being put, but the difficult issue presented is whether knowingly facilitating the commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end. In this case conflicting interests are involved: that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the

general solicitation liability only applies to those who act with the purpose of bringing about conduct planned to culminate in an offense.[19] This "purposive attitude" also constitutes the foundation of the culpability requirement governing both accomplice liability and the general inchoate crime of conspiracy.[20] It can be said to exist when a person, through his or her request, *consciously desires* to facilitate or promote conduct planned to culminate in an offense.[21]

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commission of crimes.

Model Penal Code § 5.03, cmt. at 404.

[19] *See, e.g.,* Model Penal Code § 5.02(1) (solicitation liability entails proof of must "the purpose of promoting or facilitating the commission of the crime"); *Id.*, Explanatory Note ("A purpose to promote or facilitate the commission of a crime is required, together with a command, encouragement or request to another person that he engage in specific conduct that would constitute the crime . . . "); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 ("Virtually all of the more recently enacted solicitation statutes" appear to have endorsed the position that a conscious desire to promote or facilitate criminal conduct is necessary).

This purpose requirement *does not* extend to whether the solicited conduct is, in fact, illegal or otherwise constitutes an offense. *See also* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.2(c) (accomplice cannot "escape liability by showing he did not [*desire*] to aid a crime in the sense that he was unaware that the criminal law covered the conduct of the person he aided. Such is not the case, for here as well the general principle that ignorance of the law is no excuse prevails.").

[20] *See, e.g., United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.) ("[Every definition of complicity requires that the defendant in] some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, 'abet,' carry an implication of *purposive attitude* towards it.") (italics added); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940) (Hand, J.) ("There are indeed instances . . . where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; *but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive.* It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.") (italics added); Model Penal Code § 5.02 cmt. at 371 (noting that the same purpose requirement governing complicity and conspiracy is also applicable to solicitation).

[21] *See generally* RCC § 22E-206(a) (purposely defined). The following scenario is illustrative. X is considering whether to rob a bank on his own, which would require a fast car and a small firearm, both of which X lacks. X relays his conundrum over the phone to his friend, S, who happens to own a vehicle and firearm of this nature. Having been informed of this, S proposes the following arrangement: S will lend X his car and gun in return for a ten percent stake in the profits from the bank robbery. X is initially uncertain about whether the robbery or arrangement is good idea, but S makes a very persuasive case for both positions. X asks for a few days to think about S's proposal, but soon thereafter the police—who had tapped A's phone, and thus overheard the conversation—arrest both S and X. On these facts, S may be held liable for solicitation because S, through his efforts at persuasion, consciously desired to facilitate and promote specific conduct, which, if carried out, would have constituted robbery.

That a solicitor must have the purpose to facilitate or promote conduct planned to culminate in an offense does not preclude convictions for knowledge-based theories of liability concerning the result elements of the target offense. The following example involving environmental activists S and X is illustrative. S asks X to help him blow up a coal-processing facility during the evening/afterhours when only a single person, the on-duty night guard, V, will be present. S is practically certain that V will die from the blast, though S would very much prefer that V not be injured. The police intercede soon after S communicates the request, thereby saving V's life. On these facts, S may be convicted of solicitation to commit (knowing) murder, premised on the fact that S's request was accompanied by: (1) a *desire* for X to aid conduct, which, if carried out, would have culminated in murder; and (2) S's *awareness as to a practical certainty* that such conduct would result in V's death. *See also* Paul H. Robinson & Jane A.

The corollary to this purpose requirement is that general solicitation liability is not supported under § 22E-302 where a defendant's primary motive in making a request is to achieve some other, non-criminal objective (e.g., "conduct[ing] an otherwise lawful business in a profitable manner").[22] And this is so even if the defendant knew that his or her solicitation was likely to facilitate or promote a criminal scheme.[23] Neither awareness of, nor indifference towards, another person's criminal plans are sufficient to satisfy the purpose requirement incorporated into paragraph (a)(1).[24]

Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 (1983) ("When causing a particular result is an element of the object offense and such result does not occur, the actor, to be liable for conspiracy under Subsection (1), must have the purpose or belief that the conduct contemplated by the agreement will cause such result."); Note, *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 926 (1959)) ("[A] person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees[.]"); *but see also* Model Penal Code § 5.03 cmt. at 408 ("[I]t would not be sufficient [for conspiracy], as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it.").

[22] *See, e.g., Falcone*, 109 F.2d at 581 (Hand, J.) ("[T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner" because this would "seriously undermin[e] lawful commerce."); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 353 (1985) (absent a purpose requirement, the criminal law would "cast a pall on ordinary activity" by giving us reason to "fear criminal liability for what others might do simply because our actions made their acts more probable"); Model Penal Code § 5.03 cmt. at 406 (observing that "the complicity provisions of the Code" require "a purpose to advance the criminal end," and deeming "the case" for this resolution to be an "even stronger one" in the context of conspiracy, such that "[a] conspiracy does not exist [under the Code] if a provider of goods or services is aware of, but fails to share, another person's criminal purpose").

[23] The commentary accompanying Model Penal Code § 5.02 states, in relevant part:

> It is not enough for a person to be aware that his words may lead to a criminal act or even to be quite sure they will do so; it must be the actor's purpose that the crime be committed. The language of the section may bar conviction even in some situations in which an actor does hope that his words will lead to commission of a crime. Suppose a young man seeks out a pacifist and asks for advice whether he should violate his registration obligation under the selective service laws. This particular pacifist believes all cooperation with the selective service system to be immoral and he so advises the young man. Although he may hope that the young man will refuse to register, his honest response to a request for advice might not be thought to constitute a purpose of promoting or facilitating commission of the offense. If he were tried it would be a question of fact whether his advice evidenced purpose.

Model Penal Code § 5.02 cmt. at 371.

[24] To illustrate, consider the following modified version of the scenario presented *supra* note 21. S is in dire need of money to pay for his sick child's medical bills, so he decides to sell his expensive sports car. S begins calling friends to see if anyone has interest in purchasing it, which would save S the time of listing it. S subsequently calls X. At the start of the conversation, X tells S that he is considering robbing a bank on his own, and will need a fast car to carry out the plan. S says that he thinks the envisioned robbery would be a terrible idea, but that, as it turns out, he was actually calling X to see if X had any interest in purchasing S's sports car, which would likely serve as an excellent get-away vehicle. S offers to sell X the car for market value, and X tentatively accepts subject to a later inspection. Soon thereafter, however, the police—who had tapped X's phone, and thus overheard the proposal—arrest both S and X. On these facts, S cannot be held liable for soliciting to commit robbery because, *inter alia*, A did not consciously desire to facilitate or promote X's criminal conduct. Instead, S's purpose was to raise money for his child's medical

The third issue is the relevance of impossibility to general solicitation liability—i.e., the fact that the target offense cannot be consummated under the circumstances due to a mistake on behalf of the defendant.[25] Paragraph (a)(1) establishes, in relevant part, that solicitations to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" can also provide

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bills, and to save himself the hassle of having to list and sell the vehicle on his own. That S knew the sale of his car to X would facilitate the bank robbery, and was arguably indifferent as to X's criminal conduct, would not support liability under section 302.

[25] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense and engaged in significant conduct, but nevertheless argue that impossibility of completion should by itself preclude the imposition of solicitation liability. *See, e.g.,* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 13, at § 27.07. In resolving this claim, there are four general categories of impossibility that might be considered for evaluative purposes (i.e., these are not analytically perfect distinctions).

The first category is *pure factual impossibility*, which arises where the object of the solicitation cannot be consummated because of circumstances unknown to the solicitor or beyond his or her control. The following situations are illustrative: (1) S asks X to pickpocket V's jacket, believing it to contain valuable items, when it is actually empty; and (2) S asks X to shoot into the bedroom where V customarily sleeps, believing V to be there, when V is, in fact, on vacation.

The second category of impossibility is *pure legal impossibility*, which arises where the solicitor acts under a mistaken belief that the law criminalizes his or her intended objective (e.g., solicitation of a lawful act). The following situation is illustrative. S, a 50 year-old male, asks X to arrange a sexual encounter with Z, a 20 year-old woman. S knows X is 20; however, X also believes that the age of consent is 21—when, in fact, it is 18. Therefore, X believes himself to be soliciting aid for a statutory rape.

The third category is *hybrid impossibility*, which arises where the object of the solicitation constitutes a crime, but commission of the target offense is impossible due to a factual mistake regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense. The following situations are illustrative: (1) S asks X to purchase property on the black market, believing it to be stolen, when, in fact, the property is part of a sting operation; and (2) S asks X to arrange consensual sexual relations with V, believing V to be a nine year-old child, when, in fact, V is an undercover police officer posing as a young child.

The fourth category of impossibility is *inherent impossibility*, which arises where one person solicits another to commit a crime by "employing means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.5(a)(4). The following situations are illustrative: (1) S asks X to kill V via incantation or voodoo; (2) S asks X to perform sex acts with V, a manikin that S believes to be a 9 year-old child. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244-45 (1995) (common denominator underlying inherent impossibility is that the defendant's "actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances").

It should be noted that the law of impossibility is relatively underdeveloped in the context of solicitation liability. *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019). Courts rarely seem to publish opinions addressing impossibility issues outside the attempt context, and, even when they do, those opinions shy away from the "lengthy explorations of the distinction between [different kinds of] impossibility" that characterize attempt jurisprudence. LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.5. Rather, courts are more likely to generally state—as the U.S. Supreme Court recently observed in *United States v. Williams*—that "impossibility of completing the crime because the facts were not as the defendant believed is not a defense [to solicitation]" and move on. *United States v. Williams*, 553 U.S. 285, 300 (2008).

the basis for general solicitation liability.[26] This reference to attempts imports the broad abolition of impossibility claims employed in the RCC's general attempt provision into the solicitation context.[27] Under this approach, it is generally immaterial that the proposed criminal scheme could never have succeeded under the circumstances.[28] So long as the solicitor sought to bring about conduct that would have culminated in the target offense if "the situation was as [solicitor] perceived it" then solicitation liability may attach,[29] provided that the requested course of conduct was at least "reasonably adapted" to commission of the target offense.[30]

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[26] *See, e.g.,* Model Penal Code § 5.02(1) (solicitation liability where one person asks "another person to engage in specific conduct that would constitute such crime or *an attempt to commit such crime*") (italics added). Here's how the drafters of the Model Penal Code explain the significance of this language:

> It ordinarily should not be necessary to charge an actor with soliciting another to attempt to commit a crime, since a rational solicitation would seek not an unsuccessful effort but the completed crime; the charge, therefore, should be one of solicitation to commit the completed crime. But in some cases the actor may solicit conduct that he and the party solicited believe would constitute the completed crime, but that, for reasons discussed in connection with the defense of impossibility in attempts, does not in fact constitute the crime. Such conduct by the person solicited would constitute an attempt under Section 5.01, and the actor would therefore be liable under Section 5.02 for having solicited conduct that would constitute an attempt if performed.

Model Penal Code § 5.02, cmt. at 373-74; *see also* Model Penal Code § 5.03 cmt. at 421 ("[If an] actor agrees that he or another will engage in conduct that he believes to constitute the elements of the offense, but that fortuitously does not in fact involve those elements, he would under this section be guilty of an agreement to attempt the offense, since attempt liability could be made out under [the MPC's general attempt provision] if the contemplated conduct had occurred.").

[27] Under RCC § 22E-301(a)(3)(A)(ii), a person commits an attempt if, *inter alia*, he or she "engages in conduct that . . . [w]ould have come dangerously close to completing that offense if the situation was as the person perceived it." Subparagraph (a)(3)(B) thereafter adds that the person's conduct must have been "reasonably adapted to completion of that offense."

[28] *See* RCC § 22E-301(a), Explanatory Note ("Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.").

[29] RCC § 22E-301(a)(3)(A)(ii). Specifically, the subjective approach incorporated into subparagraph (a)(1)(B) renders pure factual and hybrid impossibility claims immaterial. *See supra* note 25 (defining these categories). For example, under the RCC it would not be a defense to solicitation to commit murder that: (1) the intended victim was already dead, provided that the solicitor mistakenly believed the person to be alive; or that (2) the murder weapon provided by the solicitor to the hit man was inoperable, provided that the solicitor mistakenly believed it be operable. Nor would it preclude liability for solicitation to commit murder under the RCC that: (1) the solicitee is *unable* to commit the target offense—such as, for example, when S sends a letter to a well-regarded hit man, X, soliciting the murder of V, only to discover that X is in a coma due to a near-fatal car accident; or that (2) the solicitee is *unwilling* to commit the target offense—such as, for example, when S asks X to commit a murder for hire, only to discover that X is an undercover officer merely posing as a willing participant in a criminal offense. *See, e.g.,* ROBINSON, *supra* note 25, at 1 CRIM. L. DEF. § 85 ("The modern trend, evident in most jurisdictions, is to reject both [forms of] impossibility as defenses."); *United States v. Devorkin*, 159 F.3d 465, 468 (9th Cir. 1998) ("It is not a defense" to solicitation that "the person solicited *could not commit the crime*, or . . . *would [not] have* committed the crime solicited.") (quoting LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1).

In contrast, pure legal impossibility remains a viable theory of defense under the RCC. *See supra* note 25 (defining this category). However, this does not hinge on RCC § 22E-301(a)(3)(A)(ii), or any

Paragraph (a)(2) addresses the target offenses subject to general solicitation liability. It establishes that only an offense against persons as defined in Subtitle 2 of Title 22E, may provide the basis for general solicitation liability. Solicitations that involve other forms of prohibited conduct (e.g., prostitution) may be criminalized under

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other provision in section 301. Rather, the "underlying basis for acquittal is the principle of legality," which "provides that we should not punish people—no matter culpable or dangerous they are—for conduct that does not constitute the charged offense at the time of the action." DRESSLER, *supra* note 13, at § 27.07; *see* Model Penal Code § 5.01 cmt. at 318 ("[If] the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.").

For example, "it is not a crime to throw even a [District of Columbia] steak into a garbage can." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 595 (2d ed. 1960). So if after losses against the Washington Nationals, the Oriole Bird, the Baltimore Orioles mascot, and Phillie Phanatic, the Philadelphia Phillies mascot, together place a local District steak in the garbage, neither is guilty of committing any offense. Nor could the Oriole Bird be convicted of soliciting an imaginary offense for asking the Phillie Phanatic to place a District steak in the garbage, although the Oriole Bird honestly believed such conduct to be prohibited by the D.C. Code. *E.g.,* DRESSLER, *supra* note 13, at § 27.07 ("Just as a person may not ordinarily escape punishment on the ground that she is ignorant of a law's existence, it is also true that we cannot punish people under laws that are purely the figments of their guilty imaginations.").

Inherent impossibility also remains a viable (if exceedingly limited) theory of defense under the reasonable adaptation standard codified in paragraph (a)(2) of section 301. *See infra* note 30.

[30] RCC § 22E-301(a)(3)(B). As the Explanatory Note accompanying subparagraph (a)(3)(B) of section 301 explain:

> This reasonable adaptation requirement is intended to limit attempt liability to those situations where there exists a basic relationship between the defendant's conduct and the criminal objective sought to be achieved. Requiring the government to establish this basic relationship both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.

Id. (collecting District case law and national legal authority in support of this approach).

Inherent impossibility is an issue in solicitation prosecutions where S asks X to commit an offense by "employing means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.5(a)(4); *see, e.g.,* John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999) (recognition of inherent impossibility defense to attempt most strongly supported by relevant case law, statutes, and commentary); *compare* Model Penal Code § 5.05(2) (providing sentencing mitigation for a solicitation that "is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section"). Conduct of this nature would not be "reasonably adapted" to completion of the target offense under subparagraph (a)(3)(B) of section 301, and, therefore, could constitute a (failure of proof) defense to solicitation liability under the RCC.

For example, the fact that the defendant in a solicitation to murder prosecution asked another person to kill the victim by pulling the trigger on a broken firearm that the defendant mistakenly believed to be operable would not call into question whether the defendant's conduct was reasonably adapted to the completion of murder. In contrast, the fact that the defendant in a solicitation to murder prosecution asked another person to kill the victim by shooting a fully functional firearm at a voodoo doll with the victim's picture attached to it would be relevant to evaluating the reasonable adaptation standard—and ultimately preclude the attachment of solicitation liability under section 302. *See, e.g.,* Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 470 (1954) (where the defendant "invokes witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result.") (collecting authorities).

specific provisions in the RCC. But the general inchoate crime of solicitation codified in § 22E-302 only applies to offenses against persons.[31] It should be noted, however, that

[31] That section 302 only applies to crimes of violence is to be contrasted with sections 301 and 303 of the RCC, which respectively criminalize attempts and conspiracies to commit *any* criminal offense. *See* RCC §§ 22E-301(a), 303(a).

This limitation on general solicitation liability corresponds with the District's prior general solicitation statute, which similarly only applies to crimes of violence. *See Omnibus Public Safety Act of 2006*, 2006 DISTRICT OF COLUMBIA LAWS 16-306 (Act 16–482), as added Apr. 24, 2007, D.C. Law 16-306, § 209, 53 DCR 8610 ("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."). The limitation also respects the fact that solicitation is, given its status as the "most inchoate of the anticipatory offenses," a particularly "controversial offense." *E.g.,* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 (quoting *State v. Jensen*, 164 Wash.2d 943, 195 P.3d 512 (2008); DRESSLER, *supra* note 13, at § 28.01.

Some have argued, for example, that "a mere solicitation to commit a crime, not accompanied by agreement or action by the person solicited, presents no significant social danger." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(b); *see* Robbins, *supra* note 5, at 116 ("By placing an independent actor between the potential crime and himself, the solicitor has both reduced the likelihood of success in the ultimate criminal object and manifested an unwillingness to commit the crime himself."). The "extremely inchoate nature of the crime" has also lead others to question general solicitation liability on the basis that it essentially "punish[es] evil intent alone." Robbins, *supra* note 5, at 116; *see* DRESSLER, *supra* note 13, at § 28.01 ("According to Glanville Williams, the purpose of the offense is to enable police to 'nip criminal tendencies in the bud.' In fact, however, his metaphor would be more accurate if he had stated that its purpose is to nip criminal tendencies at the stem."). And finally, even those who generally support expansive solicitation liability admit that the basic "risk[s] inherent in the punishment of almost all inchoate crimes"—namely the possibility "that false charges may readily be brought, either out of a misunderstanding as to what the defendant said or for purposes of harassment"—are even more pronounced in the solicitation context given that "the crime may be committed merely by speaking." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(b); *see, e.g., People v. Lubow*, 29 N.Y.2d 58, 66, 272 N.E.2d 331 (1971) ("[T]here are dangers in the misinterpretation of innuendos or remarks which could be taken as invitations to commit sexual offenses."); WORKING PAPERS, *supra* note 11, at 372 ("[E]ven for persons trained in the art of speech, words do not always perfectly express what is in a man's mind. Thus in cold print or even through misplaced emphasis, a rhetorical question may appear to be a solicitation. The erroneous omission of a word could turn an innocent statement into a criminal one.").

The controversial nature of solicitation liability is also reflected in national legal trends. Although the drafters of the Model Penal Code recommended criminalizing solicitations to commit "any offense" under section 5.02(1) of the MPC, "[t]he majority of jurisdictions only regard as criminal the solicitation of the more serious crimes." Commentary on Haw. Rev. Stat. Ann. § 705-510. More broadly, there remains considerable variation in American criminal codes concerning the scope and availability of general solicitation liability.

> Even in those jurisdictions with modern recodifications, it is not uncommon for there to be no statute making solicitation a crime, [and in] those states with solicitation statutes, there is considerable variation in their coverage. Some extend to the solicitation of all crimes, some only the solicitation of felonies, particular classes of felonies, or all felonies plus particular classes of misdemeanors, and one only the solicitation of certain specified offenses.

LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(a); *see id.* ("This suggests, as does language in some of the reported cases, that there is not a uniformity of opinion on the necessity of declaring criminal the soliciting of others to commit offenses.").

Limiting general solicitation liability to crimes of violence, as was previously the case under District law, sensibly reconciles these policy considerations and diverse national legal trends.

whether the conduct solicited actually qualifies as an offense against personsunder the RCC is a matter of fact for which an actor is strictly liable (i.e., without regard to his or her awareness).

Subsection (b) provides additional clarity concerning the culpable mental state requirement governing a criminal solicitation as it relates to the results and circumstances of the target offense.[32] Whereas the prefatory clause of subsection (a) generally clarifies that a solicitation conviction entails proof that the person acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the person must: (1) "[i]ntend to cause all result elements required for that offense"[33]; and (2) "[i]ntend for all circumstance elements required for

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[32] It should be noted that "[c]ase law is almost nonexistent" on the culpable mental state issues addressed by subsection (b), while their treatment by modern criminal statutes is almost always unclear. Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1166 (1997). This is due, at least in part, to the fact that the Model Penal Code's general solicitation provision "deliberately le[aves] open" the relevant culpability issues addressed by subsection (b) for judicial resolution. Model Penal Code § 5.02(1), cmt. at 371 n.23. As the Model Penal Code commentary highlights:

> Note should be made of a question that can arise as to the need for the defendant to have contemplated all of the elements of the crime that he solicits. If, for example, strict liability or negligence will suffice for a circumstance element of the offense being solicited, will the same culpability on the part of the defendant suffice for his conviction of solicitation, or must he actually know of the existence of the circumstance? The point arises also in charges of conspiracy, where it is treated in some detail. [The Model Penal Code does not resolve these issues in either context.]

Id.

In the absence of much legal authority on these issues in the context of solicitation, the best indicator of national legal trends is the more ample legal authority on these issues in the context of conspiracy, which is a very similar form of general inchoate liability. *See, e.g.,* Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 210 (1981) ("Because of its similarities to conspiracy, solicitation should require the same mental state as conspiracy."); *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015) (criminal solicitation constitutes an "attempted conspiracy"). That said, legal authority on complicity is also relevant given that solicitation provides one of two bases (abetting) for holding someone criminally responsible as an accomplice. *E.g.,* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1. Some of these legal authorities are cited *infra* notes 34-35; however, a more extensive overview and analysis can be found in the Explanatory Note accompanying RCC §§ 22E-303(b) and 210(b).

[33] LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 ("[A]s to those crimes which are defined in terms of certain prohibited results, it is necessary that the solicitor intend to achieve that result through the participation of another. If he does not intend such a result, then the crime has not been solicited, and this is true even though the person solicited will have committed the crime if he proceeds with the requested conduct and thereby causes the prohibited result."); *see generally, e.g.,* DRESSLER, *supra* note 13, at § 28.01 ("A person is not guilty of solicitation unless he intentionally commits the *actus reus* of the inchoate offense—he intentionally invites, requests, commands, hires, or encourages another to commit a crime—with the specific intent that the other person consummate the solicited crime."); *Mizrahi v. Gonzales*, 492 F.3d 156 (2d Cir. 2007) ("[T]he specific intent element of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); *see also, e.g.,* RCC § 22E-303(b) (applying same culpability principle general conspiracy liability); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 12.2(c) ("[T]here is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result."); *State v. Donohue*, 150 N.H. 180, 184, 834 A.2d 253, 256 (2003) (deeming this position to be well-established, and collecting authorities in accordance).

that offense to exist."[34] In effect, subsection (b) incorporates dual principles of culpable mental state elevation[35] applicable whenever the target offense is comprised of a result or circumstance element that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[36]

To satisfy the first principle, codified in paragraph (b)(1), the government must prove that the defendant's purposeful solicitation was accompanied by a *practically*

To illustrate, suppose that S asks X to set fire to an occupied structure in order to claim the insurance proceeds. If the resulting fire kills occupants, they may be convicted of murder on the ground that the deaths, although unintentional, were recklessly caused. S is not guilty of solicitation to commit murder, however, because he only intended to destroy the building, rather than the death of another person. DRESSLER, *supra* note 13, at § 29.05(B) (providing similar illustration in the context of conspiracy liability) (citing *State v. Beccia*, 505 A.2d 683, 684 (Conn. 1986) (holding that conspiracy to commit reckless arson is not a cognizable offense)); *see, e.g.,* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1 ("[I]f B were to engage in criminally negligent conduct which caused the death of C, then B would be guilty of manslaughter; but it would not be a criminal solicitation to commit murder or manslaughter for A to request B to engage in such conduct unless A did so for the purpose of causing C's death.").

[34] Commentary on Haw. Rev. Stat. Ann. §§ 705-510, 520 ("[The general solicitation statute] makes clear that, with respect to the culpability of the defendant, the defendant must act with the intent to promote or facilitate the commission of a crime," which language in the conspiracy context "requires an awareness on the part of the conspirator that the circumstances exist"); *see generally, e.g.,* DRESSLER, *supra* note 13, at § 28.01 ("A person is not guilty of solicitation unless he intentionally commits the *actus reus* of the inchoate offense—he intentionally invites, requests, commands, hires, or encourages another to commit a crime—with the specific intent that the other person consummate the solicited crime."); *Mizrahi*, 492 F.3d at 156 ("[T]he specific intent element of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); *see also, e.g.,* RCC §§ 22E-210(b), 303(b) (applying same culpability principle to accomplice liability and general conspiracy liability); *Rosemond v. United States*, 134 S. Ct. 1240, 1242 (2014) ("[A]iding and abetting requires intent extending to the whole crime . . . . That requirement is satisfied when a person actively participates in a criminal venture with *full knowledge of the circumstances* constituting the charged offense.") (italics added); *State v. Pond*, 315 Conn. 451, 484, 108 A.3d 1083, 1102 (2015) (deeming intent elevation as to circumstances to be well-established in the context of conspiracy liability, and collecting authorities in accordance).

To illustrate how this principle operates in the context of a strict liability crime, consider the following scenario involving two twenty one year-old male college students, S and X. One evening, X tells S that he met a girl, V, at a sorority party who, after being shown a picture of S, expressed interest in having sexual intercourse. In response, S asks X if he'd be willing to call the girl over, and lend S his college dorm to facilitate the sexual engagement. Both S and X reasonably believe that V is a 20 year-old college student; however, V is actually a fourteen year-old minor visiting her older (of age) sister. If S actually has sex with V, and is subsequently prosecuted for a strict liability sexual abuse offense applicable to fourteen year-old victims, S can be convicted notwithstanding his mistake of fact. However, if S does not have sex with her, and is instead prosecuted for soliciting X to aid in S's commission of statutory rape, the same mistake of fact would exonerate S under subsection (b) notwithstanding the strict liability nature of the target offense. Although S purposely asked X to aid S in his sexual rendezvous with V (a minor), S lacked the *intent* for X to aid sex with *a fourteen year old*, which would be required by the principle of culpable mental state elevation codified by subsection (b).

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

[36] Importantly, neither of these principles of culpable mental state elevation precludes the government from charging solicitations to commit target offenses comprised of result or circumstance elements subject to recklessness, negligence, or strict liability. However, to secure a solicitation conviction for such offenses, proof that the solicitor acted with the intent to cause every result and circumstance element that constitutes the target offense is necessary.

certain belief that the requested course of conduct would cause the result element(s) required by the target offense, or, alternatively, by a *conscious desire* for that course of conduct to cause the result(s). Similarly, to satisfy the second principle, codified in paragraph (b)(2), the government must prove that the defendant's purposeful solicitation was accompanied by a *practically certain belief* that the circumstance element(s) incorporated into the target offense exist, or, alternatively, by a *conscious desire* for the requisite circumstance(s) to exist.[37]

Subsection (c) addresses the import of an uncommunicated solicitation, which arises when the intended recipient of the defendant's command, request, or efforts at persuasion never receives the message due to external factors (e.g., police interference or carrier malfeasance).[38] Under subsection (c), the fact that the message is never received is generally "immaterial" for purposes of solicitation liability.[39] There is, however, one important limitation placed on this principle: the person must have "done everything he or she plans to do to transmit the message."[40] The latter proviso requires proof that,

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[37] When formulating jury instructions for a solicitation to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance element), the term "intent," as defined in RCC § 22E-206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* RCC § 22E-206(b), Explanatory Note.

[38] Note that a solicitor may fail to communicate with another person because the intended recipient never receives the message—e.g., the police intercept a murder for hire letter already placed in the mail by the defendant. Or, alternatively, a solicitor may fail to communicate with the intended recipient because the message is never sent—e.g., the police intercept the solicitor holding a murder for hire letter while making his way to the post office. In the first situation, the person has engaged in what might be considered a "complete attempt" at communication—that is, the person failed to achieve his criminal objective notwithstanding the fact that he was able to carry out the entirety of his criminal plans (i.e., placing the letter in the mail). In the second situation, in contrast, the person has only engaged in what might be considered an "incomplete attempt" at communication—that is, the person was unable to carry out the entirety of his criminal plans due to external interference. Subsection (c) authorizes solicitation liability in the first, but not the second, situation. *See infra* notes 41-42 and accompanying text.

[39] *See, e.g.,* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(c) ("What if the solicitor's message never reaches the person intended to be solicited, as where an intermediary fails to pass on the communication or the solicitor's letter is intercepted before it reaches the addressee? The act is nonetheless criminal . . . .").

[40] *See, e.g.,* Model Penal Code § 5.02(2) ("It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication."). In support of this approach, the drafters of the Model Penal Code argue: that:

> [T]he last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground. Conduct falling short of the last act should be excluded because it is too remote from the completed crime to manifest sufficient firmness of purpose by the actor. The crucial manifestation of dangerousness lies in the endeavor to communicate the incriminating message to another person, it being wholly fortuitous whether the message was actually received. Liability should attach, therefore, even though the message is not received by the contemplated recipient, and should also attach even though further conduct might be required on the solicitor's part before the party solicited could proceed to the crime.

Model Penal Code § 5.02, cmt. at 381; *see* LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(c) ("Liability properly attaches under these circumstances, as the solicitor has manifested his dangerousness

where an uncommunicated solicitation is at issue, the defendant engaged in the last proximate act necessary to transmit the message.[41]

Subsection (d) establishes the penalties for criminal solicitations. Paragraph (d)(1) states the default rule governing the punishment of criminal solicitations under the RCC: a fifty percent decrease in the maximum "penalty" applicable to the target offense.[42] "Penalty," for purposes of this paragraph, means: (1) imprisonment and fine if

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and should not escape punishment because of a fortuitous event beyond his control."); *compare infra* note 43 (critiquing this dangerousness rationale in the grading context).

The Model Penal Code approach to uncommunicated solicitations has been adopted by various state codes. *See, e.g.,* Haw. Rev. Stat. § 705-510; Utah Code Ann. §§ 76-4-203. However, there are also numerous jurisdictions that, "while not specifically addressing the uncommunicated solicitation situation, might also permit a conviction in such circumstances . . . because the solicitation statute itself includes, in the alternative, the defendant's "attempt" to [solicit]." LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(c) n.98 (collecting statutes and case law); *see, e.g.,* N.Y. Penal Law § 100.05 (solicitation liability where a person "solicits, requests, commands, importunes or *otherwise attempts to cause such other person to engage in such conduct*") (italics added); *People v. Lubow*, 29 N.Y.2d 58, 62, 272 N.E.2d 331 (1971) (italicized language in NY statute "would seem literally to embrace as an attempt an undelivered letter or message initiated with the necessary intent.").

[41] Consistent with this principle of liability, a solicitation conviction would be appropriate where: (1) S mails a written request for murder to X, but where the letter is then lost by the mail carrier (and thereafter handed over to the police) before A ever has an opportunity to read it; and where (2) S places a written request for murder to X in the mail, but where the letter is then immediately intercepted by the police before X ever has an opportunity to read it. In both situations, solicitation liability is supported by subsection (c) because S has done everything he plans to do to transmit the message.

If, in contrast, S, intending to mail a written request for murder to X, is arrested by the police *on his way to the post office* with the letter in hand, subsection (c) would not support liability in light of the fact that S has not engaged in the last proximate act necessary to effect such communication (e.g., placing the letter in the mail).

[42] *See, e.g.,* Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 305 (1994) ("Adhering to an objective view of grading, a majority of jurisdictions reduce the grade of inchoate conduct below that of the corresponding substantive offense."); LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1(a) ("[Modern] solicitation statutes typically provide that the solicitation constitutes a grade of crime one level below the offense which was solicited," though "[s]ome . . . generally authorize punishment equivalent to that which is provided for the solicited crime"). This penalty reduction is to be contrasted with the Model Penal Code, which grades most criminal solicitations as "crimes of the same grade and degree as the most serious offense which is attempted." Model Penal Code § 5.05(1); *but see id.* ("[A] solicitation . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree.").

The drafters of the Model Penal Code adopted this policy of solicitation penalty equalization on the basis of the same dangerousness-based rationale that motivated their endorsement of equalizing the penalty for attempt and conspiracy. *See, e.g.,* Model Penal Code § 5.05, cmt. at 490 ("To the extent that sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan."). However, as discussed in the Explanatory Note accompanying RCC § 22E-301(d), this rationale for punishment has been called into question by many on empirical grounds, including, perhaps most notably, by the drafters of the recent Model Penal Code Sentencing Project. *See, e.g.,* Model Penal Code: Sentencing § 6.06 PFD (2017) ("There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders.").

The (original) Model Penal Code's equalization of solicitation penalties also conflicts with a strong intuitive sense, captured by public opinion surveys, that resultant harm should matter for grading purposes. *See, e.g.,* Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of*

both are applicable to the target offense; (2) imprisonment only if a fine is not applicable to the target offense; and (3) fine only if imprisonment is not applicable to the target offense. Paragraph (d)(2) thereafter lists those offenses that are exempt from this default rule and specifies the punishment for each exception.[43]

RCC § 22E-302 has been drafted in light of, and should be construed in accordance with, prevailing free speech principles. Given the centrality of speech to encouragement, solicitation liability directly implicates a criminal defendant's First Amendment rights.[44] And while the U.S. Supreme Court recently clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,"[45] it also reaffirmed the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[46] The RCC respects this distinction by requiring that the defendant solicit another person to engage in "*specific* conduct" constituting an offense under paragraph (a)(1).[47] To meet this requirement, it is not necessary that the defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. At the very least, though, it must be proven that the defendant's communication, when viewed in the context of the knowledge and

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Criminality: A Study in the Role of Social Science in Criminal Law Theory, 18 OXFORD J. LEGAL STUDIES 409, 429-30 (1998) (failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades" by lay jurors, while the earlier the defendant's plans are frustrated, the greater this "no harm" discount). This may explain why, "[i]n the United States, three-quarters of the jurisdictions reject the notion of grading inchoate offenses the same as the completed offense." Robinson, *supra* note 43, at 320 ("Nearly two-thirds of American jurisdictions have adopted codes that have been heavily influenced by the Model Penal Code, but less than 30% of these have adopted the Code's inchoate grading provision or something akin to.").

[43] Many jurisdictions that subject solicitation liability to generally applicable grading principles statutorily recognize exceptions for particular solicitation offenses or categories of solicitation offenses. *See, e.g.,* Model Penal Code § 5.05(1) ("[S]olicitation . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree."); Robinson, *supra* note 43, at 320 n.67 (nearly all jurisdictions that statutorily equalize punishment for general inchoate crimes recognize some exceptions); Utah Code Ann. § 76-4-204(1) ("Criminal solicitation to commit . . . *except as provided in Subsection (1)(c) or (d)* . . . a first degree felony is a second degree felony[.]") (italics added).

[44] *See, e.g.,* DRESSLER, *supra* note 13, at § 28.01 (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

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

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

[47] *See, e.g.,* Model Penal Code § 5.02(1) ("A person is guilty of solicitation to commit a crime if," *inter alia*, he or she "commands, encourages, or requests another person to engage in *specific conduct* that would constitute such crime . . .") (italics added). This is consistent with accomplice liability under section 210, which similarly employs a "specific conduct" standard where complicity is based on encouragement. RCC § 22E-210(a)(2) ("Purposely encourages another person to engage in specific conduct constituting that offense."); *see, e.g.,* Model Penal Code § 2.06(3)(a)(i) ("A person is an accomplice of another person in the commission of an offense if," *inter alia*, he or she "*solicits* such other person to commit it[.]") (italics added).

position of the intended recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.[48]

Relation to Current District Law. RCC § 22E-302 clarifies, improves the proportionality of, and fill in gaps in the District law of criminal solicitations.

The District's general solicitation statute is codified by D.C. Code § 22-2107.[49] Subsection (a) of this statute broadly prohibits "soliciting a murder," whether or not a murder actually "occurs," and is subject to a 20-year statutory maximum.[50] Likewise, subsection (b) of this statute broadly prohibits "soliciting a crime of violence," whether or not that crime of violence actually "occurs," and is subject to a 10-year statutory maximum.[51]

Aside from these general prohibitions and penalties, D.C. Code § 22-2107 provides no further information concerning the contours of general solicitation liability under District law. Nor, for that matter, does the legislative history underling these code

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[48] *E.g.,* Model Penal Code § 5.02 cmt. at 376; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 11.1. So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to satisfy section 302. Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor would a general exhortation to "go out and revolt." *State v. Johnson*, 202 Or. App. 478, 483 (2005); *see generally Williams*, 553 U.S. at 300 (distinguishing statements such as "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography" with the recommendation of a particular piece of purported child pornography).

[49] Enacted as part of the *Omnibus Public Safety Act of 2006*, the relevant provisions reads:

> (a) Whoever is guilty of soliciting a murder, whether or not such murder occurs, shall be sentenced to a period of imprisonment not exceeding 20 years, a fine not more than the amount set forth in § 22-3571.01, or both.
>
> (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.

2006 DISTRICT OF COLUMBIA LAWS 16-306 (Act 16–482), as added Apr. 24, 2007, D.C. Law 16-306, § 209, 53 DCR 8610.

[50] *Id.*

[51] 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.

provisions, which is essentially non-existent.[52] And the same is also true of DCCA case law, which, as the commentary to the District's criminal jury instructions observes, does not appear to contain a single reported decision "involving this statute."[53]

The D.C. Code also contains a variety of more narrowly tailored solicitation statutes, which individually provide for solicitation liability in particular contexts by incorporating the term "solicits" as an element of the offense. However, these kinds of context-specific solicitation statutes provide little, if any, clarity on the contours of general solicitation liability under current District law.

For example, the District's contributing to the delinquency of a minor offense, D.C. Code § 22-811, prohibits, among other acts, "an adult, being 4 or more years older than a minor" from "solicit[ing]" that minor to commit a crime.[54] Likewise, D.C. Code § 22-2701 makes it "unlawful for any person to . . . solicit for prostitution," while D.C. Code § 22-951 makes it "unlawful for a person to solicit . . . another individual to become a member of, remain in, or actively participate in what the person knows to be a criminal street gang."[55]

Most of these specific solicitation statutes, like D.C. Code § 22-2107, are completely silent on the meaning of solicitation in the relevant contexts.[56] And case law interpreting these statutes is sparse, though that which does exist establishes that solicitation liability is constitutional, at least insofar as it entails proof of a criminal intent.[57]

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[52] *See generally* COUNCIL OF THE DISTRICT OF COLUMBIA, *Judiciary Committee Report on Bill 16-247, "Omnibus Public Safety Act of 2006"* (April 28, 2006).

[53] Commentary on D.C. Crim. Jur. Instr. § 4.500.

[54] *See also* D.C. Code § 22-3010(b)(1) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts . . . to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact . . . .")

[55] Relatedly, D.C. Code § 22-1312 criminalizes an "indecent sexual proposal," which, as the DCCA has explained, "connotes virtually the same conduct or speech-conduct as a sexual solicitation." *Pinckney v. United States*, 906 A.2d 301, 307 (D.C. 2006) (quoting *D.C. v. Garcia*, 335 A.2d 217, 221 (D.C. 1975)); *see D.C. v. Garcia*, 335 A.2d 217, 221 (D.C. 1975) (noting that a "sexual proposal," as used in the statute, "connotes virtually the same conduct or speech-conduct as a sexual solicitation; the term clearly implies a personal importunity addressed to a particular individual to do some sexual act.").

[56] There is, however, one exception: the District's statute criminalizing solicitation of prostitution, D.C. Code § 22-2701. That statute is accompanied by a general definition of "[s]olicit for prostitution," which, pursuant to D.C. Code § 22-2701.01, "means to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution." *See* SAFE STREETS FORFEITURE AMENDMENT ACT OF 1992, 1992 District of Columbia Laws 9-267 (Act 9–250).

[57] More specifically, the DCCA, in *Ford v. United States*, upheld the constitutionality of the District's solicitation of prostitution statute on the basis that it "prohibits specified conduct for the purpose of prostitution," thereby "clearly" affording District residents "notice of the illegality" of such conduct. 498 A.2d 1135, 1139–40 (D.C. 1985) ("Such a 'scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed") (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)).

Likewise, in *D.C. v. Garcia*, the DCCA upheld the constitutionality of D.C. Code § 22-1312, which criminalizes an "indecent sexual proposal," observing that

In practice, it appears that the elements of the general solicitation liability, as codified by D.C. Code § 22-2107, are determined in the District by reference to the criminal jury instructions.[58] The relevant instruction states, in its entirety, that:

> The elements of solicitation of [insert crime of violence], each of which the government must prove beyond a reasonable doubt, are that:
>
> 1. [Name of defendant] solicited [another person] [insert name of other person] to commit [insert crime of violence]; and,
>
> 2. [Name of defendant] did so voluntarily, on purpose, and not by mistake or accident.
>
> "Solicit" means to request, command, or attempt to persuade.
>
> It is not necessary that [insert crime of violence] actually occur in order to find [name of defendant] guilty of solicitation.[59]

Three aspects of above statement of the elements of a criminal solicitation provided by this instruction bear notice. First, it leaves ambiguous the culpable mental state requirement governing the offense. This is because the jury instruction fails to respect the admonition that, as the DCCA observed in *Ortberg v. United States*, "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[60] To say, for example, that a person must solicit another person "voluntarily, on purpose, and not by mistake or accident" does not specify whether the requisite culpability requirement applies to the (1) the *conduct* planned to culminate in that

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> It is important to emphasize the precise nature of the speech which the sexual proposal clause . . . proscribes. The principle is well established that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. However, there is a significant distinction between advocacy and solicitation of law violation in the context of freedom of expression. Advocacy is the act of pleading for, supporting, or recommending; active espousal and, as an act of public expression, is not readily disassociated from the arena of ideas and causes, whether political or academic. Solicitation, on the other hand, implies no ideological motivation but rather is the act of enticing or importuning on a personal basis for personal benefit or gain. Thus advocacy of sodomy as socially beneficial and solicitation to commit sodomy present entirely distinguishable threshold questions in terms of the First Amendment freedom of speech. The latter, we hold, is not protected speech.

335 A.2d 217, 224 (D.C. 1975).

[58] *Cf.* Commentary on D.C. Crim. Jur. Instr. § 4.500 (failing to reference any of the District's specific solicitation statutes as relevant legal authority for the elements of the general inchoate crime of solicitation).

[59] D.C. Crim. Jur. Instr. § 4.500.

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

offense; (2) the *circumstances* surrounding that conduct; or (3) the *results*, if any, that conduct would cause if carried out.[61]

Second, it is unclear what the third prong of the conduct requirement, described as "attempt[ing] to persuade," actually entails given the various meanings of the term attempts. Generally speaking, for example, there are two main categories of attempts: (1) complete attempts, which are attempts that fail to achieve the actor's criminal objectives notwithstanding the fact that he or she carried out the entirety of his or her criminal plans (i.e., shoot and miss); and (2) incomplete attempts, which are attempts that fail to achieve the actor's criminal objectives because he or she is frustrated by outside forces (e.g., police interception). Incomplete attempts, in turn, can be further differentiated according to the extent of the progress an actor makes before his or her plans are disrupted (e.g., taking a substantial step towards completion vs. being dangerously close to completion). With these variances in mind, it is unclear just how far along an actor must be in his efforts to convince another to commit a crime to be deemed to have engaged in "attempt[ed] persua[sion]."[62]

Third, and more generally, the criminal jury instruction is silent on a variety of corollary issues relevant to understanding the scope of general solicitation liability. To take just one example, consider that of impossibility. In the solicitation context, impossibility issues arise where one party asks another to engage in or facilitate conduct that would culminate in a consummate criminal offense if—but only if—the conditions were as the solicitor perceived them. In this kind of situation, the solicitor might argue that criminal liability should not attach due to the fact that, by virtue of a mistake concerning the surrounding conditions, completion of the target offense was impossible. If presented with such a claim, District judges would have to determine whether the particular kind of mistake rendering the criminal objective at the heart of a solicitation prosecution impossible constitutes a defense. On this issue, among others, the District's jury instruction (and accompanying commentary) is silent.

Aside from this silence on the elements of solicitation, another aspect of District law that is problematic relates to grading. This is reflected in the fact that solicitations to commit all "crimes of violence"[63] other than murder are subjected to the same 10-year

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

[62] For example, it seems clear that where D1 mails a written request for murder to D2, but where the letter is intercepted by the police (or lost by the mail carrier and thereafter handed over to the policy) before D2 ever has an opportunity to read it, this constitutes attempted persuasion. But what about where D1, intending to mail a written request for murder to D2, is arrested by the police on his way to the post office with the letter in hand?

[63] D.C. Code § 23-1331(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, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or

statutory maxima under D.C. Code § 22-2107, notwithstanding significant distinctions between the relevant underlying offenses. For example, an assault with significant bodily injury[64] is distinct from an aggravated assault,[65] which is distinct from first degree sexual abuse[66] or child sexual abuse.[67] These crimes of violence are, based on their elements and the varying penalties afforded to them, offenses of quite differential seriousness. At the same time, however, D.C. Code § 22-2107 effectively treats solicitations to commit each of them as an offense of the same seriousness given the flat 10-year statutory maximum provided to them under subsection (b).

Another way to appreciate the comparative disproportionality presented by the District's current approach to grading solicitations is reflected in the impact that the flat 10 year statutory maximum has on particular crimes of violence. For example, the 3-year statutory maximum governing the consummated version of assault with significant bodily injury is *multiplied many times* over by the flat 10-year statutory maximum under subsection (b).[68] In contrast, this same flat 10-year statutory maximum effectively treats solicitations to commit aggravated assault *as equivalent in seriousness* to consummated aggravated assaults, which are similarly subject to a 10-year statutory maximum.[69] And solicitations to commit first degree sexual abuse[70] or child sexual abuse[71] are treated as

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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.").

[64] D.C. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[65] 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.")

[66] D.C. Code § 22-3002 ("A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner . . . .").

[67] D.C. Code § 22-3008 ("Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined not more than the amount set forth in § 22-3571.01. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.").

[68] D.C. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[69] 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."). Note also that attempted aggravated assault is only subject to a 5-year statutory maximum. 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.").

[70] D.C. Code § 22-3002 ("A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner . . . .").

[71] D.C. Code § 22-3008 ("Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined not more than the amount set forth in § 22-3571.01. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For

significantly less serious than the completed versions of such offenses under subsection (b) given that the completed version of these offenses are subject to potential life sentences.

Viewed as a whole, then, the District's approach to grading criminal solicitations does not reflect any consistent principle of punishment. And this, in turn, produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

RCC § 22E-302 addresses the above-described problems as follows. First, subsections (a), (b), and (c) provide a full description of the elements of a general criminal solicitation, which is consistent with element analysis and resolves the ambiguities surrounding the diverse set of liability issues mentioned above. When viewed collectively, this statement will improve the clarity, consistency, and comprehensiveness of the revised statutes. Second, subsection (d) establishes a principled and consistent approach to punishing solicitations (i.e., a fifty percent penalty discount[72]), which renders offense penalties more proportionate.[73]

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purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.").

[72] This general principle in paragraph (d)(1), which is similarly applicable to criminal attempts and criminal conspiracies under the RCC, is supplemented by paragraph (d)(2), which expressly recognizes the possibility of offense-specific exceptions to be clearly articulated in a single general provision incorporated into the General Part.

[73] The effect of this penalty scheme on current District law varies depending on the scope, gradations, and classifications applied to individual revised offenses. For a detailed analysis of this nature in the context of attempt penalties, which is broadly applicable here, see RCC § 22E-301(d), Relation to Current District Law on Attempt Penalties.

RCC § 22E-303. Criminal Conspiracy.

Explanatory Note. RCC § 22E-303 provides a comprehensive statement of general conspiracy liability under the RCC.[1] This statement: (1) establishes the culpable mental state requirement and conduct requirement of a criminal conspiracy; (2) specifies the penalties applicable to a criminal conspiracy; and (3) addresses particular jurisdictional issues relevant to general conspiracy liability in the District of Columbia. Section 303 replaces the District's current general conspiracy statute, D.C. Code § 22-1805a.

The prefatory clause of subsection (a) establishes three basic principles governing general conspiracy liability. The first principle is that section 303 solely prohibits conspiracies to "commit an offense." This dictates that only *criminal* objectives fall within the scope of general conspiracy liability under the RCC.[2]

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[1] By way of historical background:

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

State v. Pond, 108 A.3d 1083, 1096-97 (Conn. 2015) (internal citations and quotations omitted).

Today, the crime of conspiracy is widely understood to serve "two important but different functions: (1) as with solicitation and attempt, it is a means for preventive intervention against persons who manifest a disposition to criminality; and (2) it is also a means of striking against the special danger incident to group activity." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(a) (3d ed. Westlaw 2019). At the same time, however, conspiracy is also an "extremely controversial crime." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.01 (6th ed. 2012). This is so for two basic reasons.

First, conspiracy "is so vague that it almost defies definition." *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring); *id.* at 477 (describing the crime as "chameleon-like."). This vagueness, it is argued, provides prosecutors with "a powerful tool . . . to suppress inchoate conduct that they consider potentially dangerous or morally undesirable." DRESSLER, *supra* note 1, at § 29.01; *see Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (describing the offense as the "darling of the modern prosecutor's nursery.") (Hand, J.). "Historically," for example, "conspiracy laws have been used to suppress controversial activity, such as strikes by workers and public dissent against governmental policies." DRESSLER, *supra* note 1, at § 29.01

Second, conspiracy is "predominantly mental in composition, because it consists primarily of a meeting of minds and an intent"—very little conduct is required. *Krulewitch*, 336 U.S. at 447–48 (Jackson, J., concurring). In light of the offense's "highly inchoate nature," a "few courts and more scholars" have questioned whether conspiracies merit punishment at all. DRESSLER, *supra* note 1, at § 29.01 (collecting authorities). More often, though, it is argued that, because of conspiracy's focus on *mens rea* and concomitant disregard of *actus reus*, "persons will be punished for what they say rather than for what they do, or [simply] for associating with others who are found culpable." Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973).

[2] *See, e.g.,* Model Penal Code § 5.03(1) (limiting general conspiracy liability to agreements to commit "crime[s]"); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(a) (3d ed. Westlaw 2019) ("[M]ost states" and all of the "most recent recodifications" follow the "far better" approach of "provid[ing] that the object of a criminal conspiracy must be some crime or some felony"); *see also* DRESSLER, *supra* note 1, at § 29.04(c) (6th ed. 2012) ("People are entitled to fair notice that their planned conduct is subject to criminal sanction .

The second principle is that a criminal conspiracy necessarily incorporates "the culpability required by [the target] offense."[3] Pursuant to this principle, a defendant may not be convicted of a criminal conspiracy under § 22E-303 absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any broader aspect of culpability[4]—required to establish that offense.[5]

The third principle is that both the defendant "and at least one other person" must actually conspire in order for criminal liability to attach under section 303.[6] This establishes a bilateral approach to conspiracy, which excludes unilateral agreements to

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. . If the legislature has not made a specified act criminal it is unfair to surprise people by punishing the agreement to commit the noncriminal act.").

[3] *See, e.g.,* Model Penal Code § 5.03(1) (government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime"); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(2) ("Clearly, a 'conspiracy to commit a particular substantive offense cannot exist *without at least* the degree of criminal intent necessary for the substantive offense itself.'") (quoting *Ingram v. United States*, 360 U.S. 672, 678 (1959)) (italics added).

[4] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(d) (culpability requirement defined). For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, conspiracy liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(d)(1) (voluntariness requirement also part of culpability requirement).

[5] This derivative culpable mental state requirement, which is drawn from the target offense, is to be distinguished from the independent culpable mental state requirement governing the agreement at issue in all conspiracy prosecutions. *See infra* notes 16-22 and accompanying text.

Generally speaking, conspiracy liability entails proof that the accused: (1) "intended," by his or her agreement, to assist or directly engage in conduct planned to culminate in an offense; and (2) "intended," through that agreement, to bring about any result elements or circumstance elements that comprise the target offense. *See, e.g.,* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 754–55 (1983); *State v. Maldonado*, 114 P.3d 379, 382 (N.M. 2005) (discussing "twin intent requirements of conspiracy").

"One of these intents may exist without the other," such as, for example, "where A and B agree to burn certain property and A knows the property belongs to C but B (perhaps because he has been misled by A) believes that the property belongs to A." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(1). Here, B intends, through his agreement with A, to facilitate the destruction of another person's property. However, B does not intend the property destruction to occur *against the will of the owner*, a key circumstance element of a destruction of property offense. *See infra* note 1 (providing more detailed illustration of how these dual intent requirements operate).

[6] *E.g.,* D.C. Code § 22-1805a (defining conspiracy in terms of "two or more persons"); 18 U.S.C.A. § 371 (same). *Compare, e.g.,* Model Penal Code § 5.03(1)(a) ("A person is guilty of conspiracy *with another person or persons* to commit a crime if . . . *he . . . agrees with such other person or persons* that they or one or more of them will engage in conduct that constitutes such crime[.]") (italics added); *id.*, Explanatory Note (it is sufficient under the Model Penal Code approach that the defendant "believe that he is agreeing[] with another that they will engage in the criminal offense or in solicitation to commit it").

"Most modern codes, as does the Model Penal Code, define conspiracy in terms of a single actor agreeing with another, rather than as an agreement between two or more persons." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(6) n.30 (collecting statutes). That said, numerous state courts in the jurisdictions with these unilateral formulations have interpreted their general conspiracy statutes in bilateral terms. *Id.* (collecting cases); *see infra* notes 7-9 (discussing import of bilateral and unilateral approaches).

engage in or aid crimes from the scope of general conspiracy liability.[7] Absent proof that "two or more persons" [8] satisfy both the culpable mental state requirement[9] and conduct

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[7] The difference between the bilateral and unilateral views of conspiracy is most significant in cases in which one person, committed to furthering a criminal enterprise, approaches another seeking to enlist his or her cooperation. Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 220 (1981). If the other party *seems* to agree, but secretly withholds agreement (perhaps even resolving to notify the authorities), the initiating person is not guilty of conspiracy under the bilateral approach, but would be guilty under the unilateral approach. *Id.*; *see* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(6) (bilateral approach also rejects conspiracy liability where the only other party to an alleged conspiracy is mentally incapable of agreeing) (citing *Regle v. State*, 9 Md. App. 346 (1970)).

In support of the bilateral approach, and concomitant rejection of the unilateral approach, various courts and commentators have argued that:

> The primary reason for making conspiracy a separate offense from the substantive crime is the increased danger to society posed by group criminal activity[.] However, the increased danger is nonexistent when a person "conspires" with a government agent who pretends agreement. In the feigned conspiracy there is no increased chance the criminal enterprise will succeed, no continuing criminal enterprise, no educating in criminal practices, and no greater difficulty of detection[.] Indeed, it is questionable whether the unilateral conspiracy punishes criminal activity or merely criminal intentions[.] The "agreement" in a unilateral conspiracy is a legal fiction, a technical way of transforming nonconspiratorial conduct into a prohibited conspiracy[.] When one party merely pretends to agree, the other party, whatever he or she may believe about the pretender, is in fact not conspiring with anyone. Although the deluded party has the requisite criminal intent, there has been no criminal act[.]

State v. Pacheco, 125 Wash. 2d 150, 156–57, 882 P.2d 183, 186–87 (1994) (quoting from and citing to state case law, federal case law, and legal commentary); *see also id.* (highlighting the "potential for abuse" in a unilateral regime because "the State not only plays an active role in creating the offense, but also becomes the chief witness in proving the crime at trial"); *compare* Model Penal Code § 5.03 cmt. at 393 (highlighting crime prevention concerns that support unilateral approach to conspiracy).

[8] D.C. Code § 22-1805a; 18 U.S.C.A. § 371.

[9] *See, e.g.,* DRESSLER, *supra* note 1, at § 29.06 (conspiracy prosecution "must fail in the absence of proof that at least two persons possessed the requisite *mens rea* of a conspiracy, i.e., the intent to agree and the specific intent that the object of their agreement be achieved."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(6) ("[B]ecause of the plurality requirement it must be shown that the requisite intent existed as to at least two persons. That is, there must be a common design, so that if only one party to the agreement has the necessary mental state then even that person may not be convicted of conspiracy."). The following scenario illustrates the intersection between the bilateral agreement requirement and dual intent requirements governing conspiracy liability.

Police receive a report that someone posing as a janitor in a District of Columbia government building, P, intends to murder a plain-clothes police officer sitting in the lobby to the entrance, V. According to this reliable tip, P's plan is to quickly unhinge a large television that stands high above V, with the hopes that it will kill V upon impact. Soon thereafter, two officers arrive at the front of the building, and find P engaged in a conversation with another individual, A, a real janitor employed by the District, who is in control of a large cart of cleaning supplies. The police overhear P asking A if she'd be willing to park her cart of supplies right in front of the entrance immediately after P enters so as to block other people from entering the building. A agrees to do so, at which point both A and P begin to make their way towards the building's entrance with A's supply cart in tow. Moments later, however, the police intercede, and arrest both A and P.

If P later finds himself in D.C. Superior Court charged with conspiracy to murder a police officer based upon his agreement with A, can he be convicted? The answer to this question depends upon whether *A's* state of mind fulfills both of the dual intent requirements governing conspiracy liability, so that it can

requirement[10] stated in subsections (a) and (b), no single person is subject to general conspiracy liability under § 22E-303.[11]

Paragraph (a)(1) codifies the agreement requirement at the heart of the general inchoate crime of conspiracy.[12] In so doing, this paragraph broadly clarifies that a

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be said that P and "at least one other person" agreed to murder a police officer. (Note: there's little question that P possesses the requisite dual intents.)

For example, if A had agreed to block the entrance to the building with her cart of supplies because P had asked her to help facilitate P's *cleaning of the lobby windows*, then neither requirement is met: A did not intentionally agree to facilitate P's conduct, which, if carried out, would have resulted in the death of a police officer (the unhinging of the large television); nor did A act with the intent that, through her agreement, a police officer be killed. Alternatively, if A had agreed to block the entrance to the building with her cart of supplies because P had asked her to help facilitate P's *removal of the television*, then the first requirement is met: A intentionally agreed to facilitate the conduct of P which, if carried out, would have resulted in the death of a police officer. But the second requirement is not met: A did not intend, through her agreed-upon participation, to cause the death of anyone, let alone a police officer. Because, in both of the above sets of circumstances, A does not satisfy the dual intent requirements of conspiracy, P cannot be convicted of conspiracy to murder a police officer. (Which is not to say that P would escape liability entirely; on these facts P likely can be convicted of attempted murder of a police officer, on the basis that he intended to kill police officer V, and came dangerously close to doing so. *See* RCC § 22E-301(a).)

If, in contrast, A had agreed to block the entrance to the building because P had approached her with an opportunity to seek retribution against the same officer responsible for disrupting a drug conspiracy A was involved with years ago, then A fulfills both requirements: A acted with both the intent to facilitate P's planned course of conduct and the intent that, through her agreed-upon assistance, a police officer would be killed. Because, in this last scenario, A possesses both of the necessary dual intents—as well as the fact that the other elements of conspiracy are met, e.g., the presence of an "overt act," RCC § 22E-303(a)(2)—P can be convicted of conspiracy to murder a police officer.

[10] That is, engage in the necessary mutual agreement. *See infra* notes 13-28 and accompanying text (discussing agreement requirement). The plurality requirement does not apply to the overt act requirement, which only needs to be met by one party to a conspiracy. *See infra* notes 29-33 and accompanying text (discussing plurality requirement).

[11] It is important to note that while two or more persons must satisfy the culpability and conduct requirements of conspiracy under section 303, it is not necessary for two or more persons to be prosecuted and/or convicted of conspiracy in order to support a conviction as to any one person. *E.g.,* DRESSLER, *supra* note 1, at § 29.06 ("The plurality rule does not require, however, that two persons be prosecuted and convicted of conspiracy . . . Thus, the conviction of a conspirator is not in jeopardy simply because the other person involved in the arrangement is unapprehended, dead, or unknown, or cannot be prosecuted because he has been granted immunity.") (collecting cases). In this sense, the general inchoate crime of conspiracy under section 303 is similar to the legal accountability as an accomplice under section 210, which requires proof that another person satisfies the elements of the offense for which the defendant is being prosecuted, yet does not preclude liability "although the other person claimed to have committed the offense . . . [h]as not been prosecuted or convicted[.]" RCC § 22E-210(d); *compare United States v. Bell*, 651 F.2d 1255, 1258 (8th Cir. 1981) (Where "all other alleged coconspirators are acquitted, the conviction of one person for conspiracy will not be upheld.").

[12] *See, e.g., United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (agreement is "essence" of a conspiracy is the agreement); Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 695 (2011) ("[T]he agreement takes the law beyond the individual mental states of the parties, in which each person separately intends to participate in the commission of an unlawful act, to a shared intent and mutual goal, to a spoken or unspoken understanding by the parties that they will proceed in unity toward their shared goal.").

conspiracy is comprised of a joint criminal agreement to commit the same offense.[13] And it also more specifically addresses three fundamental issues concerning the scope and applicability of general conspiracy liability.

The first issue relates to the nature of the agreed-upon participation in a criminal scheme that will support a conspiracy conviction. Paragraph (a)(1) establishes, in relevant part, that general conspiracy liability is appropriate under the RCC where two or more parties agree to "engage in" or "aid the planning or commission" of criminal conduct.[14] This two-part formulation clarifies that agreements to assist with or otherwise facilitate the planning or commission of a crime, no less than agreements to directly engage in the requisite criminal conduct, provide an adequate basis for a conspiracy conviction, provided that the other requirements of § 22E-303 are met.[15]

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[13] Specifically, paragraph (a)(1) requires that two or more parties to a conspiracy "*agree* to engage in or aid the planning or commission of conduct which, if carried out, will constitute *that [same] offense* or an attempt to commit *that [same] offense*[.]" The necessary relationship inherent in the italicized language effectively precludes conspiracy liability where each participant intended to commit a different offense. So, for example, if the evidence in a two-person criminal scheme demonstrates that X believed the agreed-upon conduct was to rob V, but Y believed the agreed-upon conduct was to assault V, a charge for conspiracy to commit robbery cannot be sustained against X or Y due to the lack of mutual agreement concerning the taking-related element of robbery.

[14] *See, e.g.,* Model Penal Code § 5.03(1)(b) (conspiracy liability where one person "agrees to *aid* [an]other person or persons in the planning or commission of [a] crime") (italics added); *Salinas v. United States*, 522 U.S. 52, 65 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he *adopt the goal of furthering or facilitating the criminal endeavor*. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.") (italics added).

[15] *See, e.g., Ocasio v. United States*, 136 S. Ct. 1423, 1430 (2016) ("[A] specific intent to distribute drugs oneself is not required to secure a conviction for participating in a drug-trafficking conspiracy. Agreeing to store drugs at one's house in support of the conspiracy may be sufficient."); DRESSLER, *supra* note 1, at § 29.04 n.77 (Where "D1 agrees to provide D2 with a gun to be used to kill V, D1 is guilty of conspiracy to commit murder, although she did not agree to commit the offense herself.").

That an agreement to aid provides an appropriate basis for liability under section 303 reflects the well-established idea that complicity and conspiracy "normally go hand-in-hand." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 703 (3d ed. 1982)). Indeed, "in most cases an accomplice is a co-conspirator, and vice-versa." DRESSLER, *supra* note 1, at § 30.08(a). For example, if A purposely agrees to aid P in the commission of a robbery, and that agreement to aid either materializes or simply solidifies P's resolve to commit the robbery (even in the absence of such assistance), then A is responsible for P's robbery as an accomplice under section 210. On these same facts, however, A and P also appear to satisfy the requirements for general conspiracy liability (to commit robbery) under section 303.

Nevertheless, there are important differences between these two legal concepts. For example, "[a]n agreement between two or more persons to participate in the commission of a crime is the key to a conspiracy and, therefore, to conspiratorial liability." DRESSLER, *supra* note 1, at § 30.08(a). Importantly, "[a]ctual assistance in the crime is not required." *Id.* In contrast, "[a]ccomplice liability requires proof that an actor at least indirectly participated (assisted) in the crime; an agreement to do so is not needed." *Id.*

In light of these conceptual distinctions, it is possible for one person to conspire with another person to commit an offense without also being an accomplice (i.e., in the event that the other person commits that offense on his or her own). For example, if, in the above illustration, A's purposeful agreement to aid P in the commission of a crime had gone unfulfilled, and more generally failed to encourage P to commit that crime (e.g., it didn't bolster P's resolve), yet P nevertheless proceeded to commit the robbery by himself, then A (and P) would likely satisfy the requirements for general conspiracy liability under section 303. At the same time, however, A would not satisfy the requirements for accomplice liability under section 210.

The second issue focuses on the relationship between the defendant's state of mind and his or her agreed-upon facilitation of a criminal scheme.[16] Paragraph (a)(1) establishes, in relevant part, that general conspiracy liability only applies to those who act with the purpose of bringing about conduct planned to culminate in an offense.[17] This "purposive attitude" constitutes the foundation of the culpability requirement governing both accomplice liability as well as the general inchoate crime of conspiracy.[18] It can be

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Conversely, it also is possible one person to be an accomplice in the commission of an offense committed by another person without also having conspired to commit it. The following situation is illustrative. P enters a bank to rob it, at which point, A, an unaffiliated customer, observes P's actions and silently assists in the crime by disabling a bank security camera. Because P and A never agreed to commit the robbery together, they do not satisfy the requirements of section 303. That said, because A purposely assisted P with the commission of the robbery, A may be held liable for the robbery under section 210.

[16] The nature of this relationship issue "is crucial to the resolution of the difficult problems presented when a charge of conspiracy is leveled against a person whose relationship to a criminal plan is essentially peripheral":

> Typical is the case of the person who sells sugar to the producers of illicit whiskey. He may have little interest in the success of the distilling operation and be motivated mainly by the desire to make the normal profit from an otherwise lawful sale. To be criminally liable, of course, he must at least have knowledge of the use to which the materials are being put, but the difficult issue presented is whether knowingly facilitating the commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end. In this case conflicting interests are involved: that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes.

Model Penal Code § 5.03, cmt. at 404.

[17] *See, e.g.,* Model Penal Code § 5.03(1) (agreement must be accompanied by "the purpose of promoting or facilitating the commission of the crime"); *Id.*, Explanatory Note ("The purpose requirement is meant to extend to [the] conduct elements of the offense that is the object of the conspiracy."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c)(3) (purpose requirement is strong majority approach); Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1145-46 (1975) (same). This purpose requirement *does not* extend to whether the requisite conduct is, in fact, illegal or otherwise constitutes an offense. *See also* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.2(c) (accomplice cannot "escape liability by showing he did not [*desire*] to aid a crime in the sense that he was unaware that the criminal law covered the conduct of the person he aided. Such is not the case, for here as well the general principle that ignorance of the law is no excuse prevails.").

[18] *See, e.g., United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.) ("[Every definition of complicity requires that the defendant in] some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, 'abet,' carry an implication of *purposive attitude* towards it.") (italics added); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940) (Hand, J.) ("There are indeed instances . . . where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; *but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive.* It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.") (italics added); Model Penal Code § 5.03 cmt. at 406 ("Under the conspiracy provision, the same purpose requirement that governs complicity is essential for conspiracy; the actor must have 'the purpose of promoting or facilitating' the commission of the crime").

said to exist when a person, through his or her agreement, *consciously desires* to facilitate conduct planned to culminate in an offense.[19]

The corollary to this purpose requirement is that general conspiracy liability is not supported under section 303 where a defendant's primary motive in agreeing to facilitate a criminal scheme is to achieve some other, non-criminal objective (e.g., "conduct[ing] an otherwise lawful business in a profitable manner").[20] And this is so even if the defendant knew that his or her agreement was likely to facilitate that scheme.[21] Neither

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[19] *See generally* RCC § 22E-206(a) (purposely defined). The following scenario is illustrative. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature, over the phone. Having been informed of this, P offers to purchase A's car for market value. A rejects the offer, but counters with an arrangement wherein A will give P his car in return for a ten percent stake in the profits. P agrees to this arrangement, and begins his initial preparations for the robbery. Soon thereafter, however, the police—who had tapped A's phone, and thus overheard the agreement—arrest both A and P. On these facts, A (and P) can be held liable for conspiring to commit robbery because A, through his agreement with P, consciously desired to facilitate and promote P's criminal conduct.

That a conspirator must have the purpose to facilitate or promote conduct planned to culminate in an offense does not preclude convictions for knowledge-based theories of liability concerning the result elements of the target offense. The following example is illustrative. Environmental activists X and Y agree to blow up a coal-processing facility during the evening/afterhours when only a single person, the on-duty night guard, V, will be present. Both X and Y are practically certain that V will die from the blast, though they'd very much prefer that V not be injured. The police intercede right before X and Y are able to set off the explosives, thereby saving V's life. On these facts, both X and Y can be convicted of conspiracy to commit (knowing) murder, premised on the fact that their agreement was accompanied by: (1) a *desire* to engage in conduct, which, if carried out, would have culminated in murder (i.e., blowing up the facility); and (2) their *awareness as to a practical certainty* that such conduct would result in V's death. *See* Robinson & Grall, *supra* note 5, at 757 ("When causing a particular result is an element of the object offense and such result does not occur, the actor, to be liable for conspiracy under Subsection (1), must have the purpose or belief that the conduct contemplated by the agreement will cause such result."); Note, *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 926 (1959)) ("[A] person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees[.]"); *but see* Model Penal Code § 5.03 cmt. at 408 ("[I]t would not be sufficient, as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it.").

[20] *See, e.g., Falcone*, 109 F.2d at 581 (Hand, J.) ("[T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner" because this would "seriously undermin[e] lawful commerce."); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 353 (1985) (absent purpose requirement, the criminal law would "cast a pall on ordinary activity" by giving us reason to "fear criminal liability for what others might do simply because our actions made their acts more probable"); Model Penal Code § 5.03 cmt. at 406 (observing that "the complicity provisions of the Code" require "a purpose to advance the criminal end," and deeming "the case" for this resolution to be an "even stronger one" in the context of conspiracy, such that "[a] conspiracy does not exist [under the Code] if a provider of goods or services is aware of, but fails to share, another person's criminal purpose").

This purpose requirement should also "dispel the ambiguity inherent in many judicial formulations that predicate conspiracy on merely 'joining' or 'adhering' to a criminal organization or speak of an 'implied agreement' with the conspirators by aiding them 'knowing in a general way their purpose to break the law.'" Model Penal Code § 5.03 cmt. at 406

[21] It has been observed that, "[o]ften, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motivation." Model Penal Code § 2.06 cmt. at 316. And the same is also presumably true of *agreements* to aid. That said, "there are many and important cases where this is the central question in determining liability." *Id.*; *see, e.g., State v. Maldonado*, 114 P.3d 379, 382 (N.M. 2005) ("Defendant's

awareness of, nor indifference towards, the success of another person's criminal scheme is sufficient to satisfy the purpose requirement incorporated into paragraph (a)(1).[22]

The third issue is the relevance of impossibility to general conspiracy liability—i.e., the fact that the target offense cannot be consummated under the circumstances due to a mistake on behalf of the defendant(s).[23] Paragraph (a)(1) establishes, in relevant

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conviction presents a recurring question in the law of conspiracy: does a defendant whose only involvement is supplying generally available goods or services become a co-conspirator merely because he knows that the goods or services he provides may or will be used by another for a criminal purpose?"); *United States v. Falcone*, 311 U.S. 205, 208-10 (1940) (same).

[22] To illustrate, consider the following modified version of the scenario presented *supra* note 19. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature, over the phone. Having been informed of this, P offers to purchase A's car for market value. A accepts the offer to sell his car for market value because A was already planning to sell the vehicle, so accepting P's offer will save A the effort of having to list it on his own. However, A thinks the bank robbery is a stupid idea, and tells P this much. P ignores A's advice and subsequently begins his initial preparations for the robbery. Soon thereafter, however, the police—who had tapped A's phone, and thus overheard the agreement—arrest both A and P. On these facts, A (and therefore P) cannot be held liable for conspiring to commit robbery because, *inter alia*, A did not consciously desire to facilitate or promote P's criminal conduct. Instead, A's purpose was to save himself the hassle of having to list and sell the vehicle on his own. That A knew the sale of his car to P would facilitate the bank robbery, and was arguably indifferent as to P's criminal conduct, would not support liability under section 303.

[23] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense and engaged in significant conduct, but nevertheless argue that impossibility of completion should by itself preclude the imposition of conspiracy liability. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 1, at § 27.07. In resolving this claim, there are four general categories of impossibility that might be considered for evaluative purposes (i.e., these are not analytically perfect distinctions).

The first category is *pure factual impossibility*, which arises where the parties to an agreement to commit a crime are precluded from consummating that crime because of circumstances unknown to them or beyond their control. The following situation is illustrative: X and Y, adult males, agree to arrange a sexual encounter with Z, a young child, at a specified time/location. Unbeknownst to X and Y, the police have been alerted to the arrangement and are awaiting the arrival of X and Y. If charged with conspiracy to commit statutory rape, this situation presents an issue of pure factual impossibility because the object of the conspiracy, sexual activity with a minor, cannot be consummated because of circumstances beyond the parties' control, namely, police intervention.

The second category of impossibility is *pure legal impossibility*, which arises where the parties to an agreement act under a mistaken belief that the law criminalizes their intended objective. The following situation is illustrative. X and Y, adult males, agree to arrange a sexual encounter with Z, a 20 year-old woman. X and Y know Z is 20; however, they believe that the age of consent is 21—when, in fact, it is 18. Therefore, X and Y believe themselves to be conspiring to commit statutory rape. If charged with conspiracy to commit statutory rape, this situation presents an issue of pure legal impossibility because X and Y have acted under a mistaken belief that the law criminalizes their intended objective, sexual activity with a 20 year-old woman.

The third category is *hybrid impossibility*, which arises where the object of an agreement between two or more parties constitutes a crime, but commission of the target offense is impossible due to a factual mistake regarding the legal status of some attendant circumstance that constitutes an element of the target offense. The following situation is illustrative. X and Y, adult males, agree to arrange a sexual encounter with Z, an undercover police officer posing as a young child. X and Y believe that Z is a young child. If charged with conspiracy to commit statutory rape, this situation presents an issue of hybrid impossibility because the object of X and Y's agreement, sexual activity with a minor, is illegal, but commission of the

part, that agreements to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" can also provide the basis for general conspiracy liability.[24] This reference to attempts imports the broad abolition of impossibility claims employed in the RCC's general attempt provision into the conspiracy context.[25] Under this approach, it is generally immaterial that the agreed-upon criminal scheme could never have succeeded under the circumstances.[26] So long as the parties agreed to bring about conduct that would have culminated in an offense if "the situation was as [the parties] perceived it" then conspiracy liability may attach,[27] provided that the agreed-upon plan of action was at least "reasonably adapted" to commission of the target offense.[28]

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target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense, namely, whether Z is, in fact, a minor.

The fourth category of impossibility is *inherent impossibility*, which arises where the parties to an agreement to commit a crime plan to "employ[] means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5(a)(4). The following situation is illustrative. X and Y, adult males, agree to arrange a sexual encounter with Z, a child-like manikin sitting in a shop window. X and Y believe that Z is an actual child, a mistake that is patently unreasonable under the circumstances. If charged with conspiracy to commit statutory rape, this situation presents an issue of inherent impossibility because any reasonable person would have known that the manikin was not a child. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244-45 (1995) (common denominator underlying inherent impossibility is that the parties' "actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances").

[24] *See, e.g.,* Model Penal Code § 5.03(1) (conspiracy liability where one person agrees with another person that "they or one of them will engage in conduct that constitutes . . . an *attempt* … to commit such crime," or if he or she "agrees to aid such other person or persons . . . in *an attempt* . . . to commit such crime."); Model Penal Code § 5.03 cmt. at 421 ("[If an] actor agrees that he or another will engage in conduct that he believes to constitute the elements of the offense, but that fortuitously does not in fact involve those elements, he would under this section be guilty of an agreement to attempt the offense, since attempt liability could be made out under [the MPC's general attempt provision] if the contemplated conduct had occurred.").

[25] Under RCC § 22E-301(a)(3)(A)(ii), a person commits an attempt if, *inter alia*, he or she "engages in conduct that . . . [w]ould have come dangerously close to completing that offense if the situation was as the person perceived it." Subparagraph (a)(3)(B) thereafter adds that the person's conduct must have been "reasonably adapted to completion of that offense."

[26] *See* RCC § 22E-301(a), Explanatory Note ("Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.").

[27] RCC § 22E-301(a)(3)(A)(ii). Specifically, the subjective approach incorporated into subparagraph (a)(1)(B) renders pure factual and hybrid impossibility claims immaterial. *See supra* note 23 (defining these categories). For example, under the RCC it would not be a defense to conspiracy to commit murder that: (1) the intended victim was already dead, provided that the parties to the conspiracy mistakenly believed the person to be alive at the moment one of them engaged in an overt act; or that (2) the intended murder weapon was inoperable, provided that the parties mistakenly believed it be operable. Nor would it preclude liability for conspiracy to commit theft under the RCC that: (1) the owner of the target property consented to its taking, provided that the parties to the conspiracy mistakenly believed it to be absent; or that (2) the safe targeted is empty, provided that the parties believed it be filled with valuable objects. *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019) ("The modern trend, evident in most jurisdictions, is to reject both [forms of] impossibility as defenses."); DRESSLER, *supra* note 1, at § 27.07 (same).

In contrast, pure legal impossibility remains a viable theory of defense under the RCC. *See supra* note 23 (defining this category). However, this does not hinge on RCC § 22E-301(a)(3)(A)(ii), or any other provision in section 301. Rather, the "underlying basis for acquittal is the principle of legality," which "provides that we should not punish people—no matter culpable or dangerous they are—for conduct that does not constitute the charged offense at the time of the action." DRESSLER, *supra* note 1, at § 27.07; *see* Model Penal Code § 5.01 cmt. at 318 ("[If] the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.").

For example, "it is not a crime to throw even a [District of Columbia] steak into a garbage can." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 595 (2d ed. 1960). So if after losses against the Washington Nationals, the Oriole Bird, the Baltimore Orioles mascot, and the Phillie Phanatic, the Philadelphia Phillies mascot, together place a local District steak in the garbage, neither is guilty of committing any offense. Nor could the Oriole Bird and the Phillie Phanatic be convicted of conspiring to commit an imaginary offense of this nature although they honestly believed such conduct to be prohibited by the D.C. Code. *E.g.,* DRESSLER, *supra* note 1, at § 27.07 ("Just as a person may not ordinarily escape punishment on the ground that she is ignorant of a law's existence, it is also true that we cannot punish people under laws that are purely the figments of their guilty imaginations."); *In re Sealed Cases*, 223 F.3d 775 (D.C. Cir. 2000) (just as "[a] hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place," so too "a charge of conspiracy to shoot a deer would be equally untenable" although the parties themselves believed deer hunting to be criminally prohibited").

Inherent impossibility also remains a viable (if exceedingly limited) theory of defense under the reasonable adaptation standard codified in paragraph (a)(2) of section 301. *See infra* note 28.

[28] RCC § 22E-301(a)(3)(B). As the Explanatory Note accompanying subparagraph (a)(3)(B) of section 301 explain:

> This reasonable adaptation requirement is intended to limit attempt liability to those situations where there exists a basic relationship between the defendant's conduct and the criminal objective sought to be achieved. Requiring the government to establish this basic relationship both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.

Id. (collecting District case law and national legal authority in support of this approach).

Inherent impossibility is an issue in conspiracy prosecutions where the parties to a criminal agreement plan to "employ[] means which a reasonable man would view as totally inappropriate to the objective sought." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5(a)(4); *see, e.g.,* John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999) (recognition of inherent impossibility defense to attempt most strongly supported by relevant case law, statutes, and commentary); *Ventimiglia v. United States*, 242 F.2d 620, 622 (4th Cir. 1957) (recognizing inherent impossibility defense to conspiracy); *compare* Model Penal Code § 5.05(2) (providing sentencing mitigation for a conspiracy that "is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section"). Conduct of this nature would not be "reasonably adapted" to completion of the target offense under subparagraph (a)(3)(B) of section 301, and, therefore, could constitute a (failure of proof) defense to conspiracy liability under the RCC.

For example, the fact that the defendant in a conspiracy to murder prosecution agreed with another person to kill the victim by pulling the trigger on a broken firearm that the parties mistakenly believed to be operable would not call into question whether the defendant's conduct was reasonably adapted to the completion of murder. In contrast, the fact that the defendant in a conspiracy to murder prosecution agreed with another person to kill the victim by shooting a fully functional firearm at a voodoo doll with the victim's picture attached to it would be relevant to evaluating the reasonable adaptation standard—and ultimately preclude the attachment of conspiracy liability under paragraph (a)(2). *See, e.g., Ventimiglia v. United States*, 242 F.2d 620, 622 (4th Cir. 1957) ("[A]n attack on a wooden [dummy] cannot be an assault and battery (though it might constitute malicious destruction of property), and hence a combination and

Paragraph (a)(2) establishes that an overt act in furtherance of the conspiracy by either the defendant or a person with whom he or she has conspired is a necessary element of general conspiracy liability.[29] This overt act requirement is quite narrow.[30] For example, it does not require proof of progress sufficient to rise to the level of an attempt to commit the target offense.[31] Nor must the act be illegal.[32] While not particularly demanding, however, the requisite overt act must be proven beyond a reasonable doubt in order to support a conspiracy conviction.[33]

Subsection (b) provides additional clarity concerning the culpable mental state requirement governing a criminal conspiracy as it relates to the result and circumstance elements of the target offense. Whereas the prefatory clause of subsection (a) generally clarifies that an conspiracy conviction entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the "defendant and at least one other person" must both: (1) "[i]ntend to cause all result elements required for that offense"[34]; and (2)

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agreement to do so cannot be a conspiracy to commit assault and battery, although the defendants, before acting, thought the 'victim' a living person.")

[29] *See, e.g.,* Model Penal Code § 5.03(5) ("No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired."); DRESSLER, *supra* note 1, at § 29.04 (overt act requirement has gained "wide acceptance" among the states, while "[m]ost penal code revisions" apply it to all conspiracies); *Whitfield v. United States,* 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least [23] current conspiracy statutes.").

[30] *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(b) ("If the agreement has been established but the object has not been attained, virtually any act will satisfy the overt act requirement.") (collecting cases); Model Penal Code § 5.03(5) cmt. at 387, 454 (same).

[31] *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(b) n.81 ("The overt act need not rise to the level of a 'substantial step' required for an attempt to commit the felony that is the conspiracy's object.") (quoting *Owens v. State*, 929 N.E.2d 754 (Ind. 2010)); DRESSLER, *supra* note 1, at § 29.04(d) (overt act "need not constitute an attempt to commit the target offense").

[32] *See, e.g.,* DRESSLER, *supra* note 1, at § 29.04(d) ("overt act need not be illegal"); *State v. Heitman*, 262 Neb. 185, 198, 629 N.W.2d 542, 553 (2001) (same). This means that otherwise innocent conduct, such as writing a letter, making a phone call, purchasing an instrumentality, or attending a meeting, can, when made pursuant to an unlawful agreement, satisfy the overt act requirement. DRESSLER, *supra* note 1, at § 29.04 (d) (citing *Yates v. United States*, 354 U.S. 298, 333–34 (1957), overruled on other grounds in *Burks v. United States*, 437 U.S. 1 (1978)); *see* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(b) (noting comparable examples).

[33] *E.g.,* Model Penal Code § 5.03, cmt. at 454 ("[W]hen an overt act is required, it is of course an element of the crime of conspiracy, since it must be alleged and proved to support a conviction."); *see, e.g., id.* at 453 (overt act "affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists"); *People v. Russo*, 25 P.3d 641, 645 (Cal. 2001) (overt act appropriately respects the admonition that "evil thoughts alone cannot constitute a criminal offense."); *United States v. Sassi*, 966 F.2d 283, 284 (7th Cir. 1992) (overt act helps "to separate truly dangerous agreements from banter and other exchanges that pose less risk.").

[34] *See, e.g,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2(c) ("[T]here is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result."); *State v. Donohue*, 150 N.H. 180, 184, 834 A.2d 253, 256 (2003) (deeming this position to be well-established, and collecting authorities in accordance).

Dressler illustrates operation of this principle in the context of a result element crime subject to recklessness accordingly:

"[i]ntend for all circumstance elements required for that offense to exist."[35] In effect, subsection (b) incorporates dual principles of culpable mental state elevation[36] applicable whenever the target offense is comprised of a result or circumstance that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[37]

To satisfy the first principle, codified in paragraph (b)(1), the government must prove that the defendant's purposeful agreement was accompanied by a *practically certain belief* that the agreed-upon course of conduct would cause the result element(s) required by the target offense, or, alternatively, by a *conscious desire* for that course of conduct to cause the result(s). Similarly, to satisfy the second principle, codified in

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> It follows from the specific-intent nature of conspiracy that the culpability required for conviction of conspiracy at times must be greater than is required for conviction of the object of the agreement. For example, suppose that D1 and D2 agree to set fire to an occupied structure in order to claim the insurance proceeds. If the resulting fire kills occupants, they may be convicted of murder on the ground that the deaths, although unintentional, were recklessly caused. They are not guilty of conspiracy to commit murder, however, because their objective was to destroy the building, rather than to kill someone. Put another away, as a matter of logic, one "cannot agree to accomplish a required specific result unintentionally."

DRESSLER, *supra* note 1, at § 29.05(B) (quoting *State v. Beccia*, 505 A.2d 683, 684 (Conn. 1986) (holding that conspiracy to commit reckless arson is not a cognizable offense)).

[35] *See, e.g.,* Commentary on Haw. Rev. Stat. § 705-520 ("It seems clear [] that, because of the preparatory nature of conspiracy, intention to promote or facilitate the commission of the offense requires an awareness on the part of the conspirator that the circumstances exist."); *State v. Pond*, 315 Conn. 451, 484, 108 A.3d 1083, 1102 (2015) (deeming this position to be well-established, and collecting authorities in accordance); *see also, e.g., Rosemond v. United States*, 134 S. Ct. 1240, 1242 (2014) ("[A]iding and abetting requires intent extending to the whole crime . . . . That requirement is satisfied when a person actively participates in a criminal venture with *full knowledge of the circumstances* constituting the charged offense."); *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 589 (1st Cir. 2015) ("[U]nder *Rosemond*, an aider and abettor of [the crime of producing child pornography] must have *known* the victim was a minor" although the victim's age is a matter of strict liability for the target offense).

To illustrate how this principle operates in the context of a strict liability crime, consider the following scenario involving two twenty one year-old male college students, P and A. One evening, P asks A if he can borrow A's college dorm room to have consensual sex with V, a girl P just met at a fraternity party. Unbeknownst to both A and P, however, V is a fourteen year-old minor, who P mistakenly believes to be twenty-one and, crucially, who A has never met. A agrees to let P use his room, hands P his keys, and, thereafter, P and V have sex in A's room. If P is subsequently prosecuted for a strict liability sexual abuse offense applicable to fourteen year-old victims, P can be convicted notwithstanding his mistake of fact. However, the same mistake of fact would exonerate A under subsection (b) notwithstanding the strict liability nature of the target offense. Although A purposely agreed to aid P with his sexual rendezvous with V, A lacked the *intent* to facilitate sex with *a fourteen year old*, which would be required by the principle of culpable mental state elevation codified by subsection (b).

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

[37] Importantly, neither of these principles of culpable mental state elevation precludes the government from charging conspiracies to commit target offenses comprised of result or circumstance elements subject to recklessness, negligence, or strict liability. However, to secure a conspiracy conviction for such offenses, proof that the parties to the agreement acted with the intent to cause every result and circumstance element that constitutes the target offense is necessary.

paragraph (b)(2), the government must prove that the defendant's purposeful agreement was accompanied by a *practically certain belief* that the circumstance element(s) incorporated into the target offense exist, or, alternatively, by a *conscious desire* for the requisite circumstance(s) to exist.[38]

Subsection (c) establishes the penalties for criminal conspiracies. Paragraph (c)(1) states the default rule governing the punishment of criminal conspiracies under the RCC: a fifty percent decrease in the maximum "punishment" applicable to the target offense.[39] "Punishment," for purposes of this paragraph, means: (1) imprisonment and fine if both are applicable to the target offense; (2) imprisonment only if a fine is not applicable to the target offense; and (3) fine only if imprisonment is not applicable to the

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[38] When formulating jury instructions for a conspiracy to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance), the term "intent," as defined in RCC § 22E-206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* RCC § 22E-206(b), Explanatory Note.

[39] *See, e.g.,* Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 305 (1994) ("Adhering to an objective view of grading, a majority of jurisdictions reduce the grade of inchoate conduct below that of the corresponding substantive offense."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(d) (nearly half of American jurisdictions "provide that the conspiracy crime is one class lower than the object crime") (collecting statutes); Model Penal Code § 5.05 cmt. at 489 n.19 ("Many recent revisions generally grade conspiracy one level below the object offense."). This penalty reduction is to be contrasted with the Model Penal Code, which grades most criminal conspiracies as "crimes of the same grade and degree as the most serious offense which is attempted." Model Penal Code § 5.05(1); *but see id.* ("[A] conspiracy . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree.").

The drafters of the Model Penal Code adopted this policy of conspiracy penalty equalization, in a significant departure from the prevailing common law approach, on the basis of the same dangerousness-based rationale that motivated their endorsement of a unilateral approach to conspiracy and equalizing the penalty for other general inchoate crimes, such as attempt. *See, e.g.,* Model Penal Code § 5.05, cmt. at 490 ("To the extent that sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan."). However, as discussed in the Explanatory Note accompanying RCC § 22E-301(d), this rationale for punishment has been called into question by many on empirical grounds, including, perhaps most notably, by the drafters of the recent Model Penal Code Sentencing Project. *See, e.g.,* Model Penal Code: Sentencing § 6.06 PFD (2017) ("There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders.").

The (original) Model Penal Code's equalization of conspiracy penalties also conflicts with a strong intuitive sense, captured by public opinion surveys, that resultant harm should matter for grading purposes. *See, e.g.,* Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUDIES 409, 429-30 (1998) (failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades" by lay jurors, while the earlier the defendant's plans are frustrated, the greater this "no harm" discount). This may explain why, "[i]n the United States, three-quarters of the jurisdictions reject the notion of grading inchoate offenses the same as the completed offense." Robinson, *supra* note 39, at 320 ("Nearly two-thirds of American jurisdictions have adopted codes that have been heavily influenced by the Model Penal Code, but less than 30% of these have adopted the Code's inchoate grading provision or something akin to.").

target offense. Paragraph (c)(2) thereafter lists those offenses that are exempt from this default rule and specifies the punishment for each exception.[40]

Subsections (d), (e), and (f) recodify the jurisdictional provisions set forth in D.C. Code § 22-1805a,[41] and, in so doing, address two issues relevant to general conspiracy liability under the RCC. The first is whether and to what extent section 303 applies to conspiracies to commit target offenses outside the District of Columbia. And the second is whether and to what extent section 303 applies to conspiracies formed outside the District of Columbia.

Subsection (d) addresses the first situation, where the requisite agreement is formed within the District of Columbia, but where the object of the agreement is to engage in conduct outside the District of Columbia. It establishes that general conspiracy liability applies only if the conduct to be performed outside the District of Columbia would constitute a criminal offense under the statutory laws of the District of Columbia if performed inside the District of Columbia, provided that one of the two following

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[40] Many jurisdictions that subject conspiracy liability to generally applicable grading principles statutorily recognize exceptions for particular conspiracy offenses or categories of conspiracy offenses. *See, e.g.,* Model Penal Code § 5.05(1) ("[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree."); ROBINSON, *supra* note 39, at 320 n.67 (nearly all jurisdictions that statutorily equalize punishment for general inchoate crimes recognize some exceptions); Utah Code Ann. § 76-4-202 ("Conspiracy to commit . . . a first degree felony is a second degree felony; except that conspiracy to commit child kidnaping, in violation of Section 76-5-301.1 or to commit any of those felonies described in Title 76, Chapter 5, Part 4, Sexual Offenses, which are first degree felonies, is a first degree felony punishable by imprisonment for an indeterminate term of not less than three years and which may be for life[.]").

[41] The relevant statutory provisions, subsections (c) and (d), read:

> (c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:
>
> > (1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or
> >
> > (2) Such conduct would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.
>
> (d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the laws of the other jurisdiction.

D.C. Code § 22-1805a. Note that the prior references to "act[s] of Congress exclusively applicable to the District of Columbia" in the old District statute have been replaced with the phrase "statutory laws of the District of Columbia" in RCC § 22E-303(d), (e), and (f). This explicitly clarifies that these jurisdictional provisions apply to all criminal offenses in the D.C. Code, rather than just congressionally enacted offenses.

conditions is met.[42] First, that conduct would constitute a criminal offense under the statutory laws of that other jurisdiction if performed in that jurisdiction.[43] Second, and alternatively, that conduct would constitute a criminal offense under the statutory laws of the District of Columbia even if it was performed outside the District of Columbia.[44]

Subsection (e) addresses the second situation, where the requisite agreement is formed outside the District of Columbia, but where the object of the agreement is to engage in conduct inside the District of Columbia. It establishes that general conspiracy liability applies if the conduct to be performed inside the District of Columbia would constitute a criminal offense under the statutory laws of the District of Columbia,[45] provided that an overt act in furtherance of the conspiracy is committed within the District of Columbia.[46] Under these circumstances, subsection (e) further clarifies that it is no defense that the conduct that is the object of the conspiracy would not constitute a criminal offense under the laws of that other jurisdiction.[47]

RCC § 22E-303 is intended to preserve existing District law relevant to conspiracy liability to the extent it is consistent with the RCC's statutory text and accompanying commentary.[48] Subsections (a)-(e) therefore incorporate existing District legal authorities whenever appropriate.[49]

Subsection (f) specifies that when the requirements under paragraphs (e)(1) and (e)(2) are proven, it is not a defense to prosecution for conspiracy that the object of the conspiracy would not constitute a criminal offense in the jurisdiction in which the conspiracy was formed. If two or more persons agree in another jurisdiction to engage in conduct in the District that constitutes a crime in the District, and an overt act in furtherance of the conspiracy is committed within the District, it is irrelevant that the object of the conspiracy would not constitute a criminal offense in the jurisdiction where the conspiracy was originally formed.

Relation to Current District Law. RCC § 22E-303 clarifies, improves the proportionality of, and fill in gaps in the District law of criminal conspiracies.

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[42] RCC § 22E-303(d)(1).
[43] RCC § 22E-303(c)(2)(A).
[44] RCC § 22E-303(c)(2)(B).
[45] RCC § 22E-303(d)(1).
[46] RCC § 22E-303(d)(2).
[47] Nothing in subsection (e) should be construed as lessening the government's burden to prove the culpable mental state requirement for conspiracy under RCC § 22E-303(a) and (b).
[48] This includes both those topics explicitly addressed by subsections (a)-(e) as well as those that are not, such as, for example: (1) determining the scope, duration, and number of conspiracies, see *McCullough v. United States*, 827 A.2d 48, 60 (D.C. 2003); (2) unanimity, see D.C. Crim. Jur. Instr. § 7.102 (citing *U.S. v. Treadwell*, 760 F.2d 327, 336-37 (D.C. Cir. 1985)); (3) charging, see *Tann v. United States*, 127 A.3d 400, 430 (D.C. 2015); (4) joinder, see *McCray v. United States*, 133 A.3d 205 (D.C.), *cert. denied sub nom. Fortson v. United States*, 137 S. Ct. 581, 196 L. Ed. 2d 455 (2016), and (5) the fact-finder's role in determining whether the relevant jurisdictional bases have been met, see *Gilliam v. United States*, 80 A.3d 192 (D.C. 2013).
[49] For an example of an area of the District's law of conspiracy changed by the RCC, compare D.C. Code § 22-1805a(a)(1) ("If 2 or more persons conspire either to commit a criminal offense *or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose* . . . .") *with* RCC § 22E-303(a) ("A person is guilty of a conspiracy to commit *an offense* . . . ."); *see supra* note 2.

The D.C. Code provides for conspiracy liability in a variety of ways. Most prominently, the D.C. Code contains a general conspiracy penalty provision that applies to a relatively broad group of offenses. [50] Additionally, the D.C. Code contains a variety of semi-general conspiracy penalty provisions, which create conspiracy liability for narrower groups of offenses with related social harms.[51] Finally, some specific offenses in the D.C. Code individually provide for conspiracy liability by incorporating the term "conspires" as an element of the offense.[52]

The District's scattered collection of conspiracy statutes present the same two basic problems reflected in the District's "patchwork of attempt statutes."[53] The first is that the District's conspiracy statutes fail to clearly communicate the elements of a criminal conspiracy. In no place, for example, does the D.C. Code define the term conspiracy. This statutory silence has effectively delegated to District courts the responsibility to establish the contours of conspiracy liability. Over the years, the DCCA has issued numerous opinions and proffered a variety of statements relevant to determining the contours of conspiracy liability under District law. The case law in this area reflects the piecemeal evolution of doctrine over more than a century: it is sometimes ambiguous, occasionally internally inconsistent, and has never been clearly synthesized into a single analytical framework. Nonetheless, a holistic reading of District authority reveals basic and fundamental principles governing the contours of conspiracy

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

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

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

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

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

[53] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

liability. Consistent with the interests of clarity and consistency, RCC § 22E-303 translates these principles into a detailed statutory framework.

The second main problem in the District's conspiracy statutes is that they lack a consistent grading principle. For example, some District conspiracies are subject to the same statutory maxima governing the completed offense. Many other District conspiracies, in contrast, are subject to a statutory maximum less severe than (typically one-half) the statutory maximum applicable to the completed offense. Viewed collectively, then, the D.C. Code manifests at least two fundamentally different patterns in how it grades conspiracies, without any discernible rationale for the variances. This produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate. Consistent with the interests of consistency and proportionality, RCC § 22E-303 changes District law by adopting a uniform approach to grading conspiracies at one half the severity of the completed offense.

A more detailed analysis of District conspiracy law and its relationship with RCC § 22E-303 is provided below. It is organized according to seven main topics: (1) the plurality requirement; (2) the agreement requirement; (3) the culpable mental state requirement; (4) impossibility; (5) the overt act requirement; (6) the treatment of non-criminal objectives; (7) penalties; and (8) jurisdictional issues.

RCC § 22E-303(a) (Prefatory Clause): Relation to Current District Law on Plurality Requirement. The prefatory clause of RCC § 22E-303(a) both codifies and clarifies the bilateral approach to conspiracy currently applied in the District.

One fundamental policy issue at the heart of conspiracy liability is whether the offense is bilateral or unilateral in nature. This distinction can be summarized as follows:

> The bilateral approach asks whether there is an agreement between two or more persons to commit a criminal act. Its focus is on the content of the agreement and whether there is a shared understanding between the conspirators. The unilateral approach is not concerned with the content of the agreement or whether there is a meeting of minds. Its sole concern is whether the agreement, shared or not, objectively manifests the criminal intent of at least one of the conspirators.[54]

Under current District law, it is well established that conspiracy is a bilateral, rather than unilateral, offense. The genesis of this approach is the District's general conspiracy statute, which explicitly states that "2 or more persons [must] conspire" to commit an offense.[55] The DCCA, in turn, has observed that this language means what it says, namely, that at least two of the relevant parties must actually agree.[56]

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

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

District practice, as captured by the Redbook jury instructions, also reflects a bilateral approach to conspiracy. More specifically, the Redbook states that the government must prove that "an agreement existed between two or more people to commit the crime" that constitutes the object of the conspiracy.[57] This aspect of the jury instructions does not entail proof of "a formal agreement or plan, in which everyone involved sat down together and worked out the details."[58] At the very least, however, the government must prove beyond a reasonable doubt that "there was a common understanding among those who were involved to commit the crime," which constitutes the object of the conspiracy.[59]

Under current District law, therefore, "[t]he existence of an agreement between [the defendant] and at least one other person, in the sense of a 'joint commitment' to a criminal endeavor, is not a mere technicality but 'the fundamental characteristic of a conspiracy.'"[60]

Consistent with the interests of clarity, as well as the preservation of current District law, the RCC codifies this bilateral approach to conspiracy. This is reflected in the prefatory clause of RCC § 22E-303(a), which establishes that a person is guilty of a conspiracy to commit an offense when, *inter alia*, that "person *and at least one other person*" satisfy the elements of a conspiracy. This italicized language, drawn from DCCA case law, replaces the "2 or more persons" language employed in the District's current general conspiracy statute.[61] It more clearly communicates the required joint commitment at the heart of the bilateral approach to conspiracy under District law.

<u>RCC § 22E-303(a)(1): Relation to Current District Law on Agreement Requirement.</u> RCC § 22E-303(a)(1) codifies District law relevant to the agreement requirement of a criminal conspiracy.

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

D.C. Code § 23-1331(4).

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

[57] D.C. Crim. Jur. Instr. § 7.102.

[58] *Id.*

[59] *Id.*

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

[61] D.C. Code § 22-1805a(a).

The agreement constitutes both the "gist of"[62] and "[t]he essential element"[63] of a conspiracy under District law. Absent a statutory clarification of the agreement requirement in D.C. Code § 22-1805a, however, it has fallen to the DCCA to determine the contours of this essential element. The body of case law that has resulted can be subdivided into two different dimensions: (1) substantive (i.e., the principles of liability governing the agreement requirement); and (2) evidentiary (i.e., the kind of proof that will satisfy those principles). This section focuses on the substantive dimension.

The scope of the agreement requirement is quite broad under DCCA case law, encompassing a wide range of conduct. For example, it is well established that a defendant can be deemed to have agreed with others to pursue criminal objectives without "knowing the identity of all the other people . . . participating in the agreement."[64] Nor, for that matter, does the defendant need to have "agreed to all the details" of a scheme to be deemed to have agreed to pursue its objectives.[65]

Perhaps most importantly, a defendant can be convicted of a conspiracy under District law "even if that person agrees to play only a minor part as long as that person understands the unlawful nature of the plan."[66] This seems to mean that an agreement to aid another in the planning or commission of an offense, just like an agreement to directly commit that offense, can provide the basis for conspiracy liability "provided there is assent to contribute to a common enterprise."[67] Consistent with this principle, proof that

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[62] *Wilson-Bey v. United States*, 903 A.2d 818, 841 (D.C. 2006) (*en banc*) (quotations and citations omitted).
[63] *Pearsall v. United States*, 812 A.2d 953, 961 (D.C. 2002) (citation omitted).
[64] *Thomas v. United States*, 748 A.2d 931, 939 (D.C. 2000); *Green v. United States*, 718 A.2d 1042, 1057 (D.C. 1998); *see Irving v. United States*, 673 A.2d 1284, 1288 (D.C. 1996) (rejecting appellant's argument that he did not knowingly participate in a conspiracy because he had never been sure with whom he conspired); *see also Rogers v. United States*, 340 U.S. 367, 375 (1951) ("[A]t least two persons are required to constitute a conspiracy but the identity of the other members of the conspiracy is not needed inasmuch as one person can be convicted of conspiracy with persons whose names are unknown.") (cited in D.C. Crim. Jur. Instr. § 7.102).
[65] *Thomas*, 748 A.2d at 939; *Green*, 718 A.2d at 1057. So, for example, as the DCCA observed in *Collins v. United States*:

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

73 A.3d 974, 983 (D.C. 2013) (citations and quotations omitted).
[66] *Thomas*, 748 A.2d at 939; *Green*, 718 A.2d at 1057.
[67] *Long v. United States*, No. 16-CF-730, 2017 WL 4248198, at *7 (D.C. Sept. 14, 2017) (quoting *United States v. Gardiner*, 463 F.3d 445, 457 (6th Cir. 2006)); *see, e.g., In re T.M.*, 155 A.3d at 404 (conspiracy conviction upheld where one party to agreement was "walking with and advising [the other party] on how to evade detection" after shooting); *McCoy v. United States*, 890 A.2d at 210 (conspiracy conviction upheld where one party to agreement shouted instructions at the other to drive the car in close range of the victim's car in furtherance of shooting); *Hairston v. United States*, 905 A.2d 765, 784 (D.C. 2006) (conspiracy conviction upheld where defendant "obtain[ed] guns and ammunition and join[ed] efforts to 'catch' members of [rival gang]"); *Green*, 718 A.2d at 1058 (upholding conspiracy conviction where defendant "joined the agreement with an understanding of its objective and with the intent to *assist* in its accomplishment").

a person agreed to participate in "every phase of the criminal venture" is neither a necessary nor essential component of conspiracy liability under District law.[68]

RCC § 22E-303(a)(1) codifies the above District authorities applicable to understanding the scope of the agreement requirement. Specifically, RCC § 22E-303(a)(1) establishes that an "[a]gree[ment] to engage in or aid the planning or commission" of criminal conduct is sufficient to establish general conspiracy liability under the RCC. This two-part formulation clarifies that agreements to aid (i.e., assist[69]), no less than agreements to directly commit, an offense constitute a sufficient basis for general conspiracy liability. This is consistent with current District law pertaining to the scope of the agreement requirement, and, as such, should preserve current District law pertaining to proof of the agreement requirement.[70]

RCC §§ 22E-303(a) & (b): Relation to Current District Law on Culpable Mental State Requirement. RCC §§ 22E-303(a) and (b) codify and fills gaps in District law concerning the culpable mental state requirement governing a conspiracy.

The precise contours of the culpable mental state requirement applicable to conspiracy under District law are ambiguous. The DCCA has generally recognized that there exists "two separate intents" at issue in conspiracy, "the intent to agree and the intent to achieve the criminal objective."[71] And, consistent with this understanding, the court has repeatedly held that the government is required to prove that the defendant both: (1) "intentionally joined [an] agreement"; and (2) did so "with the intent to advance or further the unlawful object of the conspiracy."[72] Upon closer consideration, however, the actual import of this particular formulation is less than clear.[73]

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

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

[70] As an evidentiary matter, DCCA case law clarifies that the agreement requirement need not be "proven by direct evidence." *Mitchell v. United States*, 985 A.2d 1125, 1135 (D.C. 2009) (quotations and citations omitted). Instead, they may be—and frequently must be—"inferred from a development and a collocation of circumstances." *Id.* (noting that evidentiary concerns are particularly significant in conspiracy cases given the difficulty of directly establishing the existence of an agreement.) The relevant circumstances considered by District courts as a matter of course "include the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties and the interests of the alleged conspirators." *Castillo–Campos v. United States,* 987 A.2d 476, 483 (D.C. 2010) (internal quotation marks and alterations omitted).

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

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

[73] Note that other DCCA cases use the phrase "knowing and voluntary participation in the agreement" instead of "intentionally joining an agreement." *E.g.*, *Campos-Alvarez v. United States*, 16 A.3d 954, 965 (D.C. 2011); *In re T.M.*, 155 A.3d 400, 404 (D.C. 2017); *McCullough v. United States*, 827 A.2d 48, 58 (D.C. 2003); *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997). These appear to be substantively identical formulations, though one *could* read the term "participation" in the latter formulation to impose an

Consider that the first requirement, an intent to join an agreement, is a relatively insignificant part of any conspiracy offense. It is well established, for example, that "[t]he term 'agree' is commonly understood to include an 'intent to agree,'"[74] and that such an intent is "without moral content."[75] As a result, the larger, and more significant, issue is "what objective the parties intended to achieve by their agreement."[76] This is the issue that the second requirement of the previously quoted District formulation purports to address; it requires the government to prove an "intent to advance or further the unlawful object of the conspiracy."[77] Yet this formulation begs at least two different questions, neither of which is clearly resolved by the case law. First, what does "intent" mean in the context of an "intent to advance or further the unlawful object of the conspiracy"? And second, how does this intent requirement interact with the elements of the target offense, which may, or may not, be considered part of the "unlawful object of the conspiracy"?

Confounding the first question is the fact that the term "intent" is defined in two different ways by common law authorities. Historically, intent has been "viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of a belief as to a practical certainty.[78] But there are exceptions to this bifurcated understanding. In specific contexts, for example, intent is employed as a synonym for purpose, thereby excluding knowledge as a viable basis for liability.[79] The law of conspiracy has typically been considered to be one such context by common law authorities.[80]

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

> In certain narrow classes of crimes . . . heightened culpability has been thought to merit special attention . . . . [One] such example is the law of inchoate offenses such as . . . conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.[81]

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additional conduct requirement, above and beyond agreement. One problem with such a reading, however, is that it would seem to render the overt act requirement superfluous in the sense that the element of participation would by itself always satisfy the overt act requirement. *See generally* Commentary to RCC § 22E-303(a)(2). In any event, as a matter of *mens rea*, this formulation does not alter the analysis of District law presented in this section. *See United States v. Childress*, 58 F.3d 693, 709 (D.C. Cir. 1995) (explaining why the "knowing and voluntary participation" language does not alter the fact that conspiracy is a "specific intent" crime).

[74] Robinson & Grall, *supra* note 5, at 752–53.

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

[76] *Id.*

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

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

[79] *See United States v. Bailey*, 444 U.S. 394, 405 (1980); Model Penal Code § 2.02, cmt. at 125; LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.2.

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

[81] 979 A.2d 1191, 1194 (D.C. 2009) (quoting *Bailey*, 444 U.S. at 405); *see Childress*, 58 F.3d at 707–08.

Consistent with this understanding of conspiracy as an offense that entails proof of a "heightened mental state," the DCCA has seemingly equated the "intent" at issue in conspiracy with an "unlawful purpose"[82] or "illegal purpose."[83] This kind of purpose-based interpretation also accords with persuasive precedent—cited by the Redbook—from the U.S. Court of Appeals for the D.C. Circuit, which explicitly clarifies that "a purposeful state of mind [is] required" for conspiracy.[84]

Also relevant to this issue is the DCCA's observation in *McCoy v. United States* that "[m]ere [] awareness" is "insufficient to make out a conviction for either aiding and abetting or conspiracy."[85] The requirement of a "purposive attitude" is, as recognized by the DCCA's *en banc* decision in *Wilson-Bey*, an essential component of complicity liability under District law.[86] It therefore stands to reason—and is likewise indicated by the *McCoy* decision—that the same kind of "purposive attitude" is a necessary component of conspiracy liability.[87]

Even assuming intent means purpose in the context of the phrase "intent to advance or further the unlawful object of the conspiracy," however, the culpable mental state requirement applicable to conspiracy under District law still remains ambiguous. The reason? It fails to respect the admonition that, as the DCCA observed in *Ortberg v. United States*, "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[88] To say, for example, that the parties to an agreement must desire to "advance or further the unlawful object of the conspiracy" does not specify whether the requisite purpose requirement applies to the (1) the *conduct* planned to culminate in that offense; (2) the *circumstances* surrounding that conduct; or (3) the *results*, if any, that conduct would cause if carried out.

It seems relatively clear that, at minimum, the parties to the agreement must desire to bring about the conduct planned to culminate in an offense.[89] Less clear, however, is whether and to what extent this purpose requirement—or any other principle

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

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

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

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

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

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

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

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

of culpable mental state elevation—applies to the results and circumstances of the target offense.

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

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

Existing DCCA case law on conspiracy sheds little light on these issues.[90] The best one can do, then, is look to other legal contexts, where awareness—but likely nothing less than awareness—seems to suffice for liability.

For example, DCCA case law on attempt—described in the Commentary to RCC § 22E-301(a)—appears to indicate that a principle of intent elevation governs the results of the target offense.[91] If true, this would mean that, where an attempt to commit a result element crime is charged, the government must prove that the defendant acted with either a belief that it was practically certain that the person's conduct would cause that result, or, alternatively, that the person consciously desired to cause any results of the target offense—regardless of whether that result is subject to a less demanding culpable mental

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

> [T]he *Pinkerton* doctrine provides that "a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement." *Gordon v. United States,* 783 A.2d 575, 582 (D.C. 2001). Thus, in order to secure a conviction in conformity with *Pinkerton,* the prosecution must prove that an agreement existed, that a substantive crime was committed by a co-conspirator in furtherance of that agreement, and that the substantive crime was a reasonably foreseeable consequence of the agreement between the conspirators. *Pinkerton,* 328 U.S. at 646-47, 66 S.Ct. 1180; *Gordon,* 783 A.2d at 582. The government is not, however, required to establish that the co-conspirator actually aided the perpetrator in the commission of the substantive crime, but only that the crime was committed in furtherance of the conspiracy.

903 A.2d at 840. Note that the *Pinkerton* doctrine, while requiring proof of the elements of a conspiracy, is actually a theory of complicity. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.08 (6th ed. 2012). Therefore, it is not addressed in this Report, but will instead be considered alongside accomplice liability in the CCRC's forthcoming work on complicity. The provisions that comprise RCC § 22E-303 neither preclude nor necessitate continued recognition of the *Pinkerton* doctrine.

[91] *See* RCC § 22E-301(a): Relation to Current District Law on Culpable Mental State Requirement.

state.[92] (It would also mean, however, that purpose as to a result, while sufficient, is not necessary for an attempt conviction.[93])

Given that conspiracy, which merely requires proof of an agreement and a mere overt act in furtherance of it,[94] is even more inchoate than attempt, which requires proof of conduct dangerously close to completion,[95] it stands to reason that the culpable mental state requirement applicable to the results of a conspiracy would, at minimum, entail a principle of culpable mental state elevation at least as demanding as that applicable to attempt.[96]

For circumstances, on the other hand, DCCA case law on accomplice liability provides a relevant point of departure. In this context, the DCCA in *Robinson v. United States* recently observed that—quoting from U.S. Supreme Court case law—"[a]n aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime . . . . [T]he intent must go to the specific and entire crime charged."[97] It therefore follows, as the *Robinson* court concluded, that "[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved."[98]

The *Robinson* decision indicates that, whatever the culpable mental state governing the circumstances of the target offense, a person cannot be deemed an accomplice of that offense without knowledge (or perhaps a belief) that they existed—regardless of whether a less demanding culpable mental state, such as recklessness or negligence, will suffice to establish to target offense.[99] (It also indicates, however, that a purpose requirement does not govern the circumstances of the target offense when charged under a complicity theory.[100])

Given that accomplice liability requires proof that the target offense was completed—whereas conspiracy liability does not—it stands to reason that the culpable mental state requirement applicable to the circumstances of a conspiracy would, at minimum, entail principles of culpable mental state elevation that are at least as demanding as those applicable to those of accomplice liability.[101]

One question left open by this analysis is whether an even *more demanding* principle of purpose elevation might apply to the results and circumstances of the target offense when a conspiracy is charged.[102] While purpose elevation is possible,[103] it's hard to see why anything more demanding than intent as to the results and circumstances of

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[92] *See id.*
[93] *See id.*
[94] *See* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 61, at § 27.07.
[95] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992) (citing *Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975).
[96] *See, e.g.,* Model Penal Code § 5.01 cmt. at 408-09.
[97] *Robinson*, 100 A.3d at 105–06 (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)).
[98] *Id.*
[99] *See id.*
[100] *See Rosemond*, 134 S. Ct. at 1249.
[101] *See, e.g.,* Model Penal Code § 5.01 cmt. at 408-09.
[102] *But see Rosemond*, 134 S. Ct. at 1249.
[103] *But see Childress*, 58 F.3d at 707–08; *compare with Clarke,* 24 F.3d at 264–65 and *United States v. Haldeman,* 559 F.2d 31, 112 (D.C. Cir. 1976).

the target offense should be necessary to ground a conspiracy conviction as a policy matter.[104]

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

Finally, subsection (b) establishes that the "defendant and at least one other person" must both: (1) "[i]ntend to cause all result elements required for that offense"; and (2) "[i]ntend for all circumstance elements required for that offense to exist." This language incorporates dual principles of culpable mental state elevation[105] applicable whenever the target offense is comprised of a result or circumstance that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[106] In this case, proof of intent on behalf of two or more parties is required. These two policies fill a gap in the District law of conspiracy in a manner that is broadly consistent with District law applicable in other relevant contexts.

<u>RCC § 22E-303(a)(1): Relation to Current District Law on Impossibility</u>. RCC § 22E-303(a)(1) fills gaps in District law pertaining to the relevance of impossibility to conspiracy prosecutions in a manner that is consistent with the District approach to impossibility in the context of attempt prosecutions.

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[104] The following example is illustrative. Environmental activists X and Y agree to blow up a coal-processing facility during the evening/afterhours when only a single person, the on-duty night guard, V, will be present. Both X and Y are practically certain that V will die from the blast, though they'd very much prefer that V not be injured. The police intercede right before X and Y are able to set off the explosives, thereby saving V's life. On these facts, both X and Y should be able to be convicted of conspiracy to commit (knowing) murder, premised on the fact that their agreement was accompanied by: (1) a *desire* to engage in conduct, which, if carried out, would have culminated in murder (i.e., blowing up the facility); and (2) their *awareness as to a practical certainty* that such conduct would result in V's death. *See* Robinson & Grall, *supra* note 5, at 757 ("When causing a particular result is an element of the object offense and such result does not occur, the actor, to be liable for conspiracy under Subsection (1), must have the purpose or belief that the conduct contemplated by the agreement will cause such result."); Note, *supra* note 5 ("[A] person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees[.]"); *but see* Model Penal Code § 5.03 cmt. at 408 ("[I]t would not be sufficient, as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it.").

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

[106] Importantly, neither of these principles of culpable mental state elevation precludes the government from charging conspiracies to commit target offenses comprised of result or circumstance elements subject to recklessness, negligence, or strict liability. However, to secure a conspiracy conviction for such offenses, proof that the parties to the agreement acted with the intent to cause every result and circumstance element that constitutes the target offense is necessary.

The issue of impossibility arises in the conspiracy context wherein two or more parties agree to engage in or facilitate conduct that would culminate in a consummate criminal offense if—but only if—the conditions were as they perceived them. In this kind of situation, one or more parties charged with conspiracy might argue that liability should not attach due to the fact that, by virtue of a mistake concerning the surrounding conditions, completion of the target offense was impossible.[107] If presented with such a claim, the court would then have to determine whether and to what extent the particular kind of mistake rendering the criminal objective at the heart of a conspiracy prosecution impossible constitutes a defense.

There does not appear to be any District legal authority governing this particular kind of situation. No District statute speaks directly to the relationship between conspiracy and impossibility, and the DCCA does not appear to have published any opinions addressing it either.[108] The closest issue that District law addresses is the relationship between attempt and impossibility.

The commentary to RCC § 22E-301(a) provides a detailed discussion of the relevant legal trends in the District concerning this issue.[109] Generally speaking, impossibility is not a defense to an attempt charge under District law. In practical effect, this means that the fact that a criminal undertaking fails because of a defendant's mistaken beliefs concerning the situation in which he or she acts is typically deemed to be irrelevant for purposes of assessing attempt liability.

This broad rejection of impossibility claims extends to two different situations: (1) those involving pure factual impossibility, i.e., where "the intended substantive crime is impossible of accomplishment [] because of some physical impossibility unknown to the defendant"[110]; and (2) those involving hybrid impossibility, i.e., where the object of an agreement is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense.[111] The reason for this broad rejection of impossibility is that in either of these situations, the defendant's "conduct, intent, culpability, and dangerousness are all exactly the same."[112]

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[107] *See* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 1, at § 27.07.

[108] *See also* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4 (noting that "the issue of impossibility has been dealt with in the law of attempts . . . with much greater frequency").

[109] *See* RCC § 22E-301(a): Relation to Current District Law on Impossibility.

[110] *In re Doe*, 855 A.2d 1100, 1106 (D.C. 2004) (citing *German v. United States*, 525 A.2d 596, 606 n.20 (D.C. 1987) and LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5). Impossibility of this nature may result from the defendant's mistake as to *the victim*: consider, for example, a pickpocket who is unable to consummate the intended theft because, unbeknownst to her, she picked the pocket of the wrong *victim* (namely, one whose wallet is missing). *See* DRESSLER, *supra* note 1, at § 27.07. Alternatively, impossibility of this nature may also result from the defendant's mistake as to *the means of commission*: consider, for example, the situation of a murderer-for-hire who is unable to complete the job because, unbeknownst to him, his murder weapon malfunctions. *See id.*

[111] DRESSLER, *supra* note 1, at § 27.07; *see In re Doe*, 855 A.2d at 1106. Illustrative scenarios of hybrid impossibility involve defendants caught in police sting operations. Consider, for example, the prosecution of a defendant who sends illicit photographs to a person he believes to be an underage female, but who is actually an undercover police officer, for attempted distribution of obscene material to a minor. *See People v. Thousand*, 631 N.W.2d 694 (Mich. 2001).

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

At the same time, the District law of attempts also appears to recognize a narrow exception to this general rejection of impossibility. More specifically, it appears that impossibility may constitute a defense where the defendant's conduct is not "reasonably adapted" to completion of the target offense.[113] So, for example, if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct could not "constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result."[114] By requiring a basic relationship between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement would seem to both preclude convictions for inherently impossible attempts[115] and limits the risk that innocent conduct will be misconstrued as criminal.[116]

These impossibility principles recognized by the DCCA in the attempt context are relevant to understanding contours of conspiracy liability under District law for two reasons. First, it's at least possible that these principles have actually been statutorily incorporated into the District's law of conspiracy. More specifically, the District's general conspiracy statute criminalizes conspiracies to commit any "crime of violence."[117] The latter category, in turn, is defined by D.C. Code § 23-1331 to include

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

[114] Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954). As explained in the commentary to § 22E-301(a), there's no DCCA case law specifically addressing these kinds of issues. However, this is not surprising since attempt prosecutions premised upon "inherently impossible" attempts of this nature "seldom confront the courts." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5. Nevertheless, the DCCA has affirmatively upheld attempt convictions in impossibility cases based upon the premise that the defendant's conduct *was* reasonably adapted to commission of an offense. *See, e.g., Seeney*, 563 A.2d at 1083; *Thompson*, 678 A.2d at 27. The implication, then, is that where a defendant's conduct is *not* reasonably adapted to commission of an offense—as would be the case with attempted murder by means of witchcraft—attempt liability could not attach.

[115] An inherently impossible attempt is one "where any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought." LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5. An illustrative example is an attempt to kill implemented by means of witchcraft, incantation, or any other superstitious practice.

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

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

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

"attempt[s]" to commit a long list of designated offenses.[118] When viewed collectively, then, the possibility of liability for a conspiracy to attempt a crime of violence could be understood to cover impossible conspiracies.[119]

Second, and perhaps more important, is that the policy considerations relevant to the resolution of impossibility claims are the same whether in the context of attempt liability or conspiracy liability. Indeed, if anything, the policy considerations that weigh against recognizing impossibility claims in the attempt context weigh even more heavily in favor against recognizing impossibility claims in the conspiracy context.[120]

With these considerations in mind, and given the interests of clarity, consistency, and proportionality, the RCC applies the same approach to impossibility in the context of attempts—itself a codification of current District law—to impossibility in the context of conspiracy. This outcome is achieved by means of incorporation. Paragraph (a)(1) of section 303 establishes, in relevant part, that agreements to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" can also provide the basis for general conspiracy liability. This reference to attempts imports the broad abolition of impossibility claims employed in the

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

> (4) The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an *attempt*, solicitation, or conspiracy to commit any of the foregoing offenses.

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

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

[120] As one court has framed the point:

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

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

RCC's general attempt provision into the conspiracy context.[121] Under this approach, it is generally immaterial that the agreed-upon criminal scheme could never have succeeded under the circumstances.[122] So long as the parties agreed to bring about conduct that would have culminated in an offense if "the situation was as [the parties] perceived it" then conspiracy liability may attach,[123] provided that the agreed-upon plan of action was at least "reasonably adapted" to commission of the target offense.[124]

RCC § 22E-303(a)(2): Relation to Current District Law on Overt Act Requirement. RCC § 22E-301(a)(2) both codifies and clarifies current District law on the overt act requirement.

It is well established under District law that proof of a bilateral agreement to commit a crime and the requisite intent is not, by itself, sufficient to secure a conviction for conspiracy. Rather, "[u]nder D.C. law, a conspiracy requires proof of both agreement and action."[125] The latter component of action is reflected in the overt act requirement, which is expressly codified by the District's general conspiracy statute.

More specifically, D.C. Code § 22-1805a(b) states that: "No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose."[126] Construing this language, the DCCA has held that the overt act requirement entails proof

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[121] Under RCC § 22E-301(a)(3)(A)(ii), a person commits an attempt if, *inter alia*, he or she "engages in conduct that . . . [w]ould have come dangerously close to completing that offense if the situation was as the person perceived it." Subparagraph (a)(3)(B) thereafter adds that the person's conduct must have been "reasonably adapted to completion of that offense."

[122] *See* RCC § 22E-301(a), Explanatory Note ("Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.").

[123] RCC § 22E-301(a)(3)(A)(ii); *see supra* note 27 (observing that: (1) "the subjective approach incorporated into subparagraph (a)(1)(B) [of section 303] renders pure factual and hybrid impossibility claims immaterial"; and (2) "[i]n contrast, pure legal impossibility remains a viable theory of defense under the RCC").

[124] RCC § 22E-301(a)(3)(B). As the Explanatory Note accompanying subparagraph (a)(3)(B) of section 301 explain:

> This reasonable adaptation requirement is intended to limit attempt liability to those situations where there exists a basic relationship between the defendant's conduct and the criminal objective sought to be achieved. Requiring the government to establish this basic relationship both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.

Id. (collecting District case law and national legal authority in support of this approach); *see supra* note 29 ("Inherent impossibility is an issue in conspiracy prosecutions where the parties to a criminal agreement plan to employ means which a reasonable man would view as totally inappropriate to the objective sought' . . . . Conduct of this nature would not be "reasonably adapted" to completion of the target offense under subparagraph (a)(3)(B) of section 301, and, therefore, could constitute a (failure of proof) defense to conspiracy liability under the RCC.").

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

[126] D.C. Code § 22-1805a(b).

that "during the life of the conspiracy, and in furtherance of its objective, the commission by at least one conspirator of at least one of the overt acts specified in the indictment."[127]

This overt act requirement often is not difficult to satisfy as a matter of practice.[128] In contrast to the conduct requirement of an attempt, for example, the DCCA has observed that conspiracy's overt act requirement "is far less exacting; a preparatory act, innocent in itself, may be sufficient."[129] All the same, it seems clear from both case law and statute that the overt act requirement is nevertheless an element of the offense of conspiracy.[130]

Consistent with these legal authorities, the RCC codifies the overt act requirement reflected in current District law. The relevant language employed in RCC § 22E-303(a)(2) requires proof that "[o]ne of the parties to the agreement engages in an overt act in furtherance of the agreement." This language is intended to be substantively identical to that employed in D.C. Code § 1805a(b); however, two clarifying revisions bear notice.

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

Second, the phrase "pursuant to the conspiracy and to effect its purpose," employed in D.C. Code § 1805a(b), is replaced with the phrase "in furtherance of the conspiracy" under RCC § 22E-303(a)(2). This substitution more accessibly communicates the contours of the overt act requirement in District law.[131]

<u>RCC §§ 22E-303(a) and (b) (Generally): Relation to Current District Law on Agreements to Achieve Non-Criminal Objectives.</u> RCC §§ 22E-303(a) and (b) clarify, but may also change, District law by excluding non-criminal objectives from the scope of general conspiracy liability.

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

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

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

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

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

Under current District law, agreements to engage in non-criminal objectives also provide the basis for conspiracy liability under limited circumstances. This is a product of the fact that the District's general conspiracy statute criminalizes conspiring "*either* to commit a criminal offense or *to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose*."[132] As the DCCA recently explained in *Long v. United States*: "The use of the word "either" in the conspiracy statute envisions two types of conspiracies: (1) a conspiracy to defraud the District of Columbia or any court or agency; and (2) a conspiracy to commit a specific offense."[133]

The contours of conspiracy to defraud liability under District law are ill defined. The relevant statutory language seems to expand criminal liability beyond that provided for by a charge of conspiracy to commit fraud (e.g., it seems to cover forms of fraud that would not be criminal if committed by a single individual). Just how far this expansion is intended to go, however, is unclear: the relevant statutory language is quite vague,[134] while reported conspiracy cases premised on "defraud[ing] the District of Columbia or any court or agency" appear to be exceedingly rare. At minimum, though, relevant case law clarifies that such language is capacious enough to encompass at least some public corruption schemes.

For example, in *United States v. Lewis*, the U.S. Court of Appeals for the D.C. Circuit (CADC) upheld a conviction for conspiracy to defraud under the District's general conspiracy statute where the defendant, the owner of a restaurant-bar, agreed with two government officials to a scheme in which the officials would pressure a shopping center to provide the defendant with a lease to a liquor store in exchange for a portion of that store's profits.[135] In so doing, the CADC held that the District's general conspiracy statute covers "conspiring to defraud the District of Columbia of its lawful governmental functions including its right to have the disinterested official services of [the defendants], and its right to have its business conducted honestly."[136]

The DCCA's recent decision in *Long v. United States* is similarly in accordance.[137] In that case, the Court of Appeals upheld a conviction for conspiracy to defraud based upon the defendant's participation in a public corruption scheme, wherein he agreed to: (1) serve as the driver for a mayoral candidate paid off the books in order to avoid campaign finances laws; and (2) arrange a meeting for one mayoral candidate to endorse another in exchange for some form of compensation.[138]

Aside from these two decisions, the contours of the conspiracy to defraud prong of D.C. Code § 22-1805a are undefined by existing case law. At the same time, there is

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[132] D.C. Code § 22-1805a(1).

[133] *Long v. United States*, No. 16-CF-730, 2017 WL 4248198, at *5 (D.C. Sept. 14, 2017) (citing *Eaglin v. District of Columbia*, 123 A.3d 953, 956 (D.C. 2015)).

[134] *See generally* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959) (noting that similar language in the federal conspiracy to defraud statute is extremely vague).

[135] *United States v. Lewis*, 716 F.2d 16, 22-23 (D.C. Cir. 1983). Having been convicted by the federal trial court of conspiracy to defraud under the District's general conspiracy statute, the defendant argued on appeal that his conviction ought to be overturned because the conspiracy to defraud prong of that statute "should be limited to fraud on the government involving money or property and not be read to reach fraud which impairs governmental functions." *Id.* at 23.

[136] *Id*.

[137] *Long*, 2017 WL 4248198, at *5.

[138] *See id.*

general support in the case law for the proposition that the conspiracy to defraud prong of D.C. Code § 22-1805a should be construed in accordance with the comparable prong in the federal conspiracy statute, 18 U.S.C. § 371, which criminalizes conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." For example, the CADC in *Lewis* observed that:

> Though the legislative history does not expressly indicate Congress's desire to model the D.C. provision after the federal provision, the similarity of language and the routine construction of D.C.'s local statutes in accord with their federal counterparts lend strong support to the view that the D.C. provision should be interpreted along the lines of the federal provision.[139]

Likewise, the DCCA's *Long* decision seems to be consistent with this reading. In that case, the court observed that the federal conspiracy statute "contains essentially the same language as the District's statute," and, therefore, indicated that it should be construed in accordance with the federal statute.[140]

Assuming the breadth of these two provisions are identical, however, raises a host of problems. As further discussed below,[141] the federal conspiracy to defraud provision is oft-criticized for the use of language that is "shadowy" at best.[142] The relevant ambiguities, in turn, have produced criminal liability of "such broad and imprecise proportions as to trench . . . the standards of fair trial and on constitutional prohibitions against vagueness and double jeopardy."[143] In light of these problems, today "most states provide that the object of a criminal conspiracy must be some crime, or some felony."[144]

Given these policy and practice considerations, and consistent with the interests of clarity and consistency, the RCC's general conspiracy provision excludes any reference to conspiracies "to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose." RCC §§ 22E-303(a) and (b) are instead limited to agreements to commit criminal "offenses," including the revised and expanded fraud offense.[145] This exclusion will ensure that the RCC clearly communicates the elements of general conspiracy liability. This change may—but need not necessarily—circumscribe the limits of conspiracy liability under District law.[146]

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[139] *Lewis*, 716 F.2d at 23 (citing *Dennis v. United States,* 384 U.S. 855, 859-864 (1966); *Hammerschmidt v. United States,* 265 U.S. 182, 188 (1924)).

[140] *Long*, 2017 WL 4248198, at *5.

[141] *See* RCC §§ 22E-303(a) & (b) (Generally): Relation to National Legal Trends on Non-Criminal Objectives.

[142] Goldstein, *supra* note 134, at 408; *see In re McBride*, 602 A.2d 626, 633 (D.C. 1992) (citing *id.*).

[143] Goldstein, *supra* note 134, at 408.

[144] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.3.

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

[146] Whether this constitutes a change in law depends, first, upon whether there is a meaningful policy difference between conspiring to "defraud the District of Columbia or any court or agency thereof in any manner or for any purpose" under current law, and conspiring to commit the revised fraud statute. Assuming the answer to this question is yes, then the existence of a change in law depends upon, second,

RCC §§ 22E-303(c): Relation to Current District Law on Conspiracy Penalties. Subsection (c) establishes a uniform and proportionate grading scheme for criminal conspiracies, which clarifies, simplifies, and changes District law.

The D.C. Code's general conspiracy statute, D.C. Code § 22-1805a, establishes a default penalty framework for conspiracy offenses comprised of two basic rules. First, conspiracies to commit offenses other than "crimes of violence" are punishable by a maximum of 5 years incarceration, "except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense."[147] And second, conspiracies to commit "crimes of violence"[148] are punishable by a maximum of either

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whether the RCC codifies a specific public corruption conspiracy offense, which might otherwise fill the foregoing gap in liability.

[147] *See* D.C. Code § 22-1805a(a)(1) ("If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.").

Note that this provision also subjects conspiracies "to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose" to a maximum 5-year penalty. Interpreting this language, the DCCA has observed that:

> The use of the word "either" in the conspiracy statute envisions two types of conspiracies: (1) a conspiracy to defraud the District of Columbia or any court or agency; and (2) a conspiracy to commit a specific offense. *See* Eaglin v. District of Columbia, 123 A.3d 953, 956 (D.C. 2015) ("If the plain meaning of statutory language is clear and unambiguous and will not produce an absurd result, we will look no further." (citation, internal quotation marks, and brackets omitted)). The statute also contemplates a default five-year maximum prison term for conspiracy, except if the charge is a conspiracy to commit a specific offense and the specific offense alleged has a lower maximum prison term than five years. *See* D.C. Code § 22–1805a(a)(1).

Long v. United States, 169 A.3d 369, 375–77 (D.C. 2017) (upholding conspiracy to defraud charge, and concomitant five year statutory maximum, notwithstanding the "fact that the government could have charged appellant with a misdemeanor conspiracy to commit the specific offense of funding and concealing contributions to Mayoral Campaign A in excess of those permitted under the Campaign Finance Reform Act") (citing *District of Columbia v. Economides*, 968 A.2d 1032, 1036 (D.C. 2009) ("[T]he decision of whether or not to prosecute, and what charges to file . . . generally rests entirely in the prosecutor's discretion.").

[148] D.C. Code § 23-1331(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, 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.").

"15 years []or the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both."[149]

Notwithstanding these two generally applicable rules, numerous District statutes communicate important penalty exceptions. Some of these exceptions are communicated through the penalty provisions governing conspiracies to commit individual or certain groupings of offenses. Illustrative provisions include the D.C. Code provisions setting forth penalties for conspiracies to commit: (1) various drug-related offenses[150]; (2) the manufacture or possession of a weapon of mass destruction[151]; and (3) the use, dissemination, or detonation of a weapon of mass destruction.[152]

Other exceptions to the District's general conspiracy penalty rules are communicated through incorporation of the term "conspires" into the definition of a given offense, effectively providing that a conspiracy to commit that offense is subject to the same punishment as the completed offense. Illustrative provisions in the D.C. Code include the statutory definitions of (1) kidnapping,[153] (2) criminal violations of fiduciary obligations,[154] and (3) corrupt election practices.[155]

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[149] *See* D.C. Code § 22-1805a(a)(2) ("If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.").

[150] *See* D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[151] *See* D.C. Code § 22-3154(b) ("A person who attempts or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.")

[152] *See* D.C. Code § 22-3155(b) ("A person who attempts or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.").

[153] *See* D.C. Code § 22-2001 ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section.").

[154] *See* D.C. Code § 21-591 ("Whoever: (1) without probable cause for believing a person to be mentally ill: (A) causes or conspires with or assists another person to cause the hospitalization, under this chapter, of the person first referred to; or (B) executes a petition, application, or certificate pursuant to this chapter, by which he secures or attempts to secure the apprehension, hospitalization, detention, or restraint of the person first referred to; or (2) causes or conspires with or assists another person to cause the denial to a person of a right accorded to him by this chapter; or (3) being a physician, psychiatrist or qualified psychologist, knowingly makes a false certificate or application pursuant to this chapter as to the mental condition of a person -- shall be fined not more than the amount set forth in [§ 22-3571.01] or imprisoned not more than three years, or both.").

[155] *See* D.C. Code § 1-1001.14 (a-1)(1) ("A person shall not knowingly or willfully: (A) Pay, offer to pay, or accept payment of any consideration, compensation, gratuity, reward, or thing of value for registration to vote or for voting; (B) Give false information as to his or her name, address, or period of residence for the purpose of establishing his eligibility to register or vote, that is known by the person to be false; (C) Procure or submit voter registration applications that are known by the person to be materially false,

Collectively, the District's scattered approach to penalizing conspiracies presents two main problems: (1) it lacks a consistent grading principle; and (2) it is confusingly communicated. With respect to the first problem, at least two fundamentally different grading patterns appear in the penalties governing conspiracies to commit both crimes of violence and non-violent crimes under the D.C. Code.

The first grading pattern, which might be referred to as a "significant punishment discount," is reflected in the numerous District conspiracy offenses subject to statutory maxima that are significantly less severe than (typically half) the statutory maxima governing the completed offense.

A penalty discount of this nature is perhaps most clearly reflected in the grading of conspiracies to commit various non-violent crimes. For example, whereas the statutory maxima for felony property offenses such as first degree theft,[156] first degree fraud,[157] and first degree financial exploitation of a vulnerable adult or elderly person[158] are set at 10 years, a conspiracy to commit any of those offenses is subject to the 5 year default rule governing conspiracies to commit non-crimes of violence under the general conspiracy statute.[159] In addition, the 7-year statutory maximum applicable to first degree receiving stolen property[160] is reduced to 5 years under this default rule.[161] And the 10-year statutory maxima applicable to second degree cruelty to children,[162] as well as the 20-year statutory maximum applicable to felony threats,[163] are also reduced to five years under the first default rule.[164] (Neither of these offenses is a crime of violence.[165])

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fictitious, or fraudulent; (D) Procure, cast, or tabulate ballots that are known by the person to be materially false, fictitious, or fraudulent; or (E) Conspire with another individual to do any of the above."); *id.* at § (a)(2) ("A person who violates paragraph (1) of this subsection shall, upon conviction, be fined not more than $10,000, be imprisoned not more than 5 years, or both.").

[156] 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.").

[157] D.C. Code § 22-3221(a)(1) ("Any person convicted of fraud in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property obtained or lost, whichever is greater, or imprisoned for not more than 10 years, or both, if the value of the property obtained or lost is $1,000 or more . . . .").

[158] D.C. Code § 22-936.01(a) ("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . When the value of the property or legal obligation is $1,000 or more, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 10 years, or both.").

[159] D.C. Code § 22-1805a(a)(1).

[160] D.C. Code § 22-3232(c)(1) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 7 years, or both, if the value of the stolen property is $1,000 or more.").

[161] *See* D.C. Code § 22-1805a(a)(1).

[162] D.C. Code § 22-1101(b)(2) ("Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").

[163] D.C. Code § 22-1810 ("Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.").

[164] *See* D.C. Code § 22-1805a(a)(1).

[165] *See* D.C. Code § 23-1331(4).

A pattern of significant punishment discounting can also be seen in the penalties governing numerous conspiracies to commit crimes of violence. For example, whereas first-degree murder[166] and second-degree murder[167] are both potentially subject to a sentence of life in prison under the D.C. Code, a conspiracy to commit either of those offenses is subject to the 15 year default rule governing conspiracies to commit crimes of violence under the general conspiracy statute.[168] Likewise, the 30 year statutory maxima applicable to first degree burglary[169] is also reduced to 15 years under the default rule governing conspiracies to commit crimes of violence.[170]

These significantly discounted conspiracy penalties are to be contrasted with those that reflect a grading pattern that might be referred as "equal punishment," namely, they subject conspiracies to the same statutory maximum governing the completed offense. The D.C. Code is comprised of numerous conspiracy offenses that effectively equalize the sanction for conspiracies, though the D.C. Council has authorized this outcome in a variety of ways.

Most explicit is the District's semi-general penalty provision for drug crimes, D.C. Code § 48-904.09, which broadly states that conspiracies to commit drug crimes may be punished as seriously as completed drug crimes.[171] In practical effect, this means that, *inter alia*, conspiracies to manufacture, distribute, or possess, with intent to manufacture or distribute, a Schedule I or II controlled substance are subject to the same 30 statutory maximum governing the completed offense.[172]

A pattern of equal punishment is also apparent in those District offenses that statutorily incorporate the term "conspires" into their statutory definition. Illustrative provisions in the D.C. Code include the statutory definitions of (1) kidnapping,[173] (2) criminal violations of fiduciary obligations,[174] and (3) corrupt election practices.[175]

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[166] D.C. Code § 22-2104(a)("The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release . . . .").

[167] D.C. Code § 22-2104(c) ("Whoever is guilty of murder in the second degree shall be sentenced to a period of incarceration of not more than life . . . .").

[168] *See* D.C. Code § 22-1805a(a)(2).

[169] D.C. Code § 22-801(a) ("Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.").

[170] *See* D.C. Code § 22-1805a(a)(2).

[171] D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy[.]").

[172] *See* D.C. Code § 48-904.01(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[173] *See* D.C. Code § 22-2001 ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section.").

[174] *See* D.C. Code § 21-591 ("Whoever: (1) without probable cause for believing a person to be mentally ill: (A) causes or conspires with or assists another person to cause the hospitalization, under this chapter, of the person first referred to; or (B) executes a petition, application, or certificate pursuant to this chapter, by which he secures or attempts to secure the apprehension, hospitalization, detention, or restraint of the person first referred to; or (2) causes or conspires with or assists another person to cause the denial to a person of a right accorded to him by this chapter; or (3) being a physician, psychiatrist or qualified psychologist, knowingly makes a false certificate or application pursuant to this chapter as to the mental

Numerous other District conspiracy offenses exhibit a pattern of equal punishment through more convoluted means. For example, the District's while armed enhancement applies the same flat 30-year statutory maximum add-on to numerous crimes, without regard to whether the underlying crime is completed or merely attempted, through the D.C. Code's definition of "crimes of violence" and "dangerous crimes."[176]

In addition, conspiracies to commit second degree fraud,[177] unauthorized use of a motor vehicle,[178] and blackmail[179] (not involving a threat of violence[180]) are all subject to the same 5-year penalty as the completed offense by virtue of the default rule applicable to non-violent crimes in the general conspiracy statute.[181] And, along similar lines, conspiracies to commit the least severe forms of theft,[182] fraud,[183] receiving stolen

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condition of a person -- shall be fined not more than the amount set forth in [§ 22-3571.01] or imprisoned not more than three years, or both.").

[175] *See* D.C. Code § 1-1001.14 (a-1)(1) ("A person shall not knowingly or willfully: (A) Pay, offer to pay, or accept payment of any consideration, compensation, gratuity, reward, or thing of value for registration to vote or for voting; (B) Give false information as to his or her name, address, or period of residence for the purpose of establishing his eligibility to register or vote, that is known by the person to be false; (C) Procure or submit voter registration applications that are known by the person to be materially false, fictitious, or fraudulent; (D) Procure, cast, or tabulate ballots that are known by the person to be materially false, fictitious, or fraudulent; or (E) Conspire with another individual to do any of the above."); *id.* at § (a)(2) ("A person who violates paragraph (1) of this subsection shall, upon conviction, be fined not more than $10,000, be imprisoned not more than 5 years, or both.").

[176] More specifically, D.C. Code § 22–4502(a)(1) establishes that anyone who commits a violent or dangerous crime:

> 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 . . . .

See D.C. Code § 23-1331(4) ("The term 'crime of violence' means . . . [a] conspiracy to commit any of the foregoing [enumerated] offenses.").

[177] D.C. Code § 22-3221(b)(1) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property which was the object of the scheme or systematic course of conduct, whichever is greater, or imprisoned for not more than 3 years, or both, if the value of the property which was the object of the scheme or systematic course of conduct is $1,000 or more . . . .").

[178] D.C. Code § 22-3215(d)(1) ("[A] person convicted of unauthorized use of a motor vehicle under subsection (b) of this section shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both.").

[179] D.C. Code § 22-3252 (b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[180] *See* D.C. Code § 23-1331(4).

[181] *See* D.C. Code § 22-1805a(a)(1).

[182] D.C. Code § 22-3212(b) ("Any person convicted of theft in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property obtained or used has some value.").

[183] D.C. Code § 22-3222(b)(2) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property that was the object of the scheme or systematic course of conduct has some value.").

property,[184] financial exploitation of a vulnerable adult or elderly person,[185] and assault[186] are all subject to the same 180-day penalty as the completed offense (again) by virtue of the default rule applicable to non-violent crimes in the general conspiracy statute.[187]

Finally, conspiracies to commit first degree cruelty to children,[188] second degree burglary,[189] and robbery[190] are all subject to the same 15-year statutory maximum applicable to the completed offense by virtue of the default rule applicable to *violent crimes* under the District's general conspiracy statute.[191]

Viewed as a whole, then, the District's approach to grading criminal conspiracies does not reflect any consistent principle of punishment. Indeed, the D.C. Code manifests at least two fundamentally different patterns in how it grades conspiracies, without any discernible rationale for the variances. In practical effect, this produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

At the same time, these potential disproportionalities are not immediately apparent given the second fundamental flaw reflected in the District law of conspiracies, namely, its disorganized approach to codification. For example, notwithstanding the fact that the District's general conspiracy statute purports to articulate the District's overarching penalization scheme, the D.C. Code contains numerous exceptions to these rules. Further, the manner in which these exceptions are communicated is quite inconsistent: some are communicated through individual penalty provisions incorporated into a single offense; others are communicated through semi-general conspiracy penalty provisions that apply to groups of offenses; and still other exceptions are communicated by including the word "conspires" in the definition of the offense.

RCC § 22E-303(c) endeavors to remedy these issues by establishing a clear and consistent approach to grading conspiracies, which renders offense penalties more proportionate. First, paragraph (c)(1) adopts a single generally applicable grading

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[184] D.C. Code § 22-3232(c)(2) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both, if the stolen property has some value.").

[185] D.C. Code § 22-936.01(a)("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . . When the property or legal obligation has some value, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 180 days, or both.").

[186] D.C. Code § 22-404 ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[187] *See* D.C. Code § 22-1805a(a)(1).

[188] D.C. Code § 22-1101(c)(1) ("Any person convicted of cruelty to children in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 15 years, or both.").

[189] D.C. Code § 22-801(b) ("Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.").

[190] D.C. Code § 22-2801 ("Whoever 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, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[191] *See* D.C. Code § 22-1805a(a)(2).

principle: a proportionate penalty discount under which the statutory maximum and fine for a conspiracy is set at one-half of the statutory maximum and fine of the completed offense.[192] This general principle, which is similarly applicable to criminal attempts and criminal solicitations under the RCC, is supplemented by paragraph (c)(2), which expressly recognizes the possibility of offense-specific exceptions to be clearly articulated in a single general provision incorporated into the General Part.[193]

RCC §§ 22E-303(d), (e), and (f): Relation to Current District Law on Jurisdiction. Subsections (d), (e), and (f) are in accord with, but may also fill a potential gap in, current District law governing jurisdiction in conspiracy prosecutions.

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

> (c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:
>
> > (1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or
> >
> > (2) Such conduct would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.
>
> (d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the laws of the other jurisdiction.[194]

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[192] The Explanatory Note, *supra*, further clarify that, for purposes of paragraph (d)(1): "'punishment' means: (1) imprisonment and fine if both are applicable to the target offense; (2) imprisonment only if a fine is not applicable to the target offense; or (3) fine only if imprisonment is not applicable to the target offense."

[193] The effect of this penalty scheme on current District law varies depending on the scope, gradations, and classifications applied to individual revised offenses. For a detailed analysis of this nature in the context of attempt penalties, which is broadly applicable here, see RCC § 22E-301(d), Relation to Current District Law on Attempt Penalties.

[194] D.C. Code §§ 22-1805a(c)-(d).

The general import of these provisions, enacted as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, is relatively clear: they proscribe basic jurisdictional principles for dealing with conspiracies formed inside the District to commit crimes outside the District, D.C. Code § 22-1805a(c), as well as for conspiracies formed outside the District to commit crimes inside the District, D.C. Code § 22-1805a(d). However, there is scant District authority illuminating the precise meaning of these provisions. Relevant legislative history in the House Committee Report only indicates a general recognition that this language was "modeled" on the law of conspiracy in New York, "rather than Federal law, because of the need for greater specificity in a statute applicable to a geographically limited area within the United States."[195]

One issue that both the statutory text and legislative history leave unclear is whether and to what extent D.C. Code §§ 22-1805a(c) and (d) were intended to apply to criminal offenses *passed by the D.C. Council*. The lack of clarity on this issue is a product of the fact that D.C. Code §§ 22-1805a(c) and (d) make continuous reference to "an act of Congress applicable exclusively to the District of Columbia." This phrasing reflects the pre-Home Rule reality that, when the relevant jurisdictional provisions were enacted in 1970, local criminal laws were written by Congress. Since Home Rule, however, the D.C Council has been responsible for passing nearly all of the District's criminal laws.[196] Which raises the following question: are conspiracies to commit such offenses, enacted by the D.C. Council, covered by the jurisdictional provisions set forth in D.C. Code §§ 22-1805a(c) and (d)?[197]

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

> 1. A person may be prosecuted for conspiracy in the county in which he entered into such conspiracy or in any county in which an overt act in furtherance thereof was committed.
>
> 2. An agreement made within this state to engage in or cause the performance of conduct in another jurisdiction is punishable herein as a conspiracy only when such conduct would constitute a crime both under the laws of this state if performed herein and under the laws of the other jurisdiction if performed therein.
>
> 3. An agreement made in another jurisdiction to engage in or cause the performance of conduct within this state, which would constitute a crime herein, is punishable herein only when an overt act in furtherance of such conspiracy is committed within this state. Under such circumstances, it is no defense to a prosecution for conspiracy that the conduct which is the objective of the conspiracy would not constitute a crime under the laws of the other jurisdiction if performed therein.

N.Y. Penal Law § 105.25.

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

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

There does not appear to be any case law addressing this particular issue, and the reported decisions even mentioning these jurisdictional provisions is scant.[198] However, the one DCCA case directly addressing them, *Gilliam v. United States*, seems to provide indirect support for the proposition that conspiracies to commit offenses enacted by the D.C. Council might be covered by the relevant jurisdictional provisions.[199] After quoting to the text of D.C. Code § 22-1805a(d), for example, the *Gilliam* decision states that:

> We understand this provision to mean that when a prosecution for conspiracy is predicated on an agreement made in another jurisdiction, the government must prove that an overt act pursuant to the conspiracy was committed within the District of Columbia in order to prove the offense.[200]

Notably absent from this statement is any reference to conspiracies to commit offenses specifically passed by Congress; instead, the court merely references "a prosecution for conspiracy."[201] (That said, such a reference would not have been necessary because the charge at issue in the *Gillam* case was conspiracy to commit murder.)

Lastly, in 2009 the D.C. Council amended the District's general conspiracy statute to more severely punish conspiracies "to commit a crime of violence as defined in § 23-1331(4)."[202] The latter category of offenses specifically includes a variety of crimes enacted by the D.C. Council since Home Rule.[203] With that in mind, it seems unlikely

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

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

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

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

Id.

[201] *Id.*

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

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

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse,

that the D.C. Council would have declined to revise the relevant jurisdictional provisions had they been understood to exclude many of the very offenses that were receiving enhanced penalties under the Omnibus Public Safety and Justice Amendment Act.

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

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

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

Second, the revised jurisdictional provisions reorganize the current jurisdictional provisions in a more intuitive way. For example, the substantive requirement that the relevant conduct "constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein," employed in both D.C. Code §§ 22-1805a(c) and (d), is broken out into its own separate subsection in both RCC §§ 22E-303(d) and (e). In addition, the clarification stated in D.C. Code § 22-1805a(d)—that "it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the statutory laws of the other jurisdiction" where the substantive requirements stated in subsection (e) are met—is placed in its own subsection, RCC § 22E-303(f).

Third, the revised jurisdictional provisions rephrase the current jurisdictional provisions in a more descriptively accurate manner. For example, the vague use of "therein" employed throughout D.C. Code §§ 22-1805a(c) and (d) is replaced with a more specific reference to the relevant location in both RCC §§ 22E-303(d) and (e).

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

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

When viewed collectively, RCC §§ 22E-303(d), (e), and (f) both improve upon and preserve current District law governing jurisdiction in conspiracy prosecutions.

RCC § 22E-304. Exceptions to General Inchoate Liability.

Explanatory Note. RCC § 22E-304 establishes two exceptions to the general inchoate offenses of solicitation and conspiracy.[1]

Paragraph (a)(1) excludes the victim of an offense from being held liable for soliciting or conspiring in its commission.[2] For example, a minor who asks an adult to engage in sex may technically satisfy the requirements of general solicitation liability in the sense of having purposefully requested that adult to perpetrate statutory rape against the minor.[3] And if that adult accepts the solicitation, then the minor may technically satisfy the requirements of general conspiracy liability in the sense of having purposefully agreed to the commission of a statutory rape against the minor.[4] Nevertheless, paragraph (a)(1) precludes holding the minor criminally liable for soliciting

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[1] Within American criminal law, there are a range of situations where "an actor may technically satisfy the requirements of an offense definition, yet be of a class of persons that was not in fact intended to be included within the scope of the offense." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (Westlaw 2019). Two such situations arise in the context of the general inchoate crimes of solicitation and conspiracy where: (1) the would-be solicitor/conspirator is also a victim of the target offense; and (2) the criminal objective of the would-be solicitor/conspirator is inevitably incident to commission of the target offense. *Id.*

Sometimes, the exceptions to general inchoate liability available to these classes of individuals are stated or discussed directly. *See, e.g.,* Ark. Code Ann. § 5-3-103(a) ("It is a defense to a prosecution for solicitation or conspiracy to commit an offense that: (1) The defendant is a victim of the offense; or (2) The offense is defined so that the defendant's conduct is inevitably incident to the commission of the offense."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09(D)(1) (6th ed. 2012) ("A person may not be convicted of conspiracy to violate an offense if her conviction would frustrate a legislative purpose to exempt her from prosecution for the underlying substantive crime.").

More common (though less clear), however, is for these exceptions to be articulated by reference to the comparable exceptions governing legal accountability from which they've been derived. *See, e.g.,* Model Penal Code § 5.04(2) ("It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice[.]"); Model Penal Code § 2.06(6)(a) ("Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if . . . he is a victim of that offense; or [] the offense is so defined that his conduct is inevitably incident to its commission[.]"); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4 (3d ed., Westlaw 2017) ("[O]ne who is in a legislatively protected class and thus could not even be guilty as an accessory of the crime which is the objective is likewise not guilty of conspiracy to commit that crime.").

Both the statutory text of section 304 and this commentary employ the first (and clearer) approach of directly addressing the relevant exceptions to general inchoate liability, without express reliance on the parallel exceptions to legal accountability that otherwise exist under the RCC. *See* RCC § 22E-211(a) ("A person is not legally accountable for the conduct of another under RCC § 22E-210 or RCC § 22E-211 when: (1) The person is a victim of the offense; or (2) The person's conduct is inevitably incident to commission of the offense as defined by statute.").

[2] This rule effectively *exempts* from general inchoate liability those who might otherwise satisfy the general requirements of solicitation or conspiracy in relation to the commission of the offense perpetrated against themselves. *See, e.g.,* ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83; DRESSLER, *supra* note 1, at § 29.09(D); Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551, 562 (2004).

[3] *See* RCC § 22E-302(a) (solicitation defined).

[4] *See* RCC § 22E-303(a) (conspiracy defined).

or conspiring in the commission of the minor's own victimization under sections 302 and 303 of the RCC.[5]

Paragraph (a)(2) excludes an actor whose criminal objective is inevitably incident to commission of an offense—as defined by statute[6]—from being held liable for soliciting or conspiring to commit that offense.[7] For example, a prospective purchaser

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[5] *See, e.g.,* DRESSLER, *supra* note 1, at § 29.09(D)(2) ("[I]n the absence of express legislative authority to the contrary, if a male and an underage female have sexual intercourse, the female may not be convicted as an accomplice in her own "victimization." [] And, because underage females [] cannot be convicted as accomplices[], they are also immune from prosecution for conspiracy to commit [statutory rape] upon themselves."); *In re Meagan R.*, 42 Cal. App. 4th 17, 21–22 (1996) (minor "cannot be liable as [a] coconspirator to the crime of her own statutory rape"). This same exception would also apply to many other kinds of "people who are victims of the underlying offense—such as, for example, a person who agrees to pay money to an extortionist, thereby technically entering into a 'conspiracy' with the extortionist." Commentary on Proposed Del. Crim. Code § 705 (2017). Although those "who pay extortion, blackmail, or ransom monies" can be understood to have agreed to "significantly assist[] in the commission of the crime," the fact they are the "victim of a crime" means that they "may not be indicted" on conspiracy or solicitation charges. *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (analyzing comparable exceptions in the context of complicity).

[6] That the person's criminal objective must be inevitably incident to commission of an offense *as defined by statute* clarifies that paragraph (a)(2) only applies when the target offense could not have been committed without the defendant's planned participation under any set of facts. This is to be distinguished from the situation of a defendant whose planned participation was merely useful or conducive to the commission of target offense *as charged in a particular case*. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (In applying the inevitably incident exception, "the question is whether the crime charged is so defined that the crime could not have been committed without a third party's involvement, not whether the crime 'as charged actually involved a third party whose 'conduct was useful or conducive to' the crime.") (quoting *State v. Duffy*, 8 S.W.3d 197, 201-202 (Mo. App. 1999)).

So, for example, the role of a doorman in protecting a particular drug house from being robbed or ripped off may inextricably be part of the main business of that home, the sale and purchase of controlled substances. However, because it is entirely possible to distribute controlled substances without the assistance of a doorman, the doorman's criminal objective—as contrasted with that of the purchaser—is not inevitably incident to the commission of the crime of drug distribution. Therefore, paragraph (a)(2) would not preclude holding a prospective doorman who offers a drug dealer his services in return for a portion of the proceeds liable for soliciting or conspiring to commit the distribution of controlled substances. *Wagers v. State*, 810 P.2d 172, 175-76 (Alaska Ct. App. 1991) ("[B]ecause [defendant's] role as a doorman/guard was not 'inevitably incidental' to the commission of the crime of possession with intent to deliver, [he] is not exempt[.]").

For another example, consider a prospective bribery scheme involving bribe offeror, B, go-between G, and public official, P. B gives G $20,000 in cash with instructions to approach P and propose a transaction whereby P will receive the money in return for providing B with a government license to which B is not otherwise entitled. If G agrees with B to participate in this scheme and approaches P, paragraph (a)(2) would *not* preclude holding G liable for conspiring with B to commit the crime of bribe offering. Although G's criminal objective—to act as a middleman, and facilitate the offering of a bribe—might be useful and conducive to the crime of bribe offering *as perpetrated on these facts*, it is not strictly necessary to commit the crime of bribe offering, which can be completed without a go-between. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4) (observing that a conspiracy exists where "*D* and *E* agreed to bribe *F*") (citing *United States v. Burke*, 221 F. 1014 (D.N.Y. 1915)); *Tyler v. State*, 587 So. 2d 1238, 1243 (Ala. Crim. App. 1991) ("The crime of solicitation to commit the offense of distribution of a controlled substance is committed where A solicits B to distribute drugs to C. If the solicited crime were consummated, both A and B would be guilty of the distribution.").

[7] This rule effectively *exempts* from general solicitation and conspiracy liability those who might otherwise satisfy the requirements for these general inchoate crimes in relation to the commission of an offense for

who approaches a dealer in the hopes of securing a supply for personal use may technically satisfy the requirements of general solicitation liability in the sense of having purposefully requested the seller to perpetrate the distribution of a controlled substance.[8] And if that dealer accepts the solicitation, then the purchaser may technically satisfy the requirements of general conspiracy liability in the sense of having purposefully agreed with the seller to perpetrate the distribution of a controlled substance.[9] Nevertheless, because the purchaser's criminal objective—the *acquisition* of controlled substances—is inevitably incident to the *distribution* of controlled substances, paragraph (a)(2) precludes holding the purchaser criminally liable for soliciting or conspiring in the commission of drug distribution.[10]

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which their planned participation was logically required as a matter of law. *See, e.g.,* Commentary on Ky. Rev. Stat. Ann. § 502.040; Commentary on Ala. Code § 13A-4-3.

[8] *See* RCC § 22E-302(a) (solicitation defined).

[9] *See* RCC § 22E-303(a) (conspiracy defined).

[10] *See, e.g., Tyler*, 587 So. 2d at 1241 ("[W]here A solicits B only to sell drugs to A, and A does not receive any controlled substance, A . . . is not guilty of solicitation to commit the offense of distribution of a controlled substance."); *People v. Allen*, 92 N.Y.2d 378, 681 N.Y.S.2d 216, 703 N.E.2d 1229 (1998) (same); *Com. v. Fisher*, 426 Pa. Super. 391, 394, 627 A.2d 732, 733 (1993) (same); *United States v. Parker*, 554 F.3d 230 (2d Cir. 2009) ("[T]he objective to transfer the drugs from the seller to the buyer cannot serve as the basis for a charge of conspiracy to transfer drugs"). Along similar lines, paragraph (a)(2) would also preclude holding the dealer criminally liable for soliciting or conspiring in the commission of drug *possession*.

In contrast, paragraph (a)(2) would not preclude holding the dealer liable for conspiring to *distribute* controlled substances based on an agreement with the purchaser. *See Ex parte Parker*, 136 So. 3d 1092, 1095 (Ala. 2013) (assuming that drug transaction is sufficient to support conspiracy to distribute conviction against *seller*). This is because the dealer's criminal objective—the *distribution* of controlled substances—is not inevitably incident to commission of the target offense, but rather, actually *constitutes* the target offense (i.e., provides the actual basis for a drug distribution charge). *See also Tyler*, 587 So. 2d at 1242 ("In a prosecution against the seller, where the statutorily proscribed conduct is the sale of the controlled substance, [it is] the buyer's conduct [that] would be "inevitably or necessarily incidental" to the sale."). And, according to the same logic, subsection (a)(2) would neither preclude holding the purchaser liable for conspiring to *possess* controlled substances based on an agreement with the dealer. *See also Tyler*, 587 So. 2d at 1243 ("Similarly, in a prosecution against the buyer, where the proscribed conduct is the possession of the controlled substance, [it is] the seller's conduct [that] would be 'inevitably or necessarily incidental' to that possession.").

This treatment is consistent with the RCC approach to dealing with conduct inevitably incident in the context of complicity. *See* RCC § 22E-212(a)(2) ("A person is not legally accountable for the conduct of another under RCC § 22E-210 or RCC § 22E-211 when . . . [t]he person's conduct is inevitably incident to commission of the offense as defined by statute."). For example, RCC § 22E-212(a)(2) generally precludes holding: (1) a drug purchaser liable for *distribution* as an accomplice to the drug dealer; and (2) a drug dealer liable for *possession* as an accomplice to the *drug purchaser*. *See id.*, Explanatory Note. Conversely, RCC § 22E-212(a)(2) does not preclude holding: (1) a drug dealer directly liable for distribution; or (2) a drug purchaser directly liable for possession. And because such actors can be held directly liable for committing an offense, RCC § 22E-304(a)(2) would not preclude holding them liable for conspiring to commit that offense.

This parallel treatment of the conduct inevitably incident exception to conspiracy liability is, however, inconsistent with the broadest interpretation of Wharton's Rule, under which "[n]o person may be convicted of conspiracy to commit a crime when an element of that crime is agreement with the person with whom he is alleged to have conspired[.]" Ky. Rev. Stat. Ann. § 506.050; *see* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4) ("[This includes] the buying and selling of contraband goods, and the giving and receiving of bribes.") (citing 2 F. WHARTON, CRIMINAL LAW § 1604 (12th ed. 1932)). However, this

Subsection (b) establishes an important limitation on the exceptions to solicitation and conspiracy liability set forth in subsection (a), namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that section 304 is only a *default* bar on criminal liability for victims and those whose criminal objective is inevitably incident to commission of an offense.[11] It merely establishes that such actors are excluded from the general principles of solicitation and conspiracy liability set forth in sections 302 and 303.[12] As such, the legislature is free to

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expansive interpretation of Wharton's Rule is also the least defensible and has been subject to significant criticism. *See, e.g.,* Model Penal Code § 5.04(2) cmt. at 481 ("[Such an approach] completely overlooks the functions of conspiracy as an inchoate crime. That an offense inevitably requires concert is no reason to immunize criminal preparation to commit it."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4).

On the narrower and more defensible reading, in contrast, Wharton's Rule merely "supports a presumption" that, "absent legislative intent to the contrary," charges for conspiracy and a substantive offense that requires "concerted criminal activity" should "merge when the substantive offense is proved." *Iannelli v. United States*, 420 U.S. 770, 785–86 (1975); *see, e.g., Pearsall v. United States*, 812 A.2d 953, 962 & n.11 (D.C. 2002) ("Wharton's Rule [merely] bar[s] convictions for both the substantive offense and conspiracy to commit that same offense," so, "[e]ven if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4) ("To the extent [Wharton's Rule simply] avoids cumulative punishment for conspiracy and the completed offense, [the doctrine] makes sense."); Model Penal Code § 5.04(2) cmt. at 481 ("[Wharton's] rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime, for it is clear that the legislature would have taken the factor of concert into account in grading a crime that inevitably requires concert."). Section 304 does not preclude this outcome, while the RCC's general merger provision effectively requires it. *See* RCC § 22E-214(a)(4) (establishing presumption of merger whenever "[o]ne offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each"); *id.*, Explanatory Note ("For example, where D, a drug dealer, is convicted of both conspiracy to commit drug distribution and drug distribution, and those convictions arise from the same course of conduct (e.g., a single drug deal with purchaser X), the conspiracy charge would merge with the drug distribution charge, since the latter, by effectively requiring an agreement to distribute as a precursor, 'reasonably accounts' for the former.").

[11] *See, e.g.,* Model Penal Code § 5.04(2) cmt. at 481 ("The position [] adopted for conspiracy and solicitation[] is to leave to the legislature in defining each particular offense the selective judgment that must be made as to whether more than one participant ought to be subject to liability. Since the exception is confined to behavior 'inevitably incident' to the commission of the crime, the problem inescapably presents itself in defining the crime.").

[12] This reflects the fact that both the victim and conduct inevitably incident exceptions to solicitation and conspiracy are justified on the basis of legislative intent. *See, e.g.,* DRESSLER, *supra* note 52, at § 29.09 n.195 ("It would frustrate legislative intent[] if the underage party [in a statutory rape prosecution] were subject to prosecution for conspiracy in her own victimization."); *Gebardi v. United States*, 287 U.S. 112, 123, 53 S.Ct. 35, 77 L.Ed. 206 (1932) ("[W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."); *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 n.4 (Ky. 2016) ("[T]he legislature, by specifying the kind of individual who was guilty when involved in a transaction necessarily involving two or more parties, must have intended to leave the participation by the others unpunished.") (quotations and citations omitted); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.1(d) ("Were the [exemptions for solicitation liability] otherwise, the law of criminal solicitation would conflict with the policies expressed in the definitions of the substantive criminal law."); Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551, 571 (2004) ("This rule is often cast in the form of not permitting a conviction for conspiracy to commit an offense when doing so would undermine the legislative purpose in creating the offense.").

impose criminal liability upon these general categories of protected actors on an offense-specific basis.[13] In that case, however, the legislature must draft individual criminal statutes to clearly reflect this determination.[14]

Underlying this legislative intent rationale are considerations of proportionate punishment. For example, it has been observed that subjecting drug purchasers to liability for conspiracy or solicitation to distribute would conflict with:

> [A] policy judgment that persons who acquire or possess illegal drugs for their own consumption because they are addicted are less reprehensible and should not be punished with the severity directed against those who distribute drugs . . . .
>
> [I]f an addicted purchaser, who acquired drugs for his own use and without intent to distribute it to others, were deemed to have joined in a conspiracy with his seller for the illegal transfer of the drugs from the seller to himself, the purchaser would be guilty of substantially the same crime, and liable for the same punishment, as the seller. The policy to distinguish between transfer of an illegal drug and the acquisition or possession of the drug would be frustrated.

United States v. Parker, 554 F.3d 230, 235 (2d Cir. 2009); *see, e.g., Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) ("The traditional law is that where a statute treats one side of a bilateral transaction more leniently . . . adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature."); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) ("Under the State's argument, a purchaser convicted of soliciting the sale of a controlled substance (a Class B felony) would be punished more harshly then either a seller convicted of soliciting the purchase of a controlled substance (a Class C felony) or a purchaser who actually received the controlled substance (a Class C felony). Such an interpretation is unreasonable.").

[13] *See, e.g.,* ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 ("The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction."); *see also, e.g.,* Ala. Code § 13A-4-1(c) ("When the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the offense solicited, defendant is guilty of such related offense only and not of criminal solicitation."); N.Y. Penal Law § 100.20 ("When under such circumstances the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the crime solicited, the actor is guilty of such related and separate offense only and not of criminal solicitation.").

[14] The following situation is illustrative: X, the bribe offeror in a two-person corruption scheme involving public official Y, proposes to give Y $20,000 in cash in return for a government license to which X is not otherwise entitled. On these facts, X *cannot* be held liable for soliciting the commission of the crime of *bribe receiving* under section 304 since X's criminal objective—the *giving* of a bribe—is inevitably incident to Y's perpetration of that crime. X can, however, be held criminally liable for his conduct under a statute that, through its express terms, prohibits the *offering of a bribe*.

The same analysis is applicable to general conspiracy liability. For example, if Y agrees to the transaction, X *cannot* be held liable for conspiring in the commission of the crime of *bribe receiving* under section 304 since X's criminal objective—the *giving* of a bribe—is inevitably incident to Y's perpetration of that crime. X can, however, be held criminally liable for his own conduct under a statute that, through its express terms, prohibits *bribery agreements.*

Section 304 should also be construed to exclude victims and conduct inevitably incident from the scope of general attempt liability based on a solicitation (or conspiracy). For example, where a prospective drug purchaser asks a dealer to sell him his daily supply, knowing that the dealer will agree and has the drugs on his person, the purchaser's solicitation could potentially satisfy the requirements for attempted distribution of controlled substances. (And, where the seller accepts the invitation, all the more could the resultant conspiracy potentially satisfy the requirements for attempted distribution of controlled substances.) *See generally* RCC § 22E-301(a) (attempt generally requires intent to commit offense and

Relation to Current District Law. RCC § 22E-304 clarifies, improves the proportionality of, and fill in gaps in the District law of general inchoate liability.

RCC § 22E-304(a)(1) and (b): Relation to Current District Law on General Inchoate Liability for Victims. There is no current D.C. Code provision or case law directly addressing whether, as a general principle of criminal law, a victim can be held criminally liable for soliciting or conspiring in the commission of a crime perpetrated against him or herself. That said, this exception is consistent with the legislative intent underlying some current statutory offenses enacted by the D.C. Council. And it also has been explicitly recognized by two century-old judicial decisions from the District interpreting congressionally enacted statutes that have since been repealed in the context of accomplice liability.

No current District criminal statute explicitly exempts victims from the scope of general solicitation or conspiracy liability. However, an analysis of the child sex abuse statutes contained in the D.C. Code illustrates why this exception is consistent with legislative intent. For example, the District's current first-degree child sex abuse offense subjects to potential life imprisonment a person who, "being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."[15] And the District's current second-degree child sex abuse offense subjects to ten years of imprisonment a person who, "being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."[16] These current offenses exist specifically for the *protection* of minor-victims.[17]

At the same time, the normal principles of general inchoate liability derived from the District's general solicitation statute, D.C. Code § 22-2107,[18] and general conspiracy statute, D.C. Code § 22-1805a,[19] would appear to authorize treating a minor-victim

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dangerous proximity to completion). Under these circumstances, subsection (a)(2) should be understood to preclude holding the purchaser criminally liable for an attempt to perpetrate the distribution of controlled substances just as it would preclude comparable theories of solicitation or conspiracy liability.

[15] D.C. Code § 22-3008.

[16] D.C. Code § 22-3009.

[17] *See* D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."); *Ballard v. United States*, 430 A.2d 483, 486 (D.C. 1981) ("[T]he statutory proscription against carnal knowledge is intended to protect females below the age of sixteen, regardless of the use of force or consent, from any sexual relationship.").

[18] The relevant statutory text reads:

> (a) Whoever is guilty of soliciting a murder, whether or not such murder occurs, shall be sentenced to a period of imprisonment not exceeding 20 years, a fine not more than the amount set forth in § 22-3571.01, or both.
>
> (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.

D.C. Code § 22-2107.

[19] The relevant statutory text reads:

criminally liable for soliciting or conspiring in the perpetration of child sex abuse against him or herself.[20] Consider, for example, the situation of a minor who both initiates and agrees to a sexual act or contact with an adult. Under these circumstances, it might be said that the minor purposefully solicited and conspired with the adult to commit statutory rape in a manner sufficient to satisfy the requirements of general inchoate liability. In practical effect, then, applying general principles of solicitation and conspiracy liability to the District's child sex abuse statutes would mean that a minor may be subject to significant levels of criminal liability.

Treating the minor-victim of a statutory rape in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's statutory rape offenses. Given these problems, it's unsurprising that reported District case law involving prosecutions for first or second-degree child sex abuse does not appear to ever include charges of this nature. This example may also indicate that—from a broader legislative and executive perspective—a victim exception to general inchoate liability is implicitly understood to exist in District law and practice.

> (a)(1) If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.
>
> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.
>
> (b) No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose . . . .

D.C. Code § 22-1805a.

[20] The District's jury instruction on solicitation liability summarizes current District law as follows: "[The defendant solicited another person] voluntarily, on purpose, and not by mistake or accident. 'Solicit' means to request, command, or attempt to persuade." CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION NO. 4.500—SOLICITATION (5th ed. 2017).

And the District's jury instruction on conspiracy liability summarizes current District law as follows:

> [A] conspiracy is a kind of partnership in crime. For any defendant to be convicted of the crime of conspiracy, the government must prove two [three] things beyond a reasonable doubt: first, that [during (the charged time period)] there was an agreement to [^] [describe object of conspiracy]; [and] second, that [^] [name of defendant] intentionally joined in that agreement; [and third, that one of the people involved in the conspiracy did one of the overt acts charged].

Id. at § 7.102.

This kind of exception has also been explicitly recognized in the complicity context through two century-old District judicial decisions in the course of interpreting congressionally-enacted statutes that have since been repealed. Although in both cases the victim exceptions to accomplice liability were recognized for testimonial/evidentiary purposes, and not because the would-be accomplices were themselves being prosecuted for aiding or abetting the target offenses, the holding in each case remains relevant. In the first case, *Yeager v. United States* (1900), the U.S. Court of Appeals for the D.C. Circuit (CADC) determined that the victim of an offense criminalizing sexual intercourse with a female under sixteen years of age could not be deemed an accomplice to that offense precisely *because* she was victim of the party committing the act.[21] In the second case, *Thompson v. United States* (1908), the U.S. Court of Appeals for the District of Columbia applied similar reasoning in holding that a woman who consented to an illegal abortion could not be deemed an accomplice in the commission of an offense criminalizing the procurement of a miscarriage.[22]

Another relevant aspect of District law is the *de facto* victims exception incorporated into the District's prostitution offense. The relevant criminal statute, D.C. Code § 22-2701, codifies a general policy of excluding "children"—defined as anyone under the age of 18[23]—from criminal liability for prostitution.[24] Beyond creating a general immunity from prosecution for victimized children (including, presumably, those

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[21] *Yeager v. United States*, 16 App. D.C. 356, 357, 360 (D.C. Cir. 1900) ("The crime is committed against her, and not with her. She is, by force of the law, victim and not *particeps criminis* or accomplice.").

The relevant statute, as quoted in *Yeager*, reads:

> Every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction, . . . shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years and for each subsequent offense not more than thirty years.

Id.

[22] *Thompson v. United States*, 30 App. D.C. 352, 362–63 (D.C. Cir. 1908) (the woman whose "miscarriage has been produced, though with her consent, [] is regarded as his victim, rather than an accomplice.").

The relevant statute, as quoted in *Thompson*, reads:

> Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health, and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or, if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

Id.

[23] D.C. Code § 22-2701(d)(3).

[24] *See generally* D.C. Code § 22-2701. More specifically, subsection (a) of the relevant statute makes it "unlawful for any person to engage in prostitution or to solicit for prostitution," subject to the "[e]xcept[ion] provided in subsection (d)." *Id.* Thereafter, subsection (d) creates an exception from criminal liability for any "child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value." *Id.* at § (d)(1).

who might otherwise satisfy the requirements of accomplice liability), this statute further requires the police to "refer any child suspected of engaging in or offering to engage in a sexual act or sexual contact in return for receiving anything of value to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834."[25] These provisions appear to reflect the D.C. Council's view, articulated in supporting legislative history, that "[v]ictims of sexual abuse should not be arrested, prosecuted, or convicted."[26]

RCC § 22E-304(a)(1) and (b) accords with the above authorities, as well as the policy considerations that support them, by excluding the victim of an offense from the scope of general solicitation and conspiracy liability unless expressly provided by statute.[27] (This is consistent with the similar exclusion for victims applicable to legal accountability under RCC § 22E-212.[28])

RCC § 22E-304(a)(2) and (b): Relation to Current District Law on General Inchoate Liability for Conduct Inevitably Incident. A conduct inevitably incident exception to general inchoate liability is generally consistent with District case law recognizing Wharton's Rule. This exception is also consistent with the legislative intent underlying current statutory offenses enacted by the D.C. Council. And it is consistent with conduct inevitably incident exception to accomplice liability, which the D.C. Court of Appeals (DCCA) has implicitly recognized through *dicta* on at least one occasion.

No current District criminal statute explicitly recognizes an exemption to general solicitation or conspiracy liability for an actor whose criminal objective is inevitably incident to the commission of an offense. That said, DCCA case law recognizes the doctrine known as Wharton's Rule, which has been described as a "specialized application" of the conduct inevitably incident exception to conspiracy liability.[29]

Specifically, Wharton's Rule "is an 'exception to the general principle that a conspiracy and the substantive offense that is its immediate end' are discrete crimes for which separate sanctions may be imposed."[30] As the court in *Pearsall v. United States*

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[25] *Id.* at § (d)(2).

[26] COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY, COMMITTEE REPORT ON BILL 20-714, *Sex Trafficking of Children Prevention Amendment Act of 2014*, at 5 (Nov. 7, 2014). The Committee Report goes on to observe that:

> Without this immunity, law enforcement can use threats of prosecution to coerce victims into testifying as witnesses and into participating in treatment programs. However, this coercion inevitably creates a relationship of antagonism between the government and these victims, causing victims to fear and distrust the police, prosecutors and services provided by the government, and being less willing to cooperate as trial witnesses or program participants.

Id.

[27] Note that under RCC § 22E-304(b) the legislature remains free to subject victims to general inchoate liability on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[28] *See generally* Commentary on RCC § 22E-212(a)(1).

[29] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (2d. Westlaw 2018).

[30] *Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)).

observed:

> Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to require necessarily the participation of two people for its commission. [] For example, Wharton's Rule applies to offenses such as adultery, incest, bigamy, and duelling that require concerted criminal activity, a plurality of criminal agents and is essentially an aid to the determination of legislative intent. [] Only where it is impossible under any circumstances to commit the substantive offense without cooperative action, does Wharton's Rule bar convictions for both the substantive offense and conspiracy to commit that same offense . . . . .
>
> In determining whether more than one person is necessary to commit the offense, it is recognized that a participant is necessary to the commission of a crime, for purposes of merging substantive and conspiracy counts, if the substantive statute requires the [participant's] existence as an abstract legal element of the crime . . . .
>
> The crimes that traditionally fall under Wharton's Rule share three characteristics:
>
> [1] [t]he parties to the agreement are the only persons who participate in commission of the substantive offense . . . . [2] the immediate consequences of the crime rest on the parties themselves rather than on society at large . . . . and [3] the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert.[31]

In light of these principles, the *Pearsall* court rejected the defendant's claim that his dual convictions for (1) conspiracy to commit armed robbery and (2) armed robbery premised on his role as an accomplice violated Wharton's Rule.[32]

At the heart of the DCCA's reasoning is a recognition that it is "entirely possible for appellant to commit the offense of armed robbery . . . without the participation of anyone else."[33] True, consummation of "armed robbery may be *easier* with the assistance of others."[34] Nevertheless, "such assistance is not *necessary* to commit the offense," i.e., "[a]rmed robbery does not require proof that there was more than the one actor."[35] And "[s]ince the focus of a Wharton's Rule inquiry is on the statutory elements, rather than the facts proved at trial, that the evidence showed several persons

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[31] *Pearsall*, 812 A.2d at 962 (internal citations, quotations, and footnotes removed); *see also id.* n.11 ("Even if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment.").

[32] *Id.* at 962.

[33] *Id.*

[34] *Id.*

[35] *Id.*

participated in the armed robbery does not make the rule applicable."[36] Accordingly, the *Pearsall* court concluded, "Wharton's Rule does not preclude conviction in a single trial of conspiracy to commit armed robbery and the substantive offense of armed robbery or its lesser-included offense of attempted armed robbery."[37]

Both the general recognition of Wharton's Rule in *Pearsall* as well as DCCA's decision to uphold the defendant's conspiracy conviction in light of it provides judicial support for a conduct inevitably incident exception to conspiracy liability.[38] The conduct inevitably incident exception, like Wharton's Rule, has the practical effect of curtailing general conspiracy liability where the target offense necessarily requires the participation of two parties as a matter of law.[39] And the conduct inevitably incident exception, like Wharton's Rule, has no application where—as was the case in *Pearsall*—the participation of one party was merely helpful to completion of the target offense based on the facts of the case.[40]

Case law aside, an analysis of the drug statutes in the current D.C. Code illustrates why a conduct inevitably incident exception to general inchoate liability is consistent with legislative intent. Compare the District's different approaches to punishing those who distribute and those who merely possess controlled substances.

The District's current distribution statute makes it a thirty year felony for "any person knowingly or intentionally to manufacture, distribute, or possess, with intent to

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[36] *Id.* (internal citations and quotations omitted).

[37] *Id.* at 963.

[38] As the commentary to the D.C. jury instruction on conspiracy observes:

> Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two people for its commission. Typically, this Rule applies to offenses such as adultery, incest, bigamy, and dueling that require concerted activity. Only where it is impossible under any circumstances to commit the substantive offense without cooperative action, does Wharton's Rule, under a double jeopardy analysis, bar convictions for both the substantive offense and the conspiracy to commit that same offense. *See Pearsall v. U.S.*, 812 A.2d 953 (D.C. 2002); *U.S. v. Payan*, 992 F.2d 1387, 1390 (5th Cir. 1993). The focus of Wharton's Rule is on the statutory elements of an offense, rather than the facts proved at trial. Thus, an armed robbery, for example, does not require proof that there was more than one actor and Wharton's Rule does not apply in such circumstances. *Pearsall*, 812 A.2d at 962.

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION NO. 7.102—CONSPIRACY (5th ed. 2017).

[39] *See, e.g., State v. Roldan*, 314 N.J. Super. 173, 182–83, 714 A.2d 351, 356 (App. Div. 1998) (Wharton's Rule holds that "where an agreement between two parties is inevitably incident to the commission of a crime, such as a sale of contraband, 'conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained.'") (quoting *Iannelli v. United States,* 420 U.S. 770, 773, 95 S.Ct. 1284, 1288, 43 *L. Ed.*2d 616, 620 (1975)). For discussion of the differences between Wharton's Rule and the conduct inevitably incident exception to conspiracy, see ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[40] *Roldan*, 314 N.J. Super. at 182–83, 714 A.2d at 356 (noting that no exception where "the evidence shows that two or more parties have entered into an agreement to engage in concerted criminal activity which goes beyond the kind of simple agreement inevitably incident to the sale of contraband") (citing *Iannelli*, 420 U.S. at 778, 95 S.Ct. at 1290, 43 L.Ed.2d at 623) (quoting *Callanan v. United States*, 364 U.S. 587, 593-94, 81 S.Ct. 321, 325, 5 L.Ed.2d 312, 317 (1961)).

manufacture or distribute, a controlled substance," which is, in fact, "a narcotic or abusive drug" subject to classification "in Schedule I or II."[41] In contrast, the District's current possession statute makes it a 180 day misdemeanor to "knowingly or intentionally to possess a controlled substance" of a similar nature.[42]

These different approaches are likewise reflected in the District's current drug offense-specific attempt and conspiracy penalty provision, D.C. Code § 48-904.09, which penalizes an attempt or conspiracy to commit any particular drug offense at precisely the same level as the completed version of that drug offense.[43] This stark contrast in grading appears to reflect a legislative judgment that mere possessors are far less culpable and/or dangerous than distributors, and, therefore, should be subject to significantly less liability.[44]

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[41] D.C. Code § 48-904.01(a)(1)-(2); *see id.* at (a)(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both[.]").

[42] D.C. Code § 48-904.01(d)(1) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than $1,000, or both."); *compare* D.C. Code § 48-904.01(d)(2) ("Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both.").

[43] D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[44] Indeed, "[t]he District of Columbia Uniform Controlled Substances Act was enacted, in part, in order to punish offenders according to the seriousness of their conduct." *Long v. United States*, 623 A.2d 1144, 1151 n.13 (D.C. 1993) (citing Council of the District of Columbia*, Committee on the Judiciary, Report on Bill 4–123*, The Uniform Controlled Substances Act of 1981, 2–3 (April 8, 1981)) (hereinafter "Committee Report"). For example, the legislative history underlying the District's Uniform Controlled Substances Act observes that:

> While there is dispute over what penalties should be imposed, the proposition that the criminal consequences of prohibited conduct should be tied to the nature of the offense committed is unassailable. Title IV of the CSA would abolish the unilateral approach of the UNA and would introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.

Committee Report, at 5. *See also, e.g., Long*, 623 A.2d at 1150 (observing that "the fundamental message [in a federal case]—that the legislature did not intend to treat with equal severity on the one hand, entrepreneurs who profit from distribution of heroin or crack, and on the other hand, addicts who pool their resources to purchase drugs for their own joint use—finds meaningful support in the legislative history of the District's Uniform Controlled Substances Act."); *Lowman v. United States*, 632 A.2d 88, 98 (D.C. 1993) (Schwelb, J. dissenting) ("[A] central purpose of the enactment of the [District's] local [drug] statute was to abolish the 'unilateral approach' of the former Uniform Narcotics Act, which was viewed as not discriminating sufficiently between serious and less serious offenders, and to introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.").

At the same time, application of the District's normal principles of conspiracy liability would appear to authorize holding a purchaser-possessor criminally liable for conspiring in the distribution of drugs by the seller to the purchaser-possessor.[45] Consider, for example, the situation of a drug user who both initiates and pursues the purchase of a controlled substance from a seller. Under these circumstances, it might be said that the drug user purposefully agreed to commit distribution in a manner sufficient to satisfy the requirements of conspiracy liability under D.C. Code § 22-1805(a).[46] In practical effect, then, applying general principles of conspiracy liability to the District's drug distribution statute would mean that the drug user could be held liable to the same extent as the seller under D.C. Code § 48-904.09.

A similar analysis is likewise applicable to solicitation. Although the District's current general solicitation statute, D.C. Code § 22-2107, only applies to crimes of violence[47] (and therefore not to drug distribution), a solicitation might also provide the basis for attempt liability.[48] For example, where a prospective drug purchaser asks a dealer to sell him his daily supply, knowing that the dealer will agree and has the drugs on his person, the purchaser's solicitation might potentially satisfy the conduct requirement for attempt liability, given both the proximity to and likelihood that the solicitation would result in the distribution of controlled substances.[49] If true, however, then it would follow that the drug user, by attempting to perpetrate the distribution of controlled substances, could be held liable to the same extent as the seller under D.C. Code § 48-904.09.

Treating the purchaser-possessor in a drug deal in either of the ways described above seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's current controlled substances offenses.[50] Given these problems,

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[45] *See generally supra* note 14.
[46] *See generally supra* note 14.
[47] The phrase "crime of violence" 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.

[48] *See generally* Commentary on RCC § 301(a): Relation to Current District Law.
[49] *Id.*; *see also State v. Fristoe*, 135 Ariz. 25, 658 P.2d 825 (Ariz. App. 1982) (mere solicitation can amount to an attempt); *Ward v. State*, 528 N.E.2d 52 (Ind. 1988) (same); *but see Tyler v. State*, 587 So. 2d 1238 (Ala. Crim. App. 1991) (mere solicitation cannot amount to attempt).
[50] *See* sources cited *supra* note 38; *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that if every purchaser were to be "deemed an aider and abettor to [distribution]," this would effectively "write out of the Act the offense of simple possession, since under such a theory every drug abuser would be

it's unsurprising that reported District case law does not appear to include a single drug distribution prosecution involving general inchoate crimes brought against a drug user purchasing for individual use. This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to general inchoate liability is implicitly understood to exist in District law and practice.

This conclusion is further bolstered by the conduct inevitably incident exception to accomplice liability, which the DCCA has implicitly recognized through *dicta*. In the relevant case, *Lowman v. United States*, two of the three judges on the panel held—relying on a line of prior District precedent—that an intermediary who arranges a drug transaction between "a willing buyer [and] a willing seller" can be held criminally liable for distribution as an accomplice.[51] One judge dissented, arguing that, among other problems, the majority's holding *could* logically support holding the *buyer* him or herself liable for distribution as an accomplice.[52] In response, the two-judge majority explained that they were "unpersuaded at this point that the court's interpretation of aiding and abetting might result in a buyer of illegal drugs being guilty of the crime of distribution," while citing to federal case law explicitly recognizing that "one who receives drugs does not aid and abet distribution 'since this would totally undermine the statutory scheme [by effectively writing] out of the Act the offense of simple possession."[53]

RCC § 22E-304(a)(2) and (b) accords with the above authorities, as well as the policy considerations that support them, by excluding an actor whose criminal objective is inevitably incident to the commission of an offense as a matter of law from the scope of general solicitation and conspiracy liability unless expressly provided by statute.[54] (This is consistent with the similar exclusion for conduct inevitably incident applicable to legal accountability under RCC § 22E-212.[55])

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liable for aiding and abetting the distribution which led to his own possession.'") (quoting *United States v. Swiderski,* 548 F.2d 445, 451 (2d Cir. 1977)).

[51] *Lowman v. United States*, 632 A.2d 88, 91 (D.C. 1993) (upholding distribution conviction where defendant brought "a willing buyer to a willing seller" and "specifically asked [distributor] if he had any twenty-dollar rocks, the precise drugs that the undercover officer had said he wanted to buy"); *see, e.g., Griggs v. United States*, 611 A.2d 526, 527, 529 (D.C. 1992) (upholding distribution conviction where an officer approached the defendant and asked if anyone was "working," the defendant escorted the officer to a seller, and the defendant told the seller that the officer "wanted one twenty"); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993) ("[B]eing an agent of the buyer is not a defense to a charge of distribution.").

[52] *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that "if the government's position were adopted, and if everyone who assisted a buyer of drugs were thereby rendered a distributor, then, *a fortiori,* every purchaser would also logically have to be deemed an aider and abettor to a felony, and would therefore be subject to a mandatory minimum sentence.").

[53] *Lowman*, 632 A.2d at 92 (quoting *United States v. Swiderski,* 548 F.2d 445, 451 (2d Cir. 1977)).

[54] Note that under RCC § 22E-304(b) the legislature remains free to impose general inchoate liability on those whose criminal objectives are inevitably incident to an offense on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[55] *See generally* Commentary on RCC § 22E-212(a)(2).

RCC § 22E-305. Renunciation Defense to General Inchoate Liability.

Explanatory Note. RCC § 22E-305 establishes a renunciation defense to liability for attempting, soliciting, or conspiring to commit an offense.[1]

The affirmative defense set forth in § 22E-305 is comprised of three basic requirements. First, the defendant must have made reasonable efforts aimed at preventing the target of the charged attempt, solicitation, or conspiracy. Second, the defendant's conduct must have been motivated by a genuine desire to avoid the social harm implicated by the target offense (in contrast to more pragmatic goals, such as a desire to avoid arrest or postpone completion of the offense). Third, the target offense underlying the charged inchoate crime must not have been consummated, whether due to the defendant's preventative efforts or otherwise.[2]

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[1] Typically, "an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019). However, where a defendant has been charged with a general inchoate offense (e.g., attempt, solicitation, and conspiracy) or an offense premised on legal accountability (e.g., complicity), the criminal justice system affords an "offender the opportunity to escape liability, even after he has satisfied the elements of these offenses, by renouncing, abandoning, or withdrawing from the criminal enterprise." *Id*; *see, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.03 (6th ed. 2012); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(b) (3d ed. Westlaw 2019). As it arises in the context of general inchoate liability, this widely recognized (though seldom raised) defense is typically referred to as "renunciation." Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1 (1989); *see, e.g.,* ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81 (observing that "[a] majority of American jurisdictions recognize some form of renunciation defense to an attempt to commit an offense," while "[n]early every jurisdiction permits some form of renunciation defense to a charge of criminal solicitation" and "to a charge of conspiracy."); Model Penal Code § 5.01 cmt. at 361 ("Instances of renunciation of criminal purpose are not frequent.").

[2] Widespread recognition of "renunciation as an affirmative defense to inchoate crimes" is often said to be driven by "two basic reasons":

> First, renunciation indicates a lack of firmness of that purpose which evidences criminal dangerousness. The same rationale underlies the reluctance to make merely "preparatory" activity a basis for liability in criminal attempt: the criminal law does not seek to condemn where there is an insufficient showing that the defendant has a firm purpose to bring about the conduct or result which the penal law seeks to prevent. Where the defendant has performed acts which indicate, *prima facie*, sufficient firmness of purpose, the defendant should be allowed to rebut the inference to be drawn from such acts by showing that the defendant has plainly demonstrated the defendant's lack of firm purpose by completely renouncing the defendant's purpose to bring about the conduct or result which the law seeks to prevent.
>
> Second, it is thought that the law should provide a means for encouraging persons to abandon courses of criminal activity which they have already undertaken. In the very cases where the first reason becomes weakest, this second reason shows its greatest strength. That is, in the penultimate stage, where purpose is most likely to be firmly set, any inducement to desist achieves its greatest value.

Commentary on Haw. Rev. Stat. Ann. § 705-530 (citing Model Penal Code § 5.01 cmt. at 361); *see, e.g.,* Moriarty, *supra* note 1, at 5-6 (observing that a renunciation defense is "[a] cost-effective technique to . . . concentra[ting] our resources on those who seem most likely to commit crime, and to target our measures of social defense at those persons who are most dangerous."); Moriarty, *supra* note 1, at 5 ("Just as the

Paragraph (a)(1) codifies a "reasonable efforts" standard for evaluating the sufficiency of the defendant's attempt at preventing the target offense.[3] This standard requires a context-sensitive analysis, which calls upon the fact-finder to determine whether the defendant's efforts, when evaluated in light of the totality of the circumstances, were reasonably calculated to disrupt the criminal scheme in which he or she participated.[4] The type of conduct sufficient to satisfy this standard will, by

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degree structure of criminal [provides] greater deterrence for the higher degrees of crime [through more severe punishments], so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage than they have already.").

Perhaps a better explanation of the renunciation defense's recognition, though, is "[r]etributively oriented," namely, that voluntary and complete renunciation "makes us reassess our vision of the defendant's blameworthiness." Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981). As numerous legal authorities have recognized:

> All of us, or most of us, at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens.

Hernandez-Cruz v. Holder, 651 F.3d 1094, 1103 (9th Cir. 2011) (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.4, which in turn quotes Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937); *see, e.g.,* PAUL H. ROBINSON & JOHN DARLEY, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 247-57 (2014) (finding strong support in public opinion for renunciation defense).

[3] RCC § 22E-305(a)(1) ("The defendant engaged in reasonable efforts to prevent commission of the target offense[.]"); *see, e.g.,* R. Michael Cassidy & Gregory I. Massing, *The Model Penal Code's Wrong Turn: Renunciation As A Defense to Criminal Conspiracy*, 64 FLA. L. REV. 353, 368 n.88 (2012) (collecting and analyzing state renunciation statutes that require a "reasonable," "substantial," or "proper" effort to prevent the crime); *compare* Model Penal Code §§ 5.01(4), 5.02(3), 5.03(6) (defendant's renunciation must have "prevented [offense's] commission").

Notably, the same "reasonable efforts" standard is employed in the RCC's withdrawal defense to legal accountability. RCC § 22E-213(a) (withdrawal defense to legal accountability where defendant, *inter alia*, "[o]therwise makes reasonable efforts to prevent the commission of the offense").

[4] While RCC § 22E-305 requires that the underlying target offense not be committed, the RCC approach does not require proof that it was the defendant's reasonable efforts that actually prevented the target offense. *See infra* notes 14-16 and accompanying text (further discussing this aspect of section 305). Among other implications, this allows for the possibility of a renunciation defense in impossibility situations, such as, for example, where the defendant's general inchoate liability arises in the context of a sting operation. *See, e.g., People v. Sisselman*, 147 A.D.2d 261 (N.Y. Sup. Ct. 1989) (recognizing renunciation defense in impossibility situations as a matter of basic fairness); Moriarty, *supra* note 1, at 37 ("[It would be an] absurd result to deny [a renunciation] defense to those who have unwittingly attempted the impossible and offer it to all others. There seems to be no reason to distinguish between the two classes on the basis of either social danger or susceptibility to having their choices influenced by our offers."); *see also* RCC § 22E-301(a), Explanatory Note (providing overview of impossibility situations).

The following fact pattern is illustrative. D solicits Y, an undercover informant, to assault V. Soon thereafter, however, D reconsiders his proposal, regrets having made the request, and then wholeheartedly tries to persuade Y not to carry out the assault (unaware that Y is, in fact, a police officer). *See Sisselman*, 147 A.D.2d at 261 (case with similar facts). In this situation, D cannot *actually* persuade Y to desist or otherwise prevent the assault from occurring since Y never intended to go through with it in the first place. *See id.* at 264 ("The real problem here is that defendant was in no position to prevent the object crime since [the informant] never intended to carry out the solicited assault."). Nevertheless, D would still be eligible for a renunciation defense under section 305 since such conduct meets the reasonable efforts

necessity, be contingent upon the nature of the inchoate crime at issue. For example, in most attempt prosecutions, the defendant's abandonment of his or her criminal scheme will satisfy the reasonable efforts standard.[5] Where, however, a solicitation or conspiracy charge is at issue, and the defendant facilitates or promotes a criminal scheme that involves the participation of others, then mere desistance is unlikely to suffice.[6] In these contexts, a more proactive approach aimed at disrupting the collective criminal enterprise will be necessary. This includes, among other possibilities: (1) engaging in conduct sufficient to deprive one's prior contribution to a criminal scheme of its effectiveness[7]; (2) providing reasonable notice to law enforcement[8]; or (3) providing reasonable notice to the victim.[9]

Paragraph (a)(2) codifies a "voluntary and complete"[10] standard as the basis for

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standard. *See infra* note 7 and accompanying text (noting that attempting to deprive one's contribution to a criminal scheme of its effectiveness constitute reasonable preventative efforts).

[5] *See, e.g.,* Model Penal Code § 5.01(4) (it is an "affirmative defense" to attempt that the defendant, *inter alia*, "*abandoned* his effort to commit the crime or otherwise prevented its commission") (italics added). The exception is where a defendant has set in motion forces that will culminate in a crime independent of his or her subsequent abandonment, such as, for example, where D, intending to destroy a building, starts the timer on an explosive device placed in the basement and then later—but prior to the explosion—thinks better of the criminal scheme. *See* Model Penal Code § 5.03 cmt. at 458 ("Since attempt involves only an individual actor, abandonment will generally prevent completion of the crime, although in some cases the actor may have to put a stop to forces that he has set in motion and that would otherwise bring about the substantive crime independently of his will."). In this situation, D's abandonment would not, by itself, constitute reasonable efforts at preventing commission of the target offense. Instead, a more proactive effort, e.g., providing timely notification to the police, would be necessary. *See infra* notes 7-9 and accompanying text (discussing more proactive forms of reasonable preventative efforts).

[6] *See, e.g.,* Model Penal Code § 5.02(3) (it is an "affirmative defense" to solicitation that the defendant, *inter alia*, "*persuaded him not to do* so or otherwise prevented the commission of the crime") (italics added); Model Penal Code § 5.03(6) (it is an "affirmative defense" to conspiracy that the defendant, *inter alia*, "*thwarted the success of the conspiracy*") (italics added).

[7] Whether conduct is sufficient to deprive one's prior contribution to a criminal scheme of its effectiveness is contingent upon the nature of the contribution. For example, where the defendant's involvement goes no further than an initial request or tentative agreement to assist the commission of a crime, then a clear (and timely) statement of disapproval communicated to his or her co-participants would likely satisfy the reasonable efforts standard. However, a statement of this nature would not suffice if the defendant's participation was more significant, such as, for example, loaning a weapon central to the scheme's success. In that case, the actual retrieval of the weapon would be necessary to deprive one's prior contribution to a criminal scheme of its effectiveness.

[8] That is, notice to law enforcement, which is: (1) timely; (2) communicated to the appropriate agency (i.e., one with jurisdiction over the requisite criminal scheme); and (3) provides that agency with a reasonably feasible means of preventing the criminal scheme. Where, in contrast, notice is provided too late, relayed to the wrong agency, or does not provide a reasonably feasible means of preventing the criminal scheme, then the defendant's conduct would not meet the "reasonable efforts" standard.

[9] That is, notice to the victim, which is: (1) timely; and (2) provides the victim with a reasonably feasible means of avoiding the target harm. Where, in contrast, the notice is provided too late, or does not enable the victim to easily and safely escape harm, then the defendant's conduct would not meet the "reasonable efforts" standard.

[10] The voluntariness component of this renunciation *defense* is to be distinguished from the voluntariness requirement applicable to all criminal *offenses* under section 203. *See* RCC § 22E-203(a) (establishing, as a basic ingredient of criminal liability, that "a person voluntarily commit[] the conduct element necessary to establish liability for the offense"). With respect to the latter voluntariness requirement, the question presented is relatively narrow: was the act (or omission) "the product of conscious effort or determination,

evaluating the sufficiency of the defendant's motivations in undertaking his or her preventative efforts.[11] This standard, as further clarified in subsection (b), denies a renunciation defense to two different kinds of actors. The first, addressed in paragraph (b)(1), are those whose preventative efforts are motivated (to any extent) by a belief in the existence of circumstances which either: (1) increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or (2) render accomplishment of the criminal plans more difficult.[12] The second, addressed in paragraph (b)(2), are those whose preventative efforts are motivated (again, to any extent) by a decision to: (1) postpone the criminal conduct until another time; or (2) transfer the criminal effort to another victim or a different but similar objective.[13]

Paragraph (a)(3) establishes that a renunciation defense is only available when "the target offense was not committed." This non-consummation requirement categorically bars a renunciation defense in any situation where the target of an attempt, solicitation, or conspiracy is successful, without regard to why it was successful.[14]

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or [] otherwise subject to the person's control." RCC § 22E-203(b). Where, in contrast, the voluntariness of a defendant's renunciation is concerned, the focus is on the individual's reasons for action in a broader moral sense (i.e., whether the defendant's desistance was motivated by a concern for the legally protected interests of others). *Compare* Model Penal Code § 5.01(4), cmt. at 359 ("A 'voluntary' abandonment occurs when there is a change in the actor's purpose that is not influenced by outside circumstances[.] Lack of resolution or timidity may suffice. A reappraisal by the actor of the criminal sanctions applicable to his contemplated conduct would presumably be a motivation of the voluntary type as long as the actor's fear of the law is not related to a particular threat of apprehension or detection."), *with id.* ("An 'involuntary' abandonment occurs when the actor ceases his criminal endeavor because he fears detection or apprehension, or because he decides he will wait for a better opportunity, or because his powers or instruments are inadequate for completing the crime[.]").

[11] RCC § 22E-305(a)(2) ("Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent"); *see, e.g.,* Model Penal Code § 5.01(4) (abandonment of attempt must occur "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."); Model Penal Code § 5.02(3) (repudiation of solicitation must occur "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose"); Model Penal Code § 5.03(6) (repudiation of conspiracy must occur "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose").

Generally speaking, the requirement of a voluntary and complete renunciation envisions that the defendant's preventative conduct have been motivated by a genuine repudiation of his or her criminal plans, rather than by external influences. That said, a defendant's renunciation can be motivated by external influences in a way that is nevertheless consistent with this kind of genuine repudiation, such as, for example, where D, a participant in a nascent drug conspiracy, is persuaded by his parents to renounce because carrying out a criminal scheme would be the "wrong thing to do."

[12] *See, e.g.,* Model Penal Code § 5.01(4) ("renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."). For example, if D arrives at a bank, intending to rob the bank, but ultimately decides against it based upon a determination that it is too risky to go ahead or because she lacks something essential to the completion of the crime, D's abandonment is not voluntary.

[13] *See* Model Penal Code § 5.01(4) ("Renunciation is not *complete* if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."). For example, if D arrives at a bank, intending to rob the bank, but ultimately decides against it based upon a determination that waiting another day or robbing a different bank would be preferable, D's subsequent abandonment is not complete.

[14] For this reason, the renunciation defense to general inchoate crimes under section 305 is narrower than the withdrawal defense to legal accountability under section 213, which is available even where the target

Where, in contrast, the target of the attempt, solicitation, or conspiracy is *unsuccessful*, there is no requirement under paragraph (a)(3) that the defendant have actually contributed to its prevention, let alone been the factual (i.e., but for) cause of the prevention.[15] It is sufficient for purposes of section 305 that the offense attempted, solicited, or conspired failed for reasons entirely unrelated to the defendant's preventative efforts—provided that those efforts were reasonable and undertaken with the appropriate motivations.[16]

Relation to Current District Law. RCC § 22E-305 clarifies and fills gaps in District law concerning the availability and burden of proof governing a renunciation defense.

The current state of District law concerning the renunciation defense is unclear. The D.C. Code does not codify any general defenses to criminal conduct, including renunciation. There also does not appear to be any District case law directly addressing the issue in the context of attempt, solicitation, or conspiracy. At the same time, some

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offense is successfully completed. *See generally* RCC § 22E-213(a), Explanatory Note (observing that it is not necessary for the target offense to have been prevented or frustrated to raise withdrawal defense).

Another way in which the renunciation defense to general inchoate crimes is narrower than the withdrawal defense to legal accountability relates to the defendant's motive. Whereas a renunciation defense is *unavailable* where the defendant was motivated by a desire to avoid getting caught or postpone commission of the offense, the withdrawal defense does not incorporate a comparable requirement of non-culpable intent. *See generally* RCC § 22E-213(a), Explanatory Note (observing that any motive will suffice for withdrawal defense).

Because of these two differences, it is possible for a defendant to avoid legal accountability for another person's conduct yet still incur general inchoate liability for his or her own conduct under the RCC. The following example is illustrative. V personally insults P. P is predisposed to let the insult slide, but A persuades P over the phone that P must respond with lethal violence to protect P's reputation. In providing this encouragement, A consciously desires to bring about the death of V, who A also has an outstanding beef with due to a prior perceived slight that V earlier made against A. One day later, A has a change of heart, which is motivated, in large part, by A's having been alerted to the fact that the police were monitoring the phone call and are therefore very likely to catch and arrest both P and A. So A decides to again call P, and does his very best to persuade P to desist from violence against V, and, ultimately, to forgive V for the slight. However, A's reasonable efforts at dissuading P from carrying out the planned execution is unsuccessful; P goes on to kill V anyways.

On these facts, A satisfies the standard for withdrawal under section 213, and, therefore, cannot be deemed an accomplice to P's murder of V under section 210. A would not, however, be able to avail himself of a renunciation defense under section 305 to avoid liability for his original solicitation of P (to commit murder) under the RCC's general solicitation statute. *See* RCC § 22E-302(a) ("A person is guilty of a solicitation to commit an offense when, acting with the culpability required by that offense, the person: (1) Purposely commands, requests, or tries to persuade another person; (2) To engage in or aid the planning or commission of conduct, which, if carried out, will constitute that offense or an attempt to commit that offense; and (3) The offense solicited is, in fact, [a crime of violence]."). Specifically, a renunciation defense would not be available to A under section 305 because: (1) the target offense at the heart of A's solicitation, the murder of V, was completed; and (2) A's renunciation was not voluntary (i.e., it was motivated by a desire to avoid getting caught).

[15] So, for example, a defendant in a multi-party scheme would not need to prove that his timely warning to the police was essential—or even helpful—to the subsequent disruption by law enforcement.

[16] So, for example, a renunciation defense would remain available where the defendant's timely warning to law enforcement is rendered superfluous by identical information earlier transmitted by another source. *See also supra* note 4 (discussing availability of renunciation defense in the context of sting operation).

District authority relevant to the renunciation defense exists, providing modest support for its recognition.

In the attempt context, District courts apply a conduct requirement that, in drawing the line between preparation and perpetration, seems to imply the absence of renunciation. This so-called probable desistance test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime."[17] As various commentators have observed, this formulation of attempt liability appears to be part and parcel with a renunciation defense in the sense that a "voluntary abandonment demonstr[ates] that the agent would not have 'committ[ed] the crime except for' extraneous intervention."[18] Which is to say, the fact that a defendant genuinely repudiates his or her criminal plans establishes that, with or without external interference, the outcome would have been the same: failure to consummate the target offense.

In the conspiracy context, the DCCA has addressed an issue closely related to renunciation: withdrawal.[19] Withdrawal, unlike renunciation, does not speak to when an actor is relieved from conspiracy *liability*. Instead, it addresses when an actor may be relieved from the *collateral consequences* of a conspiracy.[20] For example, "a defendant may attempt to establish his withdrawal as a defense in a prosecution for substantive crimes subsequently committed by the other conspirators."[21] Or the defendant "may want to prove his withdrawal so as to show that as to him the statute of limitations has run."[22] On these kinds of collateral issues, DCCA case law recognizes a withdrawal defense, under which the defendant "must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation."[23] And, "[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction," the criminal jury instructions indicate that the burden is on the "government to prove that the defendant was a member of the conspiracy and did not withdraw it."[24]

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[17] *E.g.*, *Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957)) (emphasis added); *see also In re Doe*, 855 A.2d 1100, 1107 and n.11 (D.C. 2004) (quoting *Wormsley* but noting this formulation is "imperfect" in the sense that "failure is not an essential element of criminal attempt").

[18] R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); *see, e.g.,* Model Penal Code § 5.01 cmt. at 357-58; LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 11.5.

[19] There does not appear to be *any* DCCA case law on the general inchoate crime of solicitation. *See generally* COMMENTARY ON D.C. CRIM. JUR. INSTR. § 4.500 (observing that does not appear to contain a single reported decision "involving [the District's general solicitation] statute.")

[20] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2018) (collecting authorities).

[21] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 1, at § 29.09 ("If a person withdraws from a conspiracy, she may avoid liability for subsequent crimes committed in furtherance of the conspiracy by her former co-conspirators.").

[22] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 1, at § 27.07 ("[O]nce a person withdraws, the statute of limitations for the conspiracy begins to run in her favor.").

[23] *Bost v. United States*, No. 12-CF-1589, 2018 WL 893993, at *28 (D.C. Feb. 15, 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); *see, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994); *Baker v. United States*, 867 A.2d 988, 1007 (D.C. 2005).

[24] COMMENTARY ON D.C. CRIM. JUR. INSTR. § 7.102.

In the solicitation context, there does not appear to be *any* DCCA case law on the contours of this form of general inchoate liability—let alone any case law on renunciation.[25]

In the absence of District authority directly addressing the viability of a renunciation defense to the general inchoate crimes of attempt, conspiracy, and solicitation, the most relevant aspect of District law is the intersection between withdrawal and accomplice liability. The DCCA appears to recognize that the same withdrawal defense applicable in the conspiracy context is also available to those being prosecuted as aiders and abettors.[26] In this context, however, withdrawal provides the basis for a *complete defense*. Which is to say, an accomplice that "take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation" cannot be convicted of the crime for which he or she has been charged with aiding and abetting.[27]

Recognition of a withdrawal defense to accomplice liability is congruent with recognition of a renunciation defense to general inchoate crimes. This is clearest in the context of conspiracy and solicitation liability given that the elements of accomplice liability are nearly identical—indeed, soliciting or conspiring with another person to commit a crime are two ways of aiding and abetting its commission.[28] But it is also true in the context of attempts, given the broader sense in which holding someone criminally responsible as an aider and abettor effectively "constitute[s] a form of inchoate liability."[29] And, perhaps most importantly, the elements of a withdrawal defense are not only similar to, but are necessarily included within, the more stringent elements of a renunciation defense, which typically requires *non-consummation* of the target offense under circumstances manifesting a *voluntary* and *complete* repudiation of criminal intent.[30] Arguably, then, the failure to recognize a renunciation defense to general

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[25] *See generally* COMMENTARY ON D.C. CRIM. JUR. INSTR. § 4.500.

[26] *See Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("Legal withdrawal [as a defense to accomplice liability] has been defined as '(1) repudiation of the defendant's prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.") (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

[27] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) ("Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.") (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); *see In re D.N.*, 65 A.3d at 95 ("Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability.").

[28] *See, e.g.*, *Tann v. United States*, 127 A.3d 400, 499 n.11 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.") (quoting LAFAVE, supra note 1, at 2 SUBST. CRIM. L. § 13.2); *United States v. Simmons*, 431 F. Supp. 2d 38, 48 (D.D.C. 2006), *aff'd sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) ("Convictions for first degree murder while armed . . . may be based on evidence that he solicited and facilitated the murder.") (citing *Collazo v. United States,* 196 F.2d 573, 580 (D.C. Cir. 1952)); *see also* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005); Model Penal Code § 2.06(3).

[29] Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 756 n.14 (2012).

[30] As one commentator phrases the distinction:

inchoate crimes would be "inconsistent with the doctrine allowing an analogous defense in the complicity area."[31]

This is not to say, however, that the *burden of proof* governing a renunciation defense should be the same as that applicable to a withdrawal defense.[32] Even assuming that the burden of persuasion for a withdrawal defense ultimately rests with the government under current District law,[33] there are nevertheless sound policy and practical reasons to place the burden of persuasion for a renunciation defense on the defendant, subject to a preponderance of the evidence standard.[34] And there is also general District precedent supporting such an approach; many statutory defenses in the D.C. Code are subject to a preponderance of the evidence standard that must be proven by the defendant.[35]

> "Withdrawal," commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor's abandonment to his confederates. "Renunciation" generally requires not only desistance, but more active rejection, and usually contains specific subjective requirements, such as a complete and voluntary renunciation.

ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[31] Model Penal Code § 5.03 cmt. at 457.

[32] As the D.C. Court of Appeals explained in *Green v. Dist. of Columbia Dep't of Employment Servs.*:

> The term 'burden of proof' [] encompass[es] two separate burdens: the burden of production and the burden of persuasion . . . The former refers to the burden of coming forward with satisfactory evidence of a particular fact in issue . . . The latter constitutes the burden of persuading the trier of fact that the alleged fact is true.

499 A.2d 870, 873 (D.C. 1985) (internal citations omitted).

[33] *Compare* COMMENTARY ON D.C. CRIM. JUR. INSTR. § 7.102 ("In the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction, [then the] burden [is] on government to prove that the defendant was a member of the conspiracy and did not withdraw it.") *with Smith v. United States*, 568 U.S. 106 (2013) (placing burden on defendant to prove withdrawal from conspiracy under federal law).

[34] *See supra* note 13 (noting policy considerations).

[35] Most notably, this includes the District's statutory insanity defense, D.C. Code § 24-501 ("No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence."); *see Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a prima facie case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury."); *see also Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) ("Properly viewed, the concepts of both diminished capacity and insanity involve a moral choice by the community to withhold a finding of responsibility and its consequence of punishment."). For other examples, see D.C. Code § 22-3611 (b) (providing, with respect to penalty enhancement for crimes committed against minors, that it "is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense," which "defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(c) (same for penalty enhancement for crimes committed against minors); D.C. Code § 22-3011(b) (providing, with respect to child sex abuse, that [m]arriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence . . . .").

Consistent with the above analysis, the RCC recognizes a broadly applicable renunciation defense, subject to proof by the defendant beyond a preponderance of the evidence, to the general inchoate crimes of attempt, solicitation, and conspiracy.

RCC § 22E-408. Special Responsibility Defenses.

Explanatory Note. This section establishes several justification defenses based on the actor's special relationship to the complainant for the Revised Criminal Code (RCC). Each of the defenses is based on the special duty of care that an actor has toward a complainant. The defenses apply to most offenses against persons in Subtitle II of the RCC. The revised special responsibility for care, discipline, or safety defenses is the first codification of a general defense and replaces several defense provisions in specific statutes.[1]

Subsection (a) codifies the requirements of a general parental defense to offenses in Subtitle II of the RCC, other than those offenses listed in subsection (e).[2]

Paragraph (a)(1) requires that the complainant, in fact, be under 18 years of age. "Complainant" is a defined term in RCC § 22E-701 that refers to a person who is who is alleged to have been subjected to any criminal offense. Parents of adult children do not meet the requirements of the offense. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to the complainant's age.

Paragraph (a)(2) requires the actor to have one of two types of relationship to the complainant. Paragraph (a)(2)(A) first requires the actor to either be a parent or a person acting in the place of a parent per civil law. The term "parent" is undefined and is intended to include persons with parental rights by blood or adoption. A "person acting in the place of a parent under civil law" is a defined term in RCC § 22E-701, and that definition is identical to how D.C. case law has defined a person who stands in loco parentis: "both a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption, and any person acting by, through, or under the

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[1] D.C. Code § 22-3531(e)(4), Voyeurism ("This section does not prohibit the following: … (4) Any electronic recording of a medical procedure which is conducted under circumstances where the patient is unable to give consent.") and D.C. Code § 22-935, Exception [to Criminal Abuse and Neglect of Vulnerable Adults liability] (A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person."). For discussion of how the RCC changes current law for these specific offenses, see the commentary for each specific offense.

[2] Subsection (e) precludes application of the defense to sexual assault and certain human trafficking offenses. In addition, the revised kidnapping and criminal restraint statutes contain exclusions to liability for parents and close relatives in certain circumstances. *See* RCC § 22E-1401(c) ("A person does not commit aggravated kidnapping or kidnapping under subparagraphs (a)(3)(G) or (b)(3)(G), when the person is a close relative of the complainant, acted with intent to assume full responsibility for the care and supervision of the complainant, and did not cause bodily injury or threaten to cause bodily injury to the complainant.") and RCC § 22E-1402(c)(2) ("An actor is not guilty of aggravated criminal restraint or criminal restraint with respect to a complainant under 18 years of age when the actor: (A) A person with legal authority over the complainant; or (B) A close relative or a former legal guardian with authority to control the complainant's freedom of movement who: (i) Acts with intent to assume full responsibility for the care and supervision of the complainant; and (ii) Does not cause bodily injury or use a coercive threat.").

direction of a court with jurisdiction over the child."[3] In addition to being a parent or a person acting in the place of a parent per civil law, an actor must also at the time of the alleged offense be responsible for the health, welfare, or supervision of the complainant.[4] Subparagraph (a)(2)(B), alternatively, provides that the actor may also be a person who reasonably[5] believes that they are acting with the effective consent of a person referred to in subparagraph (a)(2)(A).[6] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. There is no culpable mental state required as to the actor's relationship to the child, or as to whether the actor reasonably believed he or she was acting with the effective consent of a person referred to in subparagraph (a)(2)(A).[7]

Paragraph (a)(3) requires that for the defense to apply, the actor must act with intent to safeguard or promote the welfare of the complainant. The term "welfare" should be construed broadly but precludes application of the defense where the attack is "gratuitous."[8] Unlike the guardian and limited caretaker defenses, the parental defense may apply to the punishment of misconduct, in addition to safeguarding or promoting the

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[3] *See Simms v. United States*, 867 A.2d 200, 205 (D.C. 2005) ("The term 'in loco parentis,' according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties."). *See also* Criminal Jury Instruction 4.121 (5th ed. 2018) ("… that person must have put himself or herself in the situation of a lawful parent, without going through the formalities necessary for legal adoption, by both assuming parental status and by discharging the duties and obligations of a parent toward a child. …You should consider the intent of the person claiming the status of in loco parentis and the scope of authority given to that person to so act.").

[4] For example, a parent by blood who has lost all custodial rights to a child cannot claim this defense. Whether a given parent is responsible for the health, welfare, or supervision of the child at the time of the offense when there are divorced parents with joint custody over a child is a fact-dependent inquiry that depends on the nature of the custody order.

[5] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[6] This legal recognition of others temporarily supervising children is consistent with current D.C. law. For example, the D.C. Code currently defines "lawful custodian" as a person designated by the Court "or a person designated by the lawful custodian temporarily to care for the child." D.C. Code § 16–1021.

[7] Although no culpable mental state as defined in RCC § 22E-205 is required, subparagraph (a)(2)(B) still requires that the actor subjectively believed that he or she was acting with the effective consent of a person referred to in subparagraph (a)(2)(A)

[8] *See Newby v. United States,* 797 A.2d 1233, 1242–43 (D.C. 2002) (limiting application of the parental discipline defense to conduct "for the betterment of the child or promotion of the child's welfare—and not [ ] a gratuitous attack.") (quoting *Anderson v. State,* 61 Md.App. 436, 487 A.2d 294, 298 (Ct.Spec.App.1985)).

welfare of the complainant.[9] "Intent" is a term defined in RCC § 22E-206 and here means that the actor was practically certain that the conduct would safeguard or promote the welfare of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually safeguarded or promoted the complainant's welfare.[10]

Paragraph (a)(4) requires that, in fact, the actor's conduct be reasonable in manner and degree, under all circumstances. The determination of whether a person's actions are reasonable in manner and degree "under all the circumstances" may take into account the complainant's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, or other relevant factors. This is a holistic, objective assessment of the actor's conduct, taking into account facts that may not have been known to the actor.[11] This requirement includes consideration of the actor who fails to gain relevant information before acting.[12] The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the actor's conduct was reasonable in manner and degree.

Paragraph (a)(5) limits the defense in two ways. Subparagraph (a)(5)(A) precludes the application of the defense where the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury. "Serious bodily injury" is defined in 22E-701 as bodily injury or significant injury that involves a "substantial risk of death"; "[p]rotracted and obvious disfigurement"; or "[p]rotracted loss or impairment of the function of a bodily member or organ." Subparagraph (a)(5)(B) allows application of the

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[9] This is consistent with D.C. case law. *See, e.g., Longus v. United States*, 935 A.2d 1108 (DC 2007) (Court found force reasonable where actor had slapped child on the back of the head with an open hand and grabbed child's clothing near neck as punishment for disobedience). *See also,* Model Penal Code § 3.08 cmt. at 140 (1985) (citations omitted) ("The law has universally allowed a privilege for the exercise of domestic authority, sometimes articulated in the statutes, though often without a definition of its scope.").

[10] *See also,* Model Penal Code § 3.08 cmt. at 139 (1985) (citations omitted) ("To require belief in necessity to avoid criminal conviction was thought to be too extreme. Parents may defensibly use force less on the basis of a judgment of necessity than simply with the belief that it is an appropriate preventative or corrective measure.").

[11] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.")

[12] *See* Model Penal Code § 3.09 ("When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.").

defense to situations that do involve a substantial risk of, or cause, death or serious bodily injury when the case nonetheless involves the performance or authorization of medical procedures otherwise permitted under local or federal law "by a licensed health professional or by a person acting at the direction of a licensed health professional."[13] Non-medical and illegal medical treatments are not covered by subparagraph (a)(5)(B). Health professional is a defined term.[14] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury, or is the performance or authorization of a medical procedure, otherwise permitted under District or federal civil law, by a licensed health professional or by a person acting at the direction of a licensed health professional.

Subsection (b) codifies the requirements of a general guardian defense to offenses in Subtitle II of the RCC, other than those offenses listed in subsection (e).

Paragraph (b)(1) requires that the complainant, in fact, be an "incapacitated individual." "Incapacitated individual" is defined in D.C. Code § 21-2011 as "an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator." The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the complainant is an "incapacitated individual."

Paragraph (b)(2) requires the actor to have one of two types of relationship to the complainant. Subparagraph (b)(2)(A) first requires the actor to be a court-appointed guardian to the complainant, whether a guardian appointed by the District or another jurisdiction.[15] Subparagraph (b)(2)(B), alternatively, provides that the actor may also be a person who reasonably believes that they are acting with the effective consent of the guardian referred to in subparagraph (b)(2)(A).[16] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Reasonableness is an objective standard that must take into account certain

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[13] A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they meet the definition of medical procedure, are performed by a health professional, as defined, and are otherwise legal under District or federal law. The definition of medical procedure is intended to exclude cosmetic procedures. Non-medical and illegal medical treatments are not covered by subparagraph (a)(5)(B). When evaluating whether the parental defense justifies the actor's conduct, the jury must consider the other factors of the defense, such as the reasonableness of the conduct.

[14] "Health Professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3-1205.01. Examples of licenses health professionals include physician assistants, practical nurses, and psychologists. Health Professional also includes any professional certified by the Director of the District's Emergency Medical Services (EMS) under 29 DCMR § 515–524.

[15] District law recognizes many types of guardianship. In this section, the term is used generally to refer to any person who is appointed by a court to have a special responsibility or duty of care to another person.

[16] For example, if an actor takes reasonable steps to confirm a consenting individual is the complainant's guardian, but is mistaken, the defense would apply to the actor's conduct based on that consent. Similarly, if an actor reasonably but mistakenly viewed a guardian's communication as consent, the defense would apply to the actor's conduct.

characteristics of the actor but not others.[17] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. There is no culpable mental state required as the actor's relationship with the complainant, or whether the actor reasonably believes that they are acting with the effective consent of the guardian referred to in paragraph (b)(2)(A).[18]

Paragraph (b)(3) requires that the actor acted with intent to safeguard or promote the welfare of the complainant. "Intent" is a term defined in RCC § 22E-206 and here means that the actor was practically certain that the conduct would safeguard or promote the welfare of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually safeguarded or promoted the complainant's welfare.[19]

Paragraph (b)(4) requires that, in fact, the actor's conduct be reasonable in manner and degree, under all circumstances. The determination of whether a person's actions are reasonable in manner and degree "under all the circumstances" may take into account the complainant's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, or other relevant factors. This is a holistic, objective assessment of the actor's conduct, taking into account facts that may not have been known to the actor.[20] This requirement includes consideration of the actor who fails to gain relevant information before acting.[21] The term "in fact" is defined in RCC § 22E-207, and

[17] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[18] Although no culpable mental state as defined in RCC § 22E-205 is required, subparagraph (b)(2)(B) still requires that the actor subjectively believed that he or she was acting with the effective consent of a guardian referred to in subparagraph (b)(2)(A).

[19] *See also,* Model Penal Code § 3.08 cmt. at 139 (1985) (citations omitted) ("To require belief in necessity to avoid criminal conviction was thought to be too extreme. Parents may defensibly use force less on the basis of a judgment of necessity than simply with the belief that it is an appropriate preventative or corrective measure.").

[20] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.").

[21] *See* Model Penal Code § 3.09 ("When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under

specifies that there is no culpable mental state required as to whether the actor's conduct was reasonable in manner and degree.

Paragraph (b)(5) specifies the applicability of the defense in two ways. Subparagraph (b)(5)(A) precludes the application of the defense where the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury. "Serious bodily injury" is defined in 22-701 as bodily injury or significant injury that involves a "substantial risk of death"; "[p]rotracted and obvious disfigurement"; or "[p]rotracted loss or impairment of the function of a bodily member or organ." Subparagraph (b)(5)(B) allows application of the defense to the performance or authorization of medical procedures otherwise permitted under local or federal law "by a licensed health professional or by a person acting at the direction of a licensed health professional."[22] Health professional is a defined term.[23] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury, or is the performance or authorization of a medical procedure, otherwise permitted under District or federal civil law, by a licensed health professional or by a person acting at the direction of a licensed health professional.

Subsection (c) codifies the requirements of a general Emergency Health Professional Defense to offenses in Subtitle II of the RCC, other than those offenses listed in subsection (e).

Paragraph (c)(1) requires that, in fact, the complainant is unable to give effective consent at the time of the conduct.[24] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the complainant was unable to give effective consent at the time of the conduct.

Paragraph (c)(2) requires the actor to have one of two types of licensure or status. Paragraph (c)(2)(A) first requires the actor to be a licensed health professional. Health

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Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.").

[22] A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they meet the definition of medical procedure, are performed by a health professional, as defined, and are otherwise legal under District or federal law. The definition of medical procedure is intended to exclude cosmetic procedures. Non-medical and illegal medical treatments are not covered by subparagraph (a)(5)(B). When evaluating whether the guardian defense justifies the actor's conduct, the jury must consider the other factors of the defense, such as the reasonableness of the conduct.

[23] "Health Professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3-1205.01. Examples of licenses health professionals include physician assistants, practical nurses, and psychologists. Health Professional also includes any professional certified by the Director of the District's Emergency Medical Services (EMS) under 29 DCMR § 515–524.

[24] For example, if an actor takes reasonable steps to confirm a consenting individual is the complainant's guardian, but is mistaken, the defense would apply to the actor's conduct based on that consent. Similarly, if an actor reasonably but mistakenly viewed a guardian's communication as consent, the defense would apply to the actor's conduct.

professional is a defined term.[25] Paragraph (c)(2)(B), alternatively, provides that the actor may also be a person who reasonably believe believed they were acting at the direction of a person referred to in paragraph (c)(2)(A). Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[26] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether the actor is a licensed health professional, or whether the actor reasonably believes they were acting at the direction of a person referred to in subparagraph (c)(2)(A).[27]

Paragraph (c)(3) limits application of the defense to charged conduct that is the performance or authorization of a medical procedure permitted under District or federal civil law. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether the conduct is the performance or authorization of a medical procedure permitted under District or federal law.

Paragraph (c)(4) requires that the actor acted with intent to safeguard or promote the physical or mental health of the complainant.[28] "Intent" is a term defined in RCC § 22E-206 and here means that the actor was practically certain that the medical procedure would promote the complainant's physical or mental health. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually promoted the complainant's physical or mental health.

Paragraph (c)(5) requires that the medical procedure is administered or authorized in an emergency. "Emergency" is defined in D.C. Code § 2-1542 as "an unforeseen combination of circumstances or the resulting state that calls for immediate action. The term 'emergency' includes, but is not limited to, a fire, a natural disaster, an automobile accident, or any situation that requires immediate action to prevent serious bodily injury or loss of life." Per the rule of interpretation under RCC § 22E-207, the term "with intent" also applies to this paragraph. Per RCC § 22E-205, the object of the phrase "with

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[25] "Health Professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3-1205.01. Examples of licenses health professionals include physician assistants, practical nurses, and psychologists. Health Professional also includes any professional certified by the Director of the District's Emergency Medical Services (EMS) under 29 DCMR § 515–524.

[26] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (internal citations omitted).

[27] Although no culpable mental state as defined in RCC § 22E-205 is required, subparagraph (c)(2)(B) still requires that the actor subjectively believed that he or she was acting with the effective consent of a a person referred to in paragraph (c)(2)(A).

[28] Physical or mental health should be construed broadly and should be read to include efforts to improve – or avoid the decline of – one's physical or mental condition.

intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary that the procedure was administered or authorized in an actual emergency.

Paragraph (c)(6) requires that no person who is permitted under District law to consent to the medical procedure on behalf of the complainant could be timely consulted. Per the rule of interpretation under RCC § 22E-207, the term "with intent" also applies to this paragraph. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to that no person permitted under District law to consent to the medical procedure on behalf of the complainant could be timely consulted.

Paragraph (c)(7) requires that there was no legally valid standing instruction by the complainant declining the medical procedure. Per the rule of interpretation under RCC § 22E-207, the term "with intent" also applies to this paragraph. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to that there was actually no legally valid standing instruction by the complainant declining the medical procedure.

Paragraph (c)(8) requires that, in fact, a reasonable person desiring to safeguard the welfare of the complainant would consent to the medical procedure. This requirement precludes the applicability of the defense to negligent performance.[29] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[30] The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether a reasonable person desiring to safeguard the welfare of the complainant would consent to the medical procedure.

Subsection (d) codifies the requirements of a limited caretaker defense to offenses in Subtitle II of the RCC, other than those offenses listed in subsection (e).

Paragraph (d)(1) requires, in fact, that the actor be responsible, under District civil law, for the complainant's health, welfare, or supervision.[31] The term "in fact" is defined in

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[29] For example, a health professional that performed a medical procedure without taking reasonable steps to investigate and diagnose the complainant's condition would not be able to raise the Emergency Health Professional defense.

[30] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (internal citations omitted).

[31] The determination of whether a person has a duty to the complainant under civil law may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, D.C. case law has found that schools do have a duty of care to their students. *See, e.g., District of Columbia v. Royal, 4*65 A.2d 367 (D.C. 1983) (recognizing a school's obligation to supervise its students). Consequently, teachers may utilize the defense under current D.C. case law. However, unlike the parental defense, the limited

RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the actor is responsible, under District civil law, for the complainant's health, welfare, or supervision.

Paragraph (d)(2) creates two requirements for the actor's intent. Subparagraph (d)(1)(A) requires that the actor had intent that the conduct was necessary to fulfill the actor's responsibility to the complainant. Subparagraph (d)(1)(B) requires that the actor had intent that the conduct was consistent with the welfare of the complainant. "Intent" is a term defined in RCC § 22E-206 and here means that the actor was practically certain that the medical procedure would promote the complainant's physical or mental health. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor's conduct was actually necessary to fulfill the actor's responsibility to the complainant, or that it was consistent with the complainant's welfare.

Paragraph (d)(3) requires that, in fact, the actor's conduct be reasonable in manner and degree, under all the circumstances. The determination of whether a person's actions are reasonable in manner and degree "under all the circumstances" may take into account a complainant's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, or other relevant factors. This is a holistic, objective assessment of the actor's conduct, taking into account facts that may not have been known to the actor.[32] This requirement includes consideration of the actor who fails to gain relevant information before acting.[33] The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the conduct was reasonable in manner and degree.

Paragraph (d)(4) precludes the application of the defense where the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this

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caretaker defense cannot be applied to the punishment or prevention of misconduct. The defense may apply where teachers are attempting to prevent injury though the conduct must still meet the other elements of the limited caretaker defense.

[32] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (internal citations omitted).

[33] *See* Model Penal Code § 3.09 ("When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.").

paragraph. There is no culpable mental state required as to whether the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury.

Paragraph (d)(5) requires that no other special responsibility defense applies to the conduct. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether another special responsibility defense applies to the conduct.

Subsection (e) precludes application of the defenses in this title to offenses in Chapters 13 and certain offenses in Title 16 and in Title 18. Title 13 includes Sexual Assault and related offenses; Title 16 includes Human Trafficking offenses.[34] The conduct required to meet the elements of offenses in these chapters is never in fulfillment of the actor's duties to the complainant. Consequently, the defenses are categorically excluded from application to these offenses. Title 18 includes stalking, obscenity, and invasion of property offenses. Paragraph (e)(8) specifies that the defenses in this section do not apply to creating or trafficking an obscene image of a minor under RCC § 22E-1807, when the actor is charged under subparagraphs (a)(1)(B), (a)(1)(E), (b)(1)(B) or (b)(1)(E). In addition, paragraph (e)(9) specifies that the defense is categorically unavailable for arranging a live performance of a minor under RCC § 22E-1809.

Subsection (f) cross-references applicable definitions located elsewhere in Chapters 2 and 7 of the RCC and, for the term "incapacitated individual," in D.C. Code § 21-2011.

Relation to Current District Law. *Eight aspects of the special responsibility defenses may be viewed as possible changes of law.*

First, the RCC parental defense applies to most offenses against persons. While the District has not codified a parental defense, either generally or for any particular offense, current D.C. case law has recognized a parental defense to simple assault and cruelty to children.[35] Current D.C. case law has not addressed the parental defense's applicability outside of these two offenses. To resolve this ambiguity as to the availability of the defense, the RCC parental defense specifies that it applies to crimes against persons in Subtitle II of the RCC, with the explicit exclusion of certain Human Trafficking, Sexual Assault, and Obscenity offenses as stated in subsection (e). Application of the defense is also limited by subparagraph (a)(5)(A) to conduct that neither causes nor creates a substantial risk of death or serious bodily injury—effectively precluding application of the offense to murder and certain other serious felony charges. This change improves the clarity and consistency of the revised statutes.

Second, the RCC parental defense requires that the parents or persons acting in place of parents must have current responsibility for the health, welfare, or supervision of the complainant child. There is no relevant statute and current D.C. case law requires that the actor has "put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation."[36] The precise meaning of this case law—

[34] This subsection is intended to preclude application of the defense to the trafficking of individuals to exploit them for sex work or other labor.

[35] *See, e.g.*, *Lee v. United States*, 831 A.2d 378, 380-81 (D.C. 2003); *Newby v. United States,* 797 A.2d 1233, 1241 (D.C. 2002); *Simms v. United States*, 867 A.2d 200, 205 (D.C. 2005).

[36] *See Simms v. United States*, 867 A.2d 200, 205 (D.C. 2005).

and the contemporaneous nature of the relationship and the alleged criminal conduct—is unclear, however.[37] To resolve this ambiguity, the RCC parental defense requires that the actor have current responsibility for the health, welfare, or supervision of the complainant child. This change improves the clarity and proportionality of the revised statutes.

Third, the RCC parental defense applies to persons who reasonably believe that they are acting with the effective consent of either parents or those acting in loco parentis. There is no relevant statute and current D.C. case law does not address whether the defense is available to persons acting with the effective consent of parents or those acting in loco parentis,[38] let alone whether a reasonable mistake by the actor as to the existence of effective consent is sufficient.[39] To resolve this ambiguity, the RCC parental defense is available to persons acting with such effective consent or reasonably believing they have such effective consent. This change improves the clarity and proportionality of the revised statutes.

Fourth, the RCC parental defense is generally limited to conduct not creating a risk of, or causing, serious bodily injury or death, but specifically allows the defense for the performance or authorization of certain medical procedures. Current case law does not address the parental defense's applicability to authorization of medical procedures that may be life threatening or involve serious bodily injury. Furthermore, current case law does not limit the applicability of the defense to a certain level of injury–it requires only that the force used cannot be "immoderate or unreasonable."[40] To resolve this ambiguity the RCC parental defense generally precludes application of the defense where the conduct created a risk of, or resulted in, actual serious bodily injury or death. However, the revised defense allows application where the actor has authorized or performed a medical procedure otherwise legal under District or federal law. This change improves the clarity and proportionality of the revised defense.

Fifth, the RCC recognizes a defense for guardians of incapacitated individuals. The District has not codified a general justification defense for guardians who act with intent to safeguard or promote the welfare of their ward, and case law has not addressed the existence of such a general justification defense.[41] In at least one instance, however,

[37] In their comments, the United States Attorney's Office ("USAO") advocated for the removal of the language "or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the complainant" on the grounds that the language is unclear. July 8, 2019 U.S. Attorney's Office Comments to D.C. Criminal Code Reform Commission for First Draft of Report #36, Cumulative Update to RCC, p. 3.

[38] The DCCA has noted the issue, but the specific question of whether such authority can be delegated has not been specifically addressed or presented. *See, e.g., Martin v. United States*, 452 A.2d 360, 363 (D.C. 1982) ("The complaining witness lived in her paternal grandmother's house, and at no time did the grandmother testify that disciplinary authority over the girl had been specifically delegated to appellant.") (internal citations omitted).

[39] The U.S.A.O. advocates limiting the application of the defense to those covered by the current D.C. Jury Instruction for *in loco parentis* rather than extending application to those acting with the effective consent of parents or guardians. U.S. Attorney's Office Comments for Report #36 at 3.

[40] *Newby v. United States*, 797 A.2d 1233, 1243 (D.C. 2002).

[41] Current District law assigns guardians of incapacitated individuals duties similar to those of parents and guardians of children. *See, e.g.* D.C. Code § 21-2047 ("…Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs,

the D.C. Code recognizes a special defense to a statute for persons acting according to a duty of care toward their ward.[42] To resolve this ambiguity the RCC guardian defense applies to guardians but is limited by the elements to specific complainants, actors, and conduct set out in paragraphs (b)(1)-(5). The requirements of the RCC guardian defense closely parallel those of the RCC parental defense but notably do not specifically include in paragraph (b)(3) conduct to punish misconduct.[43] This change improves the clarity, consistency, and proportionality of the revised defense.

Sixth, the RCC recognizes a defense for emergency health professionals. The District has not codified such a general justification defense for emergency health professionals who provide medical procedures with intent to safeguard or promote the physical or mental health of a patient, and case law has not addressed the existence of an emergency health professional justification defense.[44] In at least one instance, however, the D.C. Code recognizes a special defense to a statute for medical professionals acting when a patient cannot give consent.[45] To resolve this ambiguity, the RCC emergency health professional defense recognizes such a defense, which is limited by the elements to specific actors and conduct set out in paragraphs (c)(1)-(5). This change improves the clarity and proportionality of the revised defense.

Seventh, the RCC recognizes a limited caretaker defense. The District has not codified such a general justification defense for persons who act with intent to fulfill their duty to the complainant, and case law has not addressed the existence of a limited caretaker justification defense.[46] The RCC recognizes such a limited caretaker defense

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opportunities, and physical and mental health… Take reasonable care of the ward's personal effects and commence protective proceedings, if necessary, to protect other property of the ward… Apply any available money of the ward to the ward's current needs for support, care, habilitation, and treatment… Make decisions on behalf of the ward by conforming as closely as possible to a standard of substituted judgment or, if the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, make the decision on the basis of the ward's best interests…").

[42] D.C. Code § 22-935, Exception [to Criminal Abuse and Neglect of Vulnerable Adults liability] ("A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person.").

[43] The RCC guardian defense does apply to conduct to prevent future misconduct.

[44] In the analogous civil context, D.C. case law has found emergency medical personnel to be protected by the public-duty doctrine. *See Woods v. D.C.*, 63 A.3d 551, 556 (D.C. 2013) ("In both *Warren* and *Miller,* this court held that the public-duty doctrine barred a claim that a plaintiff's situation was made worse because the plaintiff relied upon actions taken by District emergency personnel in providing the kind of on-the scene emergency assistance that the District normally provides to the general public. Ms. Woods's claim takes the same form, and we therefore conclude that it is barred by the public-duty doctrine as this court has construed that doctrine. Although Ms. Woods makes three arguments to the contrary, we do not find those arguments persuasive.").

[45] D.C. Code § 22-3531(e)(4), Voyeurism ("This section does not prohibit the following: … (4) Any electronic recording of a medical procedure which is conducted under circumstances where the patient is unable to give consent.").

[46] This defense is distinct from the parental defense, which may be raised by caretakers acting *in loco parentis. In loco parentis* requires that the actor assume "the obligations incident to the parental relation without going through the formalities necessary to legal adoption." The limited caretaker defense applies

for those acting in accord with their responsibility under District civil law for the health, welfare, or supervision of the complainant.[47] Notably, unlike the RCC parental and guardian defenses, the limited caretaker offense requires that the actor believe the conduct is necessary to fulfill their responsibility to the complainant—no practical alternatives exist to the conduct.[48] Also unlike the parental defense, the limited caretaker defense does not apply to "the prevention or punishment of [the complainant's] conduct."[49] This change improves the clarity and proportionality of the revised defense.

Eighth, RCC § 22E-201(b) specifies the burden of proof for defenses codified in the RCC. RCC § 22E-210(b) specifies that if there is any evidence of a statutory defense at trial, the government must prove the absence of all elements of the defense beyond a reasonable doubt. The District has not codified general justification defenses for parents, guardians, emergency health professionals, or caretakers, or specified burdens of proof for such defenses. RCC § 22E-201(b) resolves this ambiguity by specifying that if any evidence of a statutory defense is presented at trial, the government bears the burden of proving the absence of all elements of the defense.

One other change to the RCC Special Responsibility Defenses statute is clarificatory in nature and is not intended to change current District law.

The revised parental defense codifies requirements that the parent's conduct be reasonable in manner and degree, under all the circumstances. The current D.C. Code does not codify a general parental defense or specify whether the parent's conduct must be reasonable or committed with a specified intent. However, the DCCA has repeatedly recognized in the context of assault and child cruelty that these limitations on a parental defense exist.[50] [51] The RCC parental defense clarifies these requirements with language

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where the actor has assumed less than the "obligations incident to the parental relation" but has a responsibility under District civil law for the health, welfare, or supervision of the complainant.

[47] The determination of whether a person has a duty to the complainant under civil law may depend on property law, contract law, family law, civil procedure, or other legal sources. *See, e.g., District of Columbia v. Royal,* 465 A.2d 367 (D.C. 1983) (recognizing a school's obligation to supervise its students); *Seganish v. District of Columbia Safeway Stores, Inc.,* 406 F.2d 653 (D.C. Cir. 1968) (finding business's duty to maintain its premises to be reasonably safe for customers); *Kline v. 1500 Massachusetts Avenue Apartment Corporation,* 439 F.2d 477 (D.C. Cir. 1993) (finding landlord had duty to make reasonable efforts to prevent crimes in apartment building's common area).

[48] By requiring that there be no alternative to the actor's conduct, the RCC reinforces the public policy that otherwise prohibited conduct is an act of last resort and will only be excused when used in those circumstances.

[49] The RCC precludes application of the limited caretaker defense to conduct intended to discipline the complainant in acknowledgment that the use of force toward a child or incapacitated person may only be justified in a narrow set of relationships, and actors attempting to justify such conduct must meet the heightened relationship requirements in the parental and guardian defenses. This follows the Model Penal Code Commentary's rationale for heightened requirements for a justification defense outside of a parental or guardian relationship. Model Penal Code § 3.08 cmt. at 141-42 (1985) ("The variation is designed to make clear the distinction between the position of a person charged with the general care of a minor and that of one performing a more limited protective function.").

[50] *See Lee v. United States*, 831 A.2d 378, 380-381 (D.C. 2003) (once the defense is raised, government has burden to prove the parent's purpose was not disciplinary or that the force was unreasonable); *Newby v. United States*, 797 A.2d 1233, 1237 (D.C. 2002); *Martin v. United States*, 452 A.2d 360, 362 (D.C. 1982) (the defense requires evidence that a jury could find reasonable discipline was used under the circumstances); *Powell v. United States*, 916 A.2d 890, 893 (D.C. 2006) ("In *Lee*, we reiterated that a

that is consistent with other defenses. The RCC parental defense does not specify the particular circumstances that must be considered in determining whether conduct is reasonable, but does set a threshold on the possible harm in paragraph (a)(5).[52]

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parent's privilege to exercise reasonable parental discipline is presently recognized in the District of Columbia.").

[51] In their comments, the United States Attorney's Office requested that "all circumstances" be replaced by the list in the current Jury Instruction, with the addition of "size" as an explicit factor. July 8, 2019 U.S. Attorney's Office Comments to D.C. Criminal Code Reform Commission for First Draft of Report #36, Cumulative Update to RCC, p. 3.

[52] The RCC is consistent with current case law which, in particular cases, has examined different circumstances to determine reasonableness. The District Jury Instruction, recognized by D.C. case law as "widely accepted" include the following circumstances: "if the punishment thus inflicted is not excessive in view of all the circumstances, including the child's age, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other evidence that you deem relevant." *Newby v. United States*, 797 A.2d 1233, 1242, n. 12 (D.C. 2002). The RCC, however, is broader than current District practice, as exemplified by the pattern jury instructions, which appears to require consideration of certain factors while allowing the factfinder to, in addition, consider any other evidence relevant to assessing reasonableness. The RCC approach allows factfinders to consider any relevant factor, e.g. relative size of the child to the parent, in assessing reasonableness but does not require any particular circumstances.

RCC § 22E-409. Effective Consent Defense.

Explanatory Note. This section establishes a defense based on the actor having the effective consent of the complainant for the charged conduct under the Revised Criminal Code (RCC). The defense is based on the complainant consenting to the actor's conduct. The defenses apply to most Offenses Against Persons in Subtitle II of the RCC. The revised Effective Consent defense is the first codification of a general defense.

Subsection (a) codifies the requirements of a general effective consent defense to offenses in Subtitle II of the RCC, other than those offenses listed in subsection (e).[1] The defense does not apply where the actor is the person with legal authority over the complainant. "Person with legal authority over the complainant" and "complainant" are defined terms in RCC § 22E-701. "Complainant" refers to a person who is alleged to have been subjected to any criminal offense.

Paragraph (a)(1) requires that, in fact, the complainant or a person with legal authority over the complainant gave consent to the actor for the conduct charged, or the actor reasonably believed such a person gave effective consent. If the consent is granted by a person with legal authority over the complainant, that consent must be consistent with their duty to the complainant – or the actor must have reasonably believed that the consent was consistent with the person's duty to the complainant. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[2] The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the complainant, or person with legal authority over the complainant, gave consent to the conduct charged, or whether the actor reasonably believed such a person gave effective consent.[3]

Paragraph (a)(2) further specifies the application of the defense in certain circumstances. Subparagraph (a)(2)(A) precludes application where the charged conduct created a substantial risk of, or caused, death or a protracted loss or impairment of the function of a bodily member or organ. Subparagraph (a)(2)(A) tracks the definition of serious bodily injury in RCC § 22E-701, though it omits disfigurement.[4] Paragraph (a)(2)(B) allows application of the defense where the result of the conduct was a

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[1] Subsection (e) precludes application in sexual assault, kidnapping, criminal restraint, and human trafficking charges. The revised sexual assault statute, RCC 22E-1301, contains a charge-specific effective consent defense in paragraph (e)(1).

[2] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[3] Although no culpable mental state as defined in RCC § 22E-205 is required, paragraph (a)(1) still requires that the actor subjectively believed that the complainant or a person with legal authority over the complainant gave consent to the actor for the conduct charged.

[4] This omission is intended to allow individuals to continue consenting to voluntary behaviors that may fall under the category of disfigurement, such as tattoos and brands.

reasonably foreseeable hazard of the complainant's occupation; a medical procedure permitted under civil law performed by a licensed health professional[5]; or participation in a lawful contest or sport. Health professional is a defined term in RCC § 22E-701.[6] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether the actor's conduct creates a substantial risk of, or causes, death or protracted loss or impairment of the function of a bodily member or organ; or was a reasonably foreseeable hazard of the complainant's occupation, a medical procedure, or participation in a lawful contest or sport.

Subsection (b) limits the application of the defense to exclude certain actors and offenses. Paragraph (b)(1) precludes application where the actor has legal authority over the complainant.[7] Paragraph (b)(2) precludes application to certain charged offenses. Subparagraph (b)(2)(A) precludes application to Sexual Assault and related offenses in Title 13.[8] Subparagraph (b)(2)(B) precludes application to Kidnapping and Criminal Restraint.[9] Subparagraph (b)(2)(C) precludes application to Human Trafficking offenses in Title 16.[10] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether the actor has legal authority over the complainant, or whether the conduct constitutes an offense listed in subparagraph (b)(2).

Subsection (c) cross-references applicable definitions located elsewhere in Chapters 2 and 7 of the RCC.

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[5] A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they meet the definition of medical procedure, are performed by a health professional, as defined, and are otherwise legal under District or federal law. The definition of medical procedure is intended to exclude cosmetic procedures. Non-medical and illegal medical treatments are not covered by subparagraph (a)(5)(B).

[6] "Health Professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3-1205.01. Examples of licensed health professionals include physician assistants, practical nurses, and psychologists. Health Professional also includes any professional certified by the Director of the District's Emergency Medical Services (EMS) under 29 DCMR § 515–524.

[7] For example, children and incapacitated individuals may not consent to harm by their parents or guardians.

[8] Consent to sexual assault is an offense-specific defense under the RCC. *See* RCC § 22E-1301(e)(1).

[9] he absence of effective consent is an element to Kidnapping and Criminal Restraint under the RCC. *See* RCC § 22E-1401 and § 22E-1402. Other offenses in Title 14, such as criminal threats and blackmail, do not include lack of effective consent as an element. The effective consent defense can apply to prosecutions for these offenses. In the majority of these prosecutions, however, effective consent is unlikely to apply. The rare case, however, might include a complainant who requested an actor make a criminal threat toward him if the complainant began a behavior that the complainant sought to avoid. (For example, an alcoholic complainant asking an actor to threaten assault if the actor saw the complainant drinking alcohol.) Such a claim by the actor will still be evaluated for credibility and reasonableness by the factfinder.

[10] The conduct in Human Trafficking offenses necessarily precludes effective consent. The offenses in the Human Trafficking chapter require that complainants perform labor or sex work under coercive threat or debt bondage; as minors; or both. The RCC precludes application of the defense to these offenses in acknowledgment that such conduct in such circumstances, as a public policy matter, cannot be performed with effective consent of the complainant or complainants. Effective Consent is defined by RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception."

Relation to Current District Law. Six aspects of the RCC Effective Consent Defense may be viewed as substantive changes of current District law.

First, the revised statute allows application of the effective consent defense to charges beyond offenses of sexual assault, kidnapping, and assaults with a sexual motivation. While the District has not codified an effective consent defense, current D.C. case law has recognized an effective consent defense to sexual assault, kidnapping, and assaults with a sexual motivation.[11] Current D.C. case law has not addressed the effective consent defense beyond sexual assault, kidnapping, and assaults with a sexual motivation. The revised defense applies the defense to most Crimes Against Persons in Subtitle II of the RCC. Consent as a defense to sexual assault and kidnapping are not covered by this general defense. Application is also limited by subparagraph (a)(2)(A) to conduct that neither causes nor creates a substantial risk of death or protracted loss or impairment of the function of a bodily member or organ. This change improves the clarity and proportionality of the revised defense.

Second, the revised effective consent defense precludes application of the defense to conduct creating a substantial risk of, or causing, death or protracted loss or impairment of the function of a bodily member or organ. The current D.C. Code does not codify an effective consent defense. However, D.C. case law has held that "consent is not a defense to a charge of assault with significant bodily injury arising out of a street fight."[12] The current D.C. Code does not define "significant bodily injury."[13] The revised defense precludes application where the conduct created a substantial risk of, or caused, death or protracted loss or impairment of the function of a bodily member or organ. This change improves the clarity of the defense.

Third, the revised defense allows that consent to the conduct may be given by a person with legal authority over the complainant.[14] Neither District statute nor case law addresses consent by persons other than the complainant. The revised defense allows application of the defense where the actor receives consent from a person with legal authority over the complainant. This change improves the clarity and proportionality of the defense.

Fourth, the revised defense precludes application of the defense where the actor is a person with legal authority over the complainant. Neither District statute nor case law

[11] *See, e.g., Guarro v. United States,* 237 F.2d 578, (D.C. 1956) (reversing assault conviction where police officer gave apparent consent to touching); *Goudy v. United States*, 495 A.2d 744, 746 (D.C. 1985), amended, 505 A.2d 461 (D.C. 1986) (recognizing consent as a defense to assault charge where conduct was nonforcible rape of incompetent victim); *Jenkins v. United States*, 506 A.2d 1120, 1123 (D.C. 1986) (recognizing consent as a defense to assault with intent to commit sodomy); *Davis v. United States,* 613 A.2d 906 (D.C. 1992) (recognizing consent defense to kidnapping and sexual assault); *Bush v. United States,* 516 A.2d 186 (D.C. 1986) (recognizing consent defense to kidnapping).

[12] *Woods v. United States*, 65 A.3d 667, 672 (D.C. 2013).

[13] However, the current Code does define "serious bodily injury" as "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001. The RCC statutory language resembles the third prong of this definition.

[14] Paragraph (b)(1) states that a person with legal authority over the complainant may not invoke the effective consent defense as an actor. Such a person may, however, consent to the conduct of another actor on behalf of a person over whom they have authority.

address circumstances where the actor has legal authority over the complainant. The revised defense precludes application where the actor has legal authority over the complainant. "Person with legal authority over the complainant" is a defined term in RCC § 22E-701. This change improves the clarity and proportionality of the defense.

Fifth, the revised defense allows application where the result was a foreseeable hazard of the complainant's occupation, a medical procedure permitted by law and performed by a licensed health professional, or participation in a lawful contest or sport. D.C. case law has precluded civil liability where an individual is injured in the foreseeable course of their employment.[15] Similarly, D.C. case law has declined to hold medical professionals liable where the patient knew the risks of a medical procedure.[16] Neither District statute nor case law addresses an effective consent defense where the activity includes foreseeable hazards.[17] The revised defense allows application in such circumstances where the conduct meets all other requirements of the defense. This change improves the clarity and proportionality of the defense.

Sixth, RCC § 22E-201(b) specifies the burden of proof for defenses codified in the RCC. RCC § 22E-210(b) specifies that if there is any evidence of a statutory defense at trial, the government must prove the absence of all elements of the defense beyond a reasonable doubt. The District has not codified an effective consent defense, or specified the burden of proof for such a defense. RCC § 22E-201(b) resolves this ambiguity by specifying that if any evidence of a statutory defense is presented at trial, the government bears the burden of proving the absence of all elements of the defense.

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[15] *See, e.g., Lee v. Luigi, Inc.*, 696 A.2d 1371, 1375 (D.C. 1997) ("While the doctrine may not preclude recovery for hidden or unknown hazardous conditions, foreseeable risks are within the parameters of the professional's work, and such risks will not support a claim for recovery."); *Young v. Sherwin-Williams Co.*, 569 A.2d 1173, 1178 (D.C. 1990) ("The basis of the doctrine in the District of Columbia, therefore, is the notion that firefighters and other professional rescuers voluntarily assume the risks of their employment and are compensated accordingly.").

[16] *See, e.g., Miller-McGee v. Washington Hosp. Ctr.*, 920 A.2d 430, 439 (D.C. 2007) ("In order to prevail in an action based on a theory of informed consent, the plaintiff must prove that if he had been informed of the material risk, he would not have consented to the procedure and that he had been injured as a result of submitting to the procedure.") (citing *Cleary v. Group Health Ass'n,* 691 A.2d 148, 155 (D.C.1997)).

[17] *See Woods*, 65 A.3d at 672. ("We leave for another day the question whether consent may be a defense to assault in contexts such as official or unofficial sporting events, or whether such acts even are properly considered assaults.")

RCC § 22E-701. Generally Applicable Definitions.

This section establishes definitions that apply to all provisions of Title 22E, unless otherwise specified. Each definition is discussed separately, below.

"Act" has the meaning specified in RCC § 22E-202.

Explanatory Note. The definition of "act" is addressed in the Commentary accompanying RCC § 22E-202.

"Actor" means person accused of a criminal offense.

Explanatory Note. The term "actor" is used in many RCC offenses to avoid both the confusion that may arise from multiple references to a "person" and the potential bias that may arise from other references to the alleged perpetrator in a criminal case. Use of the term "actor" is a drafting convention that is not intended to substantively affect any provision in the RCC.

The RCC definition of "actor" replaces the current definition of "actor" in D.C. Code § 22-3001(1),[1] applicable to provisions in Chapter 30, Sexual Abuse (although the term is not used consistently).[2] The RCC definition of "actor" is used in the RCC definition of "protected person,"[3] as well as all sex offenses in RCC Chapter 13 and the related admission of evidence in sexual assault and related cases provision,[4] and the revised offenses of criminal abuse of a vulnerable adult or elderly person,[5] criminal neglect of a vulnerable adult or elderly person,[6] and several obscenity offenses in RCC Chapter 18.[7]

***Relation to Current District Law*.** The RCC definition of "actor" is substantively identical to the statutory definition under current law.[8]

"Amount of damage" means:

(A) When property is completely destroyed, the property's fair market value before it was destroyed; or

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[1] D.C. Code § 22-3001(1) ("'Actor' means a person accused of any offense proscribed under this chapter.").

[2] Only three of the current sex offense statutes use the term "actor." First degree and second degree sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016) and the aggravating circumstances statute (D.C. Code § 22-3020). Instead of "actor," the other current sex offense statutes use terms like "a person," "the defendant," or by the specific position that the defendant has, e.g., "teacher."

[3] RCC § 22E-701.

[4] Sexual assault (RCC § 22E-1301); Sexual abuse of a minor (RCC § 22E-1302); Sexual abuse by exploitation (RCC § 22E-1303); Sexually suggestive conduct with a minor (RCC § 22E-1304); Enticing a minor (RCC § 22E-1305); Arranging for sexual conduct with a minor (RCC § 22E-1306); Nonconsensual sexual conduct (RCC § 22E-1307); Admission of evidence in sexual assault and related cases (RCC § 22E-1311); Incest (RCC § 22E-1312).

[5] RCC § 22E-1503.

[6] RCC § 22E-1504.

[7] Creating or trafficking an obscene image of a minor (RCC § 22E-1807); Possession of an obscene image of a minor (RCC § 22E-1808); Arranging for a live sexual performance of a minor (RCC § 22E-1809); Attending or viewing a live sexual performance of a minor (RCC § 22E-1810).

[8] D.C. Code § 22-3001(1).

(B) When the property is partially damaged, either:

(1) If there are repairs, the reasonable cost of necessary repairs, or

(2) If there are no repairs, the change in the fair market value of the damaged property.

(C) Notwithstanding subsection (B), if the reasonable cost of necessary repairs is greater than the fair market value of the property before it was partially damaged, the amount of damage is the fair market value of the property before it was partially damaged.

Explanatory Note. The term "amount of damage" provides a standard for the valuation of damage or destruction to property in the RCC criminal damage to property offense (RCC § 22E-2503). The valuation method used generally depends on whether property is "completely destroyed" or "partially damaged." The characterizations of "complete[]" destruction and "partial" damage may be redundant, but they are used to draw clear distinctions between the different types of valuation in the RCC definition.

Subsection (A) provides that when the property is completely destroyed, the property's "fair market value" is the amount of damage. "Fair market value" is a defined term in RCC § 22E-701 that generally means the price which a purchaser who is willing, but not obligated to buy would pay an owner who is willing, but not obligated to sell. "Owner" is a defined term in RCC § 22E-701.

If the property is only partially damaged, however, the valuation methods in subsection (B) are used. Under paragraph (B)(1), if there are repairs, the amount of damage is the reasonable cost of necessary repairs. Under paragraph (B)(2), if there are no repairs, the change in the fair market value of the property due to the partial damage is used. Fair market value" is a defined term in RCC § 22E-701 that generally means the price which a purchaser who is willing, but not obligated, to buy would pay an owner who is willing, but not obligated to sell. "Owner" is a defined term in RCC § 22E-701.

Under subsection (C), notwithstanding the valuation methods of subsection (B), if the reasonable cost of repairs is greater than the "fair market value" of the property before it was partially damaged, the amount of damage is the fair market value of the property before it was partially damaged. For example, an item of property has a fair market value of $100 before partial damage. After partial damage, the reasonable cost of necessary repairs would be $500. The amount of damage is $100, not $500. Fair market value" is a defined term in RCC § 22E-701 that generally means the price which a purchaser who is willing, but not obligated, to buy would pay an owner who is willing, but not obligated to sell. "Owner" is a defined term in RCC § 22E-701.

The RCC definition of "amount of damage" is new, the term is not currently defined in Title 22 of the D.C. Code. The current malicious destruction of property statute in D.C. Code § 22-303 refers to the "value" of the property, but there is no statutory definition of this term.[9] The RCC definition of "value" replaces the reference to

[9] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own, of the value of $1,000 or more, shall be fined not more than the amount set forth in § 22-3571.01 or shall be imprisoned for not more than 10 years, or both, and if the property has some value shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

"value" in the current malicious destruction of property statute and is used in the revised criminal damage to property offense.[10]

Relation to Current District Law. *The RCC definition of "amount of damage" is generally consistent with the District case law interpreting the "value" of damaged or destroyed property in the current malicious destruction of property (MDP) offense.*

Subsection (A) codifies DCCA case law for the current MDP statute that states that the "value" of property that is completely destroyed is the fair market value of the property.[11]

Paragraph (B)(1) codifies DCCA case law that states where "repairable damage or destruction is caused to a portion or portions of a greater whole, the value of the property damaged or destroyed is to be measured by tye [sic] reasonable cost of the repairs necessitated by the malicious conduct.[3] However, not every instance of property damage that could be repaired will actually be repaired. There is no DCCA case law that establishes how to value partially damaged property when repairs could be done, but are not. Paragraph (B)(2) establishes that in such a case, where there are no repairs, the amount of damage is the change in fair market value of the damaged property.

Subsection (C) establishes a final method of valuation. Notwithstanding the methods of valuation in subsection (B) for partial damage, "if the reasonable cost of necessary repairs is greater than the fair market value of the property before it was partially damaged, the amount of damage is the fair market value of the property before it was partially damaged." Subsection (C) codifies DCCA case law that states it "would be unjust" to use the cost of repairs to determine the value of the property in the current MDP statute when the cost of repairs is greater than the value of the property.[12]

The RCC definition of "amount of damage" improves the clarity, consistency, and proportionality of the revised criminal damage to property offense.

"Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any.

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[10] RCC § 22E-2503.

[11] *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975) ("Where an item of property has been entirely destroyed, there is little difficulty in applying the normal definition of 'fair market value', i. e., the price which a purchaser who is willing but not obliged to buy would pay an owner who is willing but not obliged to sell, considering all the uses to which the property is adapted and might reasonably be applied.") (internal citations omitted).

[12] *Nichols v. United States*, 343 A.2d at 342 n.3:

> We perceive one type of case in which it would be unjust to measure the value of the damaged portion by the cost of restoration. Such a situation would occur where the total value of the entire item of property involved is less than $200 [the previous felony threshold in the MPD statute], but the cost of repair would be $200 or more. For example, an old car might have a value of only $150, while the cost of repairing a damaged portion of it could exceed $200. In such a case, the maximum value chargeable should be determined by the overall value of the entire item of property before the damage occurred.

Explanatory Note. The RCC definition of "audiovisual works" is new, the term is not currently defined in Title 22 of the D.C. Code (although similar language is used to define "audiovisual works" in D.C. Code § 22-3214.01, the deceptive labeling statute).[13] The RCC definition of "audiovisual recording" replaces the current definition of "audiovisual works" in D.C. Code § 22-3214.01, applicable to the deceptive labeling statute. The RCC definition of "audiovisual recording" is used in the revised offenses of unlawful creation or possession of a recording[14] and unlawful labeling of a recording.[15]

Relation to Current District Law. The RCC definition of "audiovisual recording" is substantively identical to the statutory definition of "audiovisual works" in current law.[16]

"Block," and other parts of speech, including "blocks" and "blocking," mean render impassable without unreasonable hazard to any person.

Explanatory Note. The RCC definition of 'blocks' is new; the term is not currently defined in Title 22 of the D.C. Code (although a similar word, 'obstruct,' is used in the current crowding, obstructing, or incommoding statute).[17] The RCC definition of "block" is used in the revised offense of blocking a public way.[18]

Relation to Current District Law. The RCC definition of "block" is new and does not substantively change District law.

As applied in the revised offense of blocking a public way, RCC § 22E-4203, the term "block" does not substantively change District law. The current crowding, obstructing, or incommoding statute[19] uses the terms "crowd," "obstruct," or "incommode" without statutorily defining the terms, and there is no case law on point. The revised blocking a public way statute uses the word "blocks" to avoid confusion with other offenses referring to broader "obstruction" conduct (e.g. with respect to a law enforcement investigation). The revised blocking a public way statute uses the term "blocks" to include all conduct that would[20] substantially interfere with motor traffic or foot traffic on public grounds. This does not include minor incommoding that poses no risk to passers-by, such as standing or sitting on part of a sidewalk, causing pedestrians to step around. However, blocking does include conduct that would render the public way impassable, but for the intervention of a law enforcement officer. Whether a hazard is reasonable or unreasonable is a question for the factfinder. Use of the term "blocks" applies consistent, clearly articulated definitions and improves the clarity of the revised offense.

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[13] D.C. Code § 22-3214.01(a)(1) ("'Audiovisual works' means material objects upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.").
[14] RCC § 22E-2105.
[15] RCC § 22E-2207.
[16] D.C. Code § 22-3214.01(a)(1).
[17] D.C. Code § 22-1307.
[18] RCC § 22E-4203.
[19] D.C. Code § 22-1307.
[20] The offense does not require that anyone actually attempt to make use of the public way and be unable to do so.

"Bodily injury" means physical pain, physical injury, illness, or any impairment of physical condition.

Explanatory Note. The term "bodily injury" is the lowest of the three levels of bodily injury defined in the RCC. No minimum threshold of pain is required for "physical pain." Examples of a "physical injury" include a scratch, a laceration, a bruise, an abrasion, or a contusion. "Illness" includes any viral, bacterial, or other physical sickness or physical disease.[21] "Any" impairment of physical condition is intended to be construed broadly.[22] The definition does not require a minimum threshold of impairment. Subject to causation requirements, the definition of "bodily injury" may include indirect causes of pain, illness, or impairment, such as exposing another individual to inclement weather or administration of a drug or narcotic that has a negative effect on physical condition.

The RCC definition of "bodily injury" replaces the current statutory definition of "bodily injury" in D.C. Code § 22-3001(2),[23] applicable to provisions in Chapter 30, Sexual Abuse, and undefined references to "bodily injury" in the current child cruelty,[24] obstruction of a police report,[25] and animal cruelty statutes.[26] Similar terms are used in other Title 22 statutes,[27] and there is a definition[28] and several uses[29] of "serious bodily

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[21] For example, "bodily injury" would include sexually transmitted diseases.

[22] *Compare State v. Jarvis*, 665 N.W.2d 518, 521-22 (Minn. 2003) (concluding that "any impairment of physical condition" in the definition of "bodily harm" means "any injury that weakens or damages an individual's physical condition" and finding the evidence sufficient for bodily harm when the complaining witness involuntarily ingested drugs), *and Hanic v. State*, 406 N.E.2d 335, 337-38 (Ind. Ct. App. 1980) (finding that red marks and bruises on a woman's arms and "minor scratches" on her breast area were sufficient evidence for "bodily injury."), *with Harris v. State*, 965 A.2d 691, 694 (Del. 2009) (holding that a red mark on complainant's skin from being elbowed to the forehead and scratches on the complainant's knee did not constitute impairment of physical condition as required by the definition of "physical injury" because they "did not reduce the [complainant's] ability to use the affected parts of his body."), *and State v. Higgins*, 165 Or.App. 442 (2000) (holding that "scratches and scrapes that go unnoticed by the victim, that are not accompanied by pain and that do not result in the reduction of one's ability to use the body or a bodily organ for any period of time, do not constitute an impairment of physical condition" as required by the definition of "physical injury.").

[23] D.C. Code § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[24] D.C. Code § 22-1101 ("creates a grave risk of bodily injury to a child, and thereby causes bodily injury").

[25] D.C. Code § 22-1931 ("It shall be unlawful for a person to knowingly … block access to any telephone…with a purpose to obstruct, prevent, or interfere with…[t]he report of any bodily injury.")

[26] D.C. Code § 22-1001(c) ("'serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ.").

[27] *See, e.g.,* D.C. Code §§ 22-407 ("Whoever is convicted in the District of threats to do bodily harm…."); 22-933(1) (criminal abuse of a vulnerable adult or elderly person statute prohibiting, in part, "inflict[ing] or threat[ening[to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means.").

[28] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

injury" in the current D.C. Code. The RCC definition of "bodily injury" is used in the RCC definitions of "significant bodily injury"[30] and "serious bodily injury,"[31] as well as the revised offenses of robbery,[32] assault,[33] menacing,[34] criminal threats,[35] kidnapping,[36] criminal restraint,[37] sexual assault,[38] criminal abuse of a minor,[39] criminal abuse of a vulnerable adult or elderly person,[40] burglary,[41] disorderly conduct,[42] rioting,[43] and failure to disperse.[44]

Relation to Current District Law. *The RCC definition of "bodily injury" makes two clear changes to the statutory definition of "bodily injury" in D.C. Code § 22-3001(2).*[45] First, the RCC definition of "bodily injury" does not require "significant" pain. Eliminating the current limitation of "significant" pain avoids difficult and subjective assessments[46] as to the appropriate degree of pain and improves the clarity of the revised definition. Second, the RCC definition of "bodily injury" no longer specifically includes loss or impairment of a "mental faculty," although such an injury may be included to the extent that it otherwise satisfies the definition of "bodily injury." It is unclear whether "mental faculty" refers to the physical condition of the brain or more generally to psychological distress, and deleting it improves the consistency of the revised definition. The remaining changes to the current sex offense definition of "bodily injury" are clarificatory.[47] Despite the substantive revisions to the definition of "bodily injury," it is unclear whether the RCC definition actually changes current District law for the current sexual abuse offenses due to the broad definition of "force" for these offenses.

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[29] *See, e.g.,* D.C. Code § 22-404.01 ("A person commits the offense of aggravated assault if: (1) By any means, that person knowingly or purposely causes serious bodily injury to another person….").
[30] RCC § 22E-701.
[31] RCC § 22E-701.
[32] RCC § 22E-1201.
[33] RCC § 22E-1202.
[34] RCC § 22E-1203.
[35] RCC § 22E-1204.
[36] RCC § 22E-1402.
[37] RCC § 22E-1404.
[38] RCC § 22E-1301.
[39] RCC § 22E-1501.
[40] RCC § 22E-1503.
[41] RCC § 22E-2701.
[42] RCC § 22E-4201.
[43] RCC § 22E-4301.
[44] RCC § 22E-4302.
[45] D.C. Code § 22-3001(2).
[46] The difficulty in assessing pain thresholds at the low end of the spectrum is similar to such assessments at the high end, which the DCCA has criticized in the context of interpreting "extreme physical pain" in the definition of "serious bodily injury." *Swinton v. United States*, 902 A.2d 772, 777 (D.C. 2006) ("The term [extreme physical pain] is regrettably imprecise and subjective, and we cannot but be uncomfortable having to grade another human being's pain.").
[47] The RCC definition of "bodily injury" makes several non-substantive clarifications to the current definition of "bodily injury" in D.C. Code § 22-3001(2). The references to impairment of a "bodily member" or "organ," and "physical disfigurement" in the current definition are deleted as superfluous to the more inclusive term of "impairment of physical condition" in the RCC definition. Similarly, the current definition's references to "disease, sickness" are covered by the RCC definition's reference to "illness." Finally, the RCC definition specifies that "physical injury" is included.

The commentary to the RCC sexual assault offense (RCC § 22E-1301) discusses further the effect of the revised definition of "bodily injury" on current District law.

The RCC definition of "bodily injury" is generally consistent with the limited District case law interpreting the term "bodily injury" in non-sexual offenses, where there is no statutory definition of the term.[48] This limited case law does not generally discuss the meaning of the term. However, the RCC definition of "bodily injury" results in changes to current District law as applied to particular offenses. For example, the RCC assault statute (RCC § 22E-1202) is graded, in part, based in part on whether "bodily injury" was inflicted. Physical contacts that do not cause physical pain or otherwise satisfy the RCC definition of "bodily injury" are criminalized by the RCC offensive physical contact offense (RCC § 22E-1205), whereas current District law would criminalize these physical contacts as assault.[49] The commentaries to relevant RCC offenses against persons discuss further the effect of the RCC definition of "bodily injury" on current District law. The revised definition of "bodily injury" improves the consistency and proportionality of revised offenses.

The commentaries to relevant RCC offenses against persons discuss further the effect of the RCC definition of "bodily injury" on current District law.

"Building" means a structure affixed to land that is designed to contain one or more natural persons.

Explanatory Note. The RCC definition of "building" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "building" are in several current property offenses[50]). The RCC definition of "building" is used in the revised definitions of "correctional facility," "dwelling," "halfway house," and "secure juvenile detention facility," as well as the revised offenses of trespass,[51] burglary,[52] arson,[53] and reckless burning.[54]

Relation to Current District Law. The RCC definition of "building" is new and does not substantively change District law.

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[48] *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[49] Under current District law, mere offensive physical contact is sufficient for assault liability. *See, e.g.*, *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990)). However, this case law, and the scope assault, is in active litigation in the DCCA. A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[50] *E.g.*, trespass (D.C. Code § 22-3302), burglary (D.C. Code § 22-801).

[51] RCC § 22E-2601.

[52] RCC § 22E-2701.

[53] RCC § 22E-2501.

[54] RCC § 22E-2502.

"Bump stock" means any object that, when installed in or attached to a firearm, increases the rate of fire of the firearm by using energy from the recoil of the firearm to generate a reciprocating action that facilitates repeated activation of the trigger.

Explanatory Note. The RCC definition of "bump stock" replaces the current definition of "bump stock" in D.C. Code § 22-4501, applicable to provisions in Chapter 45, Weapons and Possession of Weapons. The RCC definition of "bump stock" is used in the revised offense of possession of a prohibited weapon or accessory,[55] as well as the revised civil provisions for taking and destruction of dangerous articles.[56]

Relation to Current District Law. The RCC definition of "bump stock" is identical to the statutory definition under current law.[57]

"Business yard" means securely fenced or walled land where goods are stored or merchandise is traded.

Explanatory Note. The RCC definition of "business yard" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current burglary statute[58]). The RCC definition of "business yard" is used in the revised offense of burglary.[59]

Relation to Current District Law. The RCC definition of "business yard" is new and does not substantively change District law.

As applied in the revised burglary statute, the term "business yard" may substantively change District law. The current burglary statute uses the phrase "any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade."[60] Case law has clarified that the phrase is limited to sites that store items for the purpose of a future commercial transaction.[61] The revised code uses the words "goods" and "merchandise," which are more common in modern English usage and broadly encompass lumber, coal, and chattels for trade. The revised code specifies that the yard must be walled or fenced, so as to distinguish a yard from open land. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Check" means any written instrument for payment of money by a financial institution.

Explanatory Note. The RCC definition of "check" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "check"

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[55] RCC § 22E-4101.
[56] RCC § 22E-4117.
[57] D.C. Code § 22-4501.
[58] D.C. Code § 22-801.
[59] RCC § 22E-2701.
[60] D.C. Code § 22-801.
[61] *Sydnor v. United States*, 129 A.3d 909, 913 (D.C. 2016) (finding a construction site could not be burglarized).

are in several current offenses[62]). The RCC definition of "check" is used in the revised definition of value,[63] as well as the revised offense of check fraud.[64]

Relation to Current District Law. The RCC definition of "check" is new and does not substantively change District law. There is no case law defining "check" where the term is used in current property offenses.

"Circumstance element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "circumstance element" is addressed in the Commentary accompanying RCC § 22E-201.

"Class A contraband" means:

- **(A) A dangerous weapon or imitation dangerous weapon;**
- **(B) Ammunition or an ammunition clip;**
- **(C) Flammable liquid or explosive powder;**
- **(D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;**
- **(E) A shank or homemade knife;**
- **(F) Tear gas, pepper spray, or other substance designed or specifically adapted for causing temporary blindness or incapacitation;**
- **(G) A tool designed or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;**
- **(H) Handcuffs, security restraints, handcuff keys, or any other object designed or specifically adapted for locking, unlocking, or releasing handcuffs or security restraints;**
- **(I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool designed or specifically adapted for cutting through metal, concrete, or plastic;**
- **(J) Rope; or**
- **(K) A law enforcement officer's uniform, medical staff clothing, or any other uniform.**

Explanatory Note. The RCC definition of "Class A contraband" replaces the current definition of "Class A contraband" in D.C. Code § 22-2603.01(2)(A),[65]

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[62] Making, drawing, or uttering check, draft, or order with intent to defraud; proof of intent; "credit" defined, D.C. Code § 22-1510; Definition of "value" for Chapter 32, D.C. Code §22-3201; Forgery D.C. Code §§ 22-3241; 22-3242;

[63] RCC § 22E-701.

[64] RCC § 22E-2203.

[65] D.C. Code § 22-2603.01(2)(A) ("'Class A Contraband' means: (i) Any item, the mere possession of which is unlawful under District of Columbia or federal law; (ii) Any controlled substance listed or described in Unit A of Chapter 9 of Title 48, or any controlled substance scheduled by the Mayor pursuant to § 48-902.01; (iii) Any dangerous weapon or object which is capable of such use as may endanger the safety or security of a penal institution or secure juvenile residential facility or any person therein, including,: (I) A firearm or imitation firearm, or any component of a firearm; (II) Ammunition or ammunition clip; (III) A stun gun, as defined in § 7-2501.01(17A); (IV) Flammable liquid or explosive powder; (V) A knife, screwdriver, ice pick, box cutter, needle, or any other object or tool that can be used for cutting, slicing, stabbing, or puncturing a person; (VI) A shank or homemade knife; or (VII) Tear gas,

applicable to the unlawful possession of contraband offense and related provisions. The terms "dangerous weapon," "imitation dangerous weapon," and "law enforcement officer" that are used in the definition of "Class A contraband" are defined elsewhere in RCC § 22E-701. The RCC definition of "Class A contraband" is used in the revised offense of correctional facility contraband.[66]

The RCC defines "Class A contraband" to include contraband that may be used to cause an injury or facilitate an escape more readily than other prohibited items.

Relation to Current District Law. *The RCC definition of "Class A contraband" makes several substantive changes to the current definition of "Class A contraband" in D.C. Code § 22-2603.01(2).*

First, the revised definition does not classify controlled substances as Class A contraband. The current D.C. Code definition of "Class A contraband" includes "[a]ny controlled substance listed or described in Unit A of Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01."[67] In contrast, the revised code classifies contraband according to the danger presented into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. This change improves the proportionality of the revised definition.
Second, the revised definition does not classify clothing, other than uniforms, as Class A contraband. The current D.C. Code definition of "Class A contraband" includes "civilian clothing."[68] In contrast, the revised definition includes a law enforcement officer's uniform, medical staff clothing, or any other uniform. The term "law enforcement officer" is defined in RCC § 22E-701 to include Department of Corrections employees, probation officers, and others. If disallowed by a facility, possession of civil clothing may still subject an incarcerated person to administrative sanctions. This change improves the proportionality of the revised definition.

Third, the revised definition does not classify unlawful items other than weapons as Class A contraband. The current D.C. Code definition of "Class A contraband" includes "[a]ny item, the mere possession of which is unlawful under District of Columbia or federal law."[69] There is no case law on point. However, the language would seem to include items that pose no apparent threat to the safety or order of a correctional facility.[70] In contrast, the revised definition of Class A contraband is limited

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pepper spray, or other substance that can be used to cause temporary blindness or incapacitation; (iv) Any object designed or intended to facilitate an escape; (v) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints; (vi) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool that can be used to cut through metal, concrete, or plastic; (vii) Rope; or (viii) When possessed by, given to, or intended to be given to an inmate or securely detained juvenile, a correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, any other uniform, or civilian clothing. (B) The term "Class A contraband" does not include any object or substance which a person is authorized to possess in the penal institution or secure juvenile residential facility by the director of the penal institution or secure juvenile residential facility and that is in the form or quantity for which it was authorized.").

[66] RCC § 22E-3403.

[67] D.C. Code § 22-2603.01(2)(A)(ii).

[68] D.C. Code § 22-2603.01(2)(A)(viii).

[69] D.C. Code § 22-2603.01(2)(A)(i).

[70] *See, e.g.*, 16 U.S.C. § 668 (criminalizing possession of a bald eagle feather).

to items that pose a clear security or escape risk. This change improves the clarity and proportionality of the revised definition.

Fourth, the current statute also classifies as Class A contraband, "Any object designed or intended to facilitate an escape."[71] There is no case law on point. In contrast, the revised code refers more specifically to "A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door." The revised language creates a more objective basis for identifying contraband—rather than making the subjective intent to facilitate escape the sole criterion for whether any object is Class A contraband—and is consistent with language in the revised possession of tools to commit property crime offense.[72] This change improves the clarity, consistency, and proportionality of the revised definition.

"Class B contraband" means:

(A) Any controlled substance or marijuana;

(B) Any alcoholic liquor or beverage;

(C) A hypodermic needle or syringe or other item designed or specifically adapted for administering unlawful controlled substances; or

(D) A portable electronic communication device or accessories thereto.

Explanatory Note. The RCC definition of "Class B contraband" replaces the current definition of "Class B contraband" in D.C. Code § 22-2603.01(3)(A),[73] applicable to the unlawful possession of contraband offense and related provisions. The term "controlled substance" used in the definition of "Class B contraband" is defined elsewhere in RCC § 22E-701. The RCC definition of "Class B contraband" is used in the revised offense of correctional facility contraband.[74]

The RCC defines "Class B contraband" to include contraband that may impede a facility's ability to provide an orderly, safe, and humane environment more readily than other items prohibited under administrative regulations. The phrase "item that can be used for the administration of a controlled substance" means an object that could be used to assist a user to introduce the drug into the body.[75] "Accessories" refers to devices that "enable or facilitate the use of a mobile telephone or other portable communication device. It is difficult to be exhaustive in light of changing technology, but accessories include chargers and batteries."[76]

Relation to Current District Law. The RCC definition of "Class B contraband" makes one substantive change to the current definition of "Class B contraband" in D.C.

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[71] D.C. Code § 22-2603.01(2)(A)(iv).

[72] *See* RCC § 22E-2702.

[73] D.C. Code § 22-2603.01(3)(A) ("'Class B Contraband' means: (i) Any alcoholic liquor or beverage; (ii) A hypodermic needle or syringe or other item that can be used for the administration of unlawful controlled substances; or (iii) A cellular telephone or other portable communication device and accessories thereto. (B) The term "Class B contraband" does not include any object or substance which a person is authorized to possess in the penal institution or secure juvenile residential facility by the director of the penal institution or secure juvenile residential facility and that is in the form or quantity for which it was authorized.").

[74] RCC § 22E-3403.

[75] For example, a pipe may be included, whereas aluminum foil is not.

[76] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-151, "Omnibus Public Safety and Justice Amendment Act of 2009," (June 26, 2009) at page 16.

Code § 22-2603.01(3)(A): it reclassifies controlled substances, including marijuana,[77] which are classified as Class A contraband under current law[78] as Class B contraband. The current statute roughly classifies contraband as (A) any item prohibited by law, weapons, escape implements, and drugs; (B) alcohol, drug paraphernalia, and cellular phones; and (C) any item prohibited by rule (only administrative sanctions are authorized for Class C contraband). In contrast, the revised code classifies contraband according to the danger presented into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. This change improves the proportionality of the revised definition.

"Close relative" means a parent, grandparent, sibling, child, grandchild, aunt, or uncle.

Explanatory Note. The RCC definition of "close relative" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "close relative" is used in the revised kidnapping[79] and criminal restraint[80] offenses.

Relation to Current District Law. The RCC definition of "close relative" is new and does not substantively change District law.

As applied in the revised kidnapping statute, the term "close relative" substantively changes current District law in one main way. The current kidnapping statute contains an exception to liability "in the case of a minor, by a parent thereof," but otherwise does not address kidnapping by close relatives.[81] In contrast, the revised statute codifies a defense to kidnapping if the accused is a "close relative" of the complainant, acted with intent to assume custody of the complainant and did not cause bodily injury or threaten to cause bodily injury. This change improves the proportionality of the revised offense.

"Coercive threat" means a threat that, unless the complainant complies, any person will do any of the following:

(A) Engage in conduct that, in fact, constitutes:

(A) An offense against persons as defined in subtitle II of Title 22E; or

(B) A property offense as defined in subtitle III of Title 22E;

(B) Take or withhold action as a government official, or cause a government official to take or withhold action;

(C) Accuse another person of a crime;

(D) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the

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[77] [Definitions of marijuana, cannabis, and cannabinoids will be reviewed and revised when the Commission issues recommendations for drug offenses.]

[78] D.C. Code § 22-2603.01(2)(A)(ii) classifies as Class A contraband "[a]ny controlled substance listed or described in Unit A of Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01."

[79] RCC § 22E-1401.

[80] RCC § 22E-1402.

[81] D.C. Code § 22-2001.

secret, fact, or item, that tends to subject another person to, or perpetuate:

(A) Hatred, contempt, ridicule, or other significant injury to personal reputation; or

(B) Significant injury to credit or business reputation;

(E) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;

(F) Restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns; or

(G) Cause any harm that is sufficiently serious, under all the circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply.

Explanatory Note. The RCC defines "coercive threat" as consisting of seven forms of threatened behavior—six *per se* types of "coercive threat" and one flexible standard to what constitutes a "coercive threat." A person making a coercive threat may threaten to carry out the coercive conduct himself or herself, but that need not be the case.[82] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice.[83]

Paragraph (A) specifies that coercive threats include threatening that any person will engage in conduct that constitutes a criminal offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E. This form of coercive threat does not include threats to commit any other types of criminal offenses.[84] The use of "in fact" indicates that no culpable mental state is required as to whether the threatened conduct constitutes an offense against persons or a property offense, or a criminal offense. However, all the elements of the predicate offense against persons or property offense, including their culpable mental states, must be proven.

Paragraph (B) specifies that coercive threats include threatening to take or withhold action as a government official, or to cause a government official to take or withhold action. This form of coercive threat includes threats to cite someone for violation of a regulation, make an arrest, or deny the award of a government contract or permit.

Paragraph (C) specifies that coercive threats include threatening to accuse another person of a crime. Under this form of coercive threat it is immaterial whether the accusation is accurate.

Paragraph (D) specifies that coercive threats include threatening to expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate hatred, contempt, ridicule, or other significant injury to personal reputation, or a significant injury to credit or business reputation. This

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[82] For example, a person may compel another person to perform labor by threatening that a third party will injure the laborer if he or she refuses to perform.

[83] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

[84] For example, threatening to commit a controlled substance offense would not constitute coercion.

paragraph does not require that the asserted secret or fact be true or false. This form of "coercive threat" is intended only to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.[85] There is one possible exception, in that this form of coercive threat also includes threats to expose secrets, assert facts, etc., that would tend to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. A person who is already subject to hatred, contempt, and ridicule may still be the target of this form of coercive threat.[86]

Paragraph (E) specifies that coercive threats include threatening to notify a federal, state, or local government agency or official of, or to publicize, another person's immigration or citizenship status. The definition of "coercive threat" includes these threats because of the unique, often life-changing consequences stemming from a person's immigration or citizenship status becoming publicized.

Paragraph (F) specifies that coercive threats include threatening to restrict a person's access to a controlled substance that the person owns, or to prescription medication that the person owns. As this form of coercive threat requires that the other person already owns the controlled substance or prescription medication, a threat to refuse to sell or provide a controlled substance or prescription medication does not constitute a coercive threat under this paragraph.[87]

Paragraph (G) specifies that coercive threats include threatening to cause any harm that is sufficiently serious under all the circumstances to compel a reasonable person of the same background and in the same circumstances as the complainant to comply. This is a catch-all provision intended to capture potential harms that are not *per se* included in the RCC's coercive threats definition. In determining whether the harm was sufficiently serious, fact finders should consider the nature of the harm, the complainant's particular circumstances and background, and the conduct demanded by the defendant. A threat may be coercive to a particular complainant, but not another.[88] In addition, harms that may constitute a coercive threat when used to compel certain conduct may not necessarily constitute a coercive threat when used to compel different conduct.[89]

The RCC definition of "coercive threat" is new, the term is not currently defined in Title 22 of the D.C. Code (although the close-related term "coercion" is currently defined for the human trafficking statutes[90] and other statutes[91] use the undefined term "coercion"). The RCC definition of "coercive threats" replaces the current definition of

[85] D.C. Code § 22-3252.

[86] For example, even if it is well known that a person has engaged in numerous acts of infidelity, a threat to reveal an additional act of infidelity may still constitute a coercive threat under this paragraph. Although there is no clear DCCA case law on point, it is possible threats to reveal this type of information may not have constituted blackmail at common law.

[87] However, in some cases refusal to sell or provide a controlled substance of prescription medication may constitute a coercive threat under the catch-all provision set forth in paragraph (13)(G).

[88] For example, threatening to leave a small child alone in an unknown part of a city may constitute coercion, but would not if the same threat were made to an adult.

[89] For example, some harms that would compel a reasonable person to perform basic tasks may not necessarily be sufficient to compel a reasonable person to engage in sexual activity.

[90] D.C. Code § 22-1831(3).

[91] Criminal street gangs (D.C. Code § 22-951); definition of "Act of terrorism" (D.C. Code § 22-3152).

"coercion" in D.C. Code § 22-1831(3),[92] applicable to provisions in Chapter 18A, Human Trafficking. The RCC definition of "coercive threat" is used in the revised definition of "effective consent"[93] and the many statutes which use that term,[94] including the revised offenses of forced labor or services,[95] forced commercial sex,[96] trafficking in labor or services,[97] trafficking in commercial sex,[98] and first degree,[99] second degree,[100] third degree,[101] and fourth degree sexual assault.[102]

Relation to Current District Law. The RCC definition of "coercive threats" makes several substantive, possibly substantive, and clarificatory changes to the current definition of "coercion" in D.C. Code § 22-1831(3). As applied to the revised sexual assault offense in RCC § 22E-1301, the RCC definition of "coercive threats" may change current law.

The revised coercive threat definition makes two changes that constitute substantive changes to current District law in D.C. Code § 22-1831(3).

First, the revised "coercive threat" definition excludes fraud, deception, or causing a person to believe he or she is property of another. The current D.C. Code coercion definition for human trafficking offenses includes as one form "fraud or deception."[103] Similarly, the current D.C. Code states that coercion includes "knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstance to believe that he or she is the property of a person or business."[104] There is no DCCA case law interpreting the meaning of these provisions. In contrast, the RCC definition of coercive threat does not specifically address frauds or deceptions. Leading someone to believe that they are property of another appears to be a particular

[92] D.C. Code § 22-1831(3) ("'Coercion' means any one of, or a combination of, the following: (A) Force, threats of force, physical restraint, or threats of physical restraint; (B) Serious harm or threats of serious harm; (C) The abuse or threatened abuse of law or legal process; (D) Fraud or deception; (E) Any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or physical restraint; (F) Facilitating or controlling a person's access to an addictive or controlled substance or restricting a person's access to prescription medication; or (G) Knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business.").
[93] RCC § 22E-701.
[94] RCC §§ 22E-1202 (assault); 22E-1203 (menace); 22E-1204 (criminal threats); 22E-1205 (offensive physical contact); 22E-1301 (sexual assault); 22E-1307 (nonconsensual sexual conduct); 22E-1401 (kidnapping); 22E-1402 (criminal restraint); 22E-1503 (abuse of a vulnerable adult or elderly person); 22E-1504 (neglect of a vulnerable adult or elderly person).
[95] RCC § 22E-1601.
[96] RCC § 22E-1602.
[97] RCC § 22E-1603.
[98] RCC § 22E-1604.
[99] RCC § 22E-1301.
[100] RCC § 22E-1301.
[101] RCC § 22E-1301.
[102] RCC § 22E-1301.
[103] D.C. Code § 22-1831(3)(D).
[104] D.C. Code § 22-1831(3)(G).

form of deception.[105] Although deceiving another person for personal gain is wrongful and may be subject to criminal liability,[106] it is not equivalent to the coercive behavior listed in this definition when it is the sole form of wrongdoing.[107] This change improves the clarity and proportionality of the revised statute.

Second, the revised "coercive threat" definition includes threatening to "restrict a person's access to a controlled substance that the person owns," or to "prescription medication that the person owns." The current D.C. Code definition of "coercion" for human trafficking offenses refers to "*facilitating or controlling*" a person's access to "an addictive or controlled substance" or "restricting a person's access to prescription medication." There is no DCCA case law interpreting the meaning of these terms. In contrast, the revised definition of coercive threats is narrower in three respects. First, this form of coercive threat requires that the defendant *restricts* another person's access to a controlled substance or prescription medication. This form of coercive threat does not include facilitating or controlling a person's access to controlled substances.[108] Second, this form of coercive threat requires that the accused threaten to restrict a person's access to a controlled substance *that the person owns*, or to a prescription medication *that the person owns*. This form of coercive threat excludes a refusal to sell or provide a controlled substance or prescription medication that the other person does not already own. Third, this form of coercive threat does not include limiting a person's access to addictive but legal substances like alcohol and tobacco. Including threats to restrict access to any addictive substance as a form of coercive threat creates the possibility of criminalizing conduct that is comparatively less harmful than other forms of coercive threats included in the revised definition.[109] These changes improve the clarity and proportionality of the revised statute.

In addition, the revised coercive threat definition makes six changes that may constitute substantive changes to current District law in D.C. Code § 22-1831(3).

First, the revised "coercive threat" definition includes threatening to engage in "any criminal offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E" or any "harm that is sufficiently serious,

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[105] As a matter of practice, in most cases in which a reasonable person would believe that he or she was the property of another, that person may also be subject to threats of physical injury or other form of abuse that would satisfy other forms of coercive threat included in the revised definition.

[106] E.g., using deception to cause another person to provide labor is punishable under the RCC's revised fraud statute. RCC § 22E-2201.

[107] Deception may be a critical part of a human trafficking scheme involving other types of coercion that would trigger liability. For example, a person may deceive a person with the false promise of high wages to entice a person to begin providing labor, and then use threats of bodily harm to compel the person to continue providing labor.

[108] However, a person can satisfy this subsection by facilitating or controlling a person's access a controlled substance, when doing so constitutes an implicit threat that future access will be limited. For example, a person may behave coercively by giving heroin to a heroin addict if by doing so he or she implicitly threatens that access to heroin will be limited in the future.

[109] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably may constitute forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and is relatively easier to obtain. Restricting a person's access to alcohol is not as inherently coercive as restricting a person's access to a controlled substance, as it is relatively easy for a person to obtain alcohol by other means.

under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply." The current D.C. Code definition of "coercion" for human trafficking offenses includes "force, threats of force, physical restraint, or threats of physical restraint,"[110] conduct that generally would constitute the criminal offenses of assault or kidnapping. The current D.C. Code also references any scheme intended to cause a person to believe that someone would suffer "serious harm or physical restraint."[111] The current definition of "coercion" also includes "serious harm or threats of serious harm,"[112] and "serious harm" is defined, in relevant part, as "harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[113] It is unclear under the current D.C. Code whether threatening to commit other offenses against persons or property offenses would constitute "serious harm." There is no DCCA case law interpreting the meaning of these terms. However, the revised definition clarifies that threats to commit a criminal offense against persons or a property offense suffices to establish a coercive threat, while at the same time preserving an explicit catch-all provision for other sufficiently serious harms. These changes improve the clarity and consistency[114] of the revised statutes.

Second, the revised coercive threat definition does not specifically include "force," "physical restraint," or "serious harm." The revised coercive threat definition includes threatening that another person will "commit any criminal offense against persons as defined in subtitle II of Title 22E[.]" Although the use of force, physical restraint, and serious harm may constitute offenses against persons[115], the revised definition requires that the accused *threatens* that another person will commit a criminal offense against persons or to inflict serious harm. Committing an offense against persons without an implicit or explicit threat of further criminal activity would not constitute a coercive threat under the revised definition. However, in almost any case in which a person coerces a person by using force or physical restraint, there is at least an implicit threat to commit an additional crime against persons. This change clarifies and improves the consistency of the revised statute.

Third, the revised coercive threat definition specifically includes threatening to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status. The current D.C. Code coercion definition does not explicitly refer to threats to reveal a person's immigration or citizenship status. However, such conduct or threats may constitute "serious harm" as that term is used in the current human trafficking offenses,[116] or may constitute "[t]he abuse or threatened abuse of law or legal process" which is included in the current coercion definition.[117] There is no relevant case law interpreting what constitutes "serious harm." The revised

[110] D.C. Code § 22-1831(3)(A).
[111] D.C. Code § 22-1831(3)(E).
[112] D.C. Code § 22-1831(3)(B).
[113] D.C. Code § 22-1831(7).
[114] *See*, sex offenses RCC §§ 22E-1301 through 22E-1309; and extortion § 22E-2301.
[115] Force and physical restraint could constitute assault, kidnapping, or criminal restraint.
[116] D.C. Code § 22-1831(3)(B); D.C. Code § 22-1831(7).
[117] D.C. Code § 22-1831(3)(C).

definition clarifies that any threat to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status constitutes a coercive threat. This change clarifies and improves the consistency of the revised statute.

Fourth, the revised definition includes threatening to "expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate: Hatred, contempt, ridicule, or other significant injury to personal reputation; or significant injury to credit or business reputation." The current D.C. Code "coercion" definition does not explicitly refer threats to cause significant reputational harms. However, such threats may constitute "serious harm" as that term is used in the current human trafficking offenses.[118] There is no relevant case law interpreting what constitutes "serious harm." The revised definition clarifies that such severe reputational harms constitutes a coercive threat. This change clarifies and improves the consistency of the revised statute.

Fifth, the revised coercive threat definition does not specifically include "the abuse or threatened abuse of law or legal process." The current D.C. Code definition of "coercion" for human trafficking offenses includes "the abuse or threatened abuse of law or legal process."[119] There is no relevant case law, or legislative history that provides examples of what would constitute abuse of law or legal process. The RCC definition of coercive threat omits specific reference to the abuse of law or legal process, although such conduct may still constitute a coercive threat if it involves threats to accuse a person of a crime, threats to reveal a person's immigration or citizenship status, or other harm sufficiently serious to compel a reasonable person to comply. [120] This change improves the clarity of the revised offense.

Sixth, the revised coercive threat definition does not explicitly include making a "wrongful threat of economic injury." The current extortion statute[47] includes the phrase "wrongful threat of economic injury," but the phrase is not defined in the statute, and there is no relevant DCCA case law. The legislative history notes that this language was "not intended to cover the threat of labor strikes or other labor activities," or "consumer boycotts,"[121] but is intended to cover "a leader of an organization [who] threatens to strike or boycott in order to extort anything of value for his personal benefit, unrelated to the interest of the group he represents."[49] However, the RCC's definition of "coercive threats" does not specifically include a "wrongful threat of economic injury." While the revised coercive threat definition is not intended to include

[118] D.C. Code § 22-1831(3)(B); D.C. Code § 22-1831(7). Note that the current D.C. Code definition of "serious harm specifically includes certain sufficiently serious "reputational harm." D.C. Code § 22-1831(7).

[119] D.C. Code § 22-1831(3)(C).

[120] Whether threats to abuse law or legal process would satisfy the requirements of the catch-all provision would be determined on a case by case basis. It is possible that only certain abuses of law or legal process would be sufficiently harmful given the surrounding circumstances to constitute coercion. For example, a threat to file a suit in small claims court for very minor damages against a wealthy complainant may not necessarily be sufficiently harmful to satisfy the catch-all provision. Similarly, it is unclear whether threatening to file a civil noise complaint would be sufficiently coercive to satisfy the revised definition's catch-all provision.

[121] Judiciary Committee, Report on Bill No. 4-193, the D.C. Theft and White Collar Crime Act of 1982, at 69 (hereinafter, "Judiciary Committee Report").

threats of labor strikes or consumer boycotts, certain types of threats of economic injury may still satisfy the catch-all provision. However, because it is not clear exactly what constitutes a "wrongful threat of economic injury under current law," it is unclear whether the catch-all provision would necessarily cover all such threats. This change clarifies and improves the consistency of the revised statute.

The remaining changes to the revised coercive threat definition are clarificatory and are not intended to change current District law in D.C. Code § 22-1831(3).

First, the revised coercive threat definition does not specifically include "threats of force" or "threats of physical restraint." This change is not intended to change current law. The revised coercive threat definition includes threatening that another person will "commit any criminal offense against persons as defined in subtitle II of Title 22E[.]" Threats of force and threats of physical restraint involve threatening to engage in a criminal offense against persons.[122]

Second, the revised coercive threat definition does not specifically include "threats of serious harm." Omitting this language is not intended to change current District law. The revised coercive threat definition includes "any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." The language in this catch-all provision in the revised coercive threat definition is intended to include threats of all harms that constitute threats of "serious harm" under current law.[123]

Third, the revised coercive threat definition does not specifically include "any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or physical restraint[.]" Omitting this language is not intended to change current District law. The revised coercive threat definition includes threatening to commit a criminal offense against persons, or cause any harm sufficiently serious to compel a reasonable person to comply. An explicit or implicit threat may be established by a single act, or a scheme, plan, or pattern of behavior.[124]

As applied to the revised sexual assault offense in RCC § 22E-1301, the RCC definition of "coercive threats" may change current law. The current D.C. Code sexual abuse statutes do not use the term "coercion," but second degree and fourth degree sexual abuse broadly prohibit causing a complainant to engage in sexual activity "by threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury,

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[122] Force, threats of force, physical restraint, or threats of physical restraint could constitute assault, criminal threats, kidnapping, or criminal restraint.

[123] The DCCA has never issued an opinion interpreting the definition of "serious harm" under current law. However, federal courts interpreting analogous provisions in federal human trafficking statutes have approved jury instructions defining "serious harm" as "any consequences, whether physical or non-physical, that are sufficient under all of the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labor or services." *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) *cert. granted, judgment vacated on other grounds*, 545 U.S. 1101, 125 S. Ct. 2543, 162 L. Ed. 2d 271 (2005).

[124] For example, if a person routinely beats laborers, causing other laborers to fear that they will face similar beatings if they refuse to work, that person would satisfy the requirements of coercion even without an explicit threatening language.

or kidnapping)."[125] However, as discussed further in the commentary to the revised sexual assault statute (RCC § 22E-1301), second degree and fourth degree of the revised sexual assault statute prohibit causing a complainant to engage in sexual activity by a "coercive threat." The use of "coercive threat" in the revised sexual assault statute's second and fourth degrees is not limited to threats "other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping," and thereby is a lesser included offense of those specific kinds of threats which remain a basis of liability in first and third degree sexual assault. Otherwise, the RCC definition of "coercive threat" captures the breadth of the plain language of the current second degree and fourth degree sexual abuse statutes as well as limited DCCA case law interpreting these statutes.

"Commercial sex act" means any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.

Explanatory Note. The RCC definition of "commercial sex act" replaces the definition of "commercial sex act" in D.C. Code § 22-1831. The RCC definition of "commercial sex act" is copied verbatim from the definition in D.C. Code § 22-1831, except that it does not include violations of various Chapter 27 offenses.[126] The terms "sexual act" and "sexual contact" are defined in RCC § 22E-701. The RCC definition of "commercial sex act" is used in the revised forced commercial sex,[127] trafficking in commercial sex,[128] sex trafficking of minors,[129] and commercial sex with a trafficked person[130] offenses.

Relation to Current District Law. The revised definition of "commercial sex act" changes current District law in two main ways.

First, violations of offenses under Chapter 27 do not constitute commercial sex acts, unless they involve a sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.[131]

Second, the RCC definition of "commercial sex" act uses the terms "sexual act" and "sexual contact," which are also defined in RCC § 22E-701. The current definition of "commercial sex act" also uses the terms as they are defined in D.C. Code § 22-3001. To the extent that the RCC definitions of "sexual act" and "sexual contact" change current District law, the RCC definition of "commercial sex act" also changes current District law.

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[125] D.C. Code §§ 22-3003(1), 22-3005(1).
[126] "The term "commercial sex act" includes a violation of § 22-2701, § 22-2704, §§ 22-2705 to 22-2712, §§ 22-2713 to 22-2720, and § 22-2722." D.C. Code § 22-1831 (4).
[127] RCC § 22E-1602.
[128] RCC § 22E-1604
[129] RCC § 22E-1605.
[130] RCC § 22E-1608.
[131] For example, D.C. Code 22-2713 states that "[w]hoever shall erect, establish, continue, maintain, use, own, occupy, or release any building . . . for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance[.]" This conduct does not constitute a "commercial sex act" as defined in the RCC.

"Comparable offense" means a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime.

Explanatory Note. The RCC definition of "comparable offense" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "comparable offense" is used in the revised offense of stalking.[132]

Relation to Current District Law. The RCC definition of "comparable offense" is new and does not substantively change District law.

As applied in the revised stalking offense, the term "comparable offense" may substantively change District law. The current stalking statute defines a "course of conduct" and provides an extensive list of activities that already are separately criminalized in the D.C. Code, such as efforts to "threaten," "[i]nterfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so," and "[u]se another individual's personal identifying information."[133] Case law on the stalking statute has not addressed whether the listed conduct differs from their corresponding separate criminal offenses in the District or elsewhere. The revised statute refers to the term "comparable offense" to clarify that these separate crimes serve as a predicate for stalking, even if committed outside the District of Columbia. This change improves the clarity, consistency, and completeness of the revised offense.

"Community based organization" means an organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use. The term "community-based organization" includes all organizations currently participating in the Needle Exchange Program with the Department of Human Services under § 48-1103.01.

Explanatory Note. The term "community based organization" includes an array of organizations that provide various services to persons affected by drug use.

Relation to Current District Law. The definition is taken verbatim from D.C. Code §7-404 (a)(1), and is not intended to change current District law.

"Complainant" means person who is alleged to have been subjected to any criminal offense.

Explanatory Note. The term "complainant" is used in many RCC offenses to avoid both the confusion that may arise from multiple references to a "person" and the potential bias that may arise from other references to the alleged victim in a criminal case. Use of the term "complainant" is a drafting convention that is not intended to substantively affect any provision in the RCC.

The RCC definition of "complainant" is new, the term is not currently defined in Title 22 of the D.C. Code (although similar language is inconsistently[134] used in the

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[132] D.C. Code § 22E-1206.

[133] D.C. Code § 22-3132(8).

[134] Only three of the current sex offense statutes use the term "victim." The consent defense for first degree through fourth degree and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating

provisions in Chapter 30, Sexual Abuse, through the definition of "victim" in D.C. Code § 22-3001(11)).[135] The RCC definition of "complainant" replaces the current definition of "victim" in D.C. Code § 22-3001(11) and is used in the RCC definition of "protected person,"[136] as well as the revised offenses of assault,[137] offensive physical contact,[138] several sex offenses and related provisions in RCC Chapter 13,[139] criminal abuse of a minor,[140] criminal neglect of a minor,[141] criminal abuse of a vulnerable adult or elderly person,[142] criminal neglect of a vulnerable adult or elderly person,[143] and several obscenity offenses in RCC Chapter 18.[144]

Relation to Current District Law. The RCC definition of "complainant" is substantively identical to the definition of "victim"[145] provided in the current sex offense statutes under current law.

"Conduct element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "conduct element" is addressed in the Commentary accompanying RCC § 22E-201.

"Consent" means:

(A) A word or act that indicates, expressly or implicitly, agreement to particular conduct or a particular result; and

(B) Is not given by a person who:

(1) Is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof; or

(2) Because of youth, mental illness or disorder, or intoxication, is known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof.

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circumstances statute (D.C. Code § 22-3020). Instead of "victim," the other current sex offense statutes use terms like "another person" or "child," "ward," etc.

[135] D.C. Code § 22-3001(11) ("'Victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter.").

[136] RCC § 22E-701.

[137] RCC § 22E-1202.

[138] RCC § 22E-1205.

[139] Sexual assault (RCC § 22E-1301); Sexual abuse of a minor (RCC § 22E-1302); Sexual abuse by exploitation (RCC § 22E-1303); Sexually suggestive conduct with a minor (RCC § 22E-1304); Enticing a minor (RCC § 22E-1305); Arranging for sexual conduct with a minor (RCC § 22E-1306); Nonconsensual sexual conduct (RCC § 22E-1307); Admission of evidence in sexual assault and related cases (RCC § 22E-1311).

[140] RCC § 22E-1501.

[141] RCC § 22E-1502.

[142] RCC § 22E-1503.

[143] RCC § 22E-1505.

[144] Creating or trafficking an obscene image of a minor (RCC § 22E-1807); Possession of an obscene image of a minor (RCC § 22E-1808); Arranging for a live sexual performance of a minor (RCC § 22E-1809); Attending or viewing a live sexual performance of a minor (RCC § 22E-1810).

[145] D.C. Code § 22-3001(11).

Explanatory Note. The RCC defines "consent" to mean that a person has expressed (by word or act) an agreement to particular conduct or to a particular result and the person is generally competent to give such agreement. "Consent" generally means to agree to some act or to choose some act. The RCC relies on civil law principles of agency to determine when an individual is authorized to give "consent" on behalf of another person.[146]

Per subsection (A), typically, a word or words, such as saying, "Yes, I agree," or writing the same in an email, or an act or acts, such as nodding or gesturing positively will constitute consent. However, the word or act is not limited to a literal "yes," and includes other, indirect types of agreement, such as the use of well-recognized customs.[147] Inaction at a certain point in time may indicate agreement if there was a prior word or act that indicated ongoing agreement.[148] However, in the absence of any communication or prior communication establishing ongoing agreement, inaction necessarily means that no consent was given.[149] The word or act also must be to some particular conduct or to a particular result.[150] Typically, in the RCC's offenses against persons, the particular conduct is defined by the use of consent within an offense definition or within an affirmative defense.

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[146] Thus, an employee may sell her employer's merchandise by giving "consent" on behalf of the employer to a transaction. RCC § 22E-40X addresses whether and under what circumstances a person may consent, on behalf of another person, to conduct constituting an offense against person. Generally, it would be improper for one person to give consent to conduct on behalf of another where that conduct harms the person. However, there may be categorical exceptions to this general rule for offenses against persons. For example, it may be that a parent or guardian may consent to an elective medical procedure, ear piercing, or participation in a karate lesson on behalf of their child or ward.

[147] For example, raising one's fists or assuming a fighting stance may be commonly understood to indicate that the person has agreed to mutual combat, and handing a merchant currency or a method of payment is commonly understood to indicate that the person has agreed to the transaction.

[148] Determining whether inaction at a given is consenual based on a prior word or act is a context-sensitive factual inquiry that may require examination of the parties' relationship and prior experiences with one another, as well as the nature of the conduct that is the object of the alleged consent. For example, absent a prior act or word indicating ongoing consent, the inaction of a coworker to say or do anything would not constitute consent if, when taking one of several inexpensive pens from the worker's desk the coworker says "you don't mind if I borrow your pen?" However, if a coworker at one time asks if she can borrow a person's expensive pen and returns it, then five minutes later takes the pen again while the owner is absent or passively watches, the relevant question is whether the earlier consent to borrowing constituted an ongoing grant of permission.

[149] For example, imagine a case of assault where a person is walking down a street late at night, and the defendant sees the person and strikes him from behind. There would be no evidence in this case that the victim consented to mutual combat, because the victim gave no words or actions that indicated consent to the defendant's strikes. Or, imagine a case of theft where a person leaves his laptop out on a table at a café while he goes to use the restroom. A thief sees the person step away from the laptop, and promptly takes it. The taking would be completely without consent, because the owner gave no words or actions that indicated consent to the taking.

[150] For example, a person may agree to particular conduct (e.g. playing football) or a particular result (getting pushed to the ground). The distinction may be important in some cases where there is consent to one aspect but not the other. For instance, a complainant may give consent to sexual intercourse but not to anal penetration.

Notably, "consent" in subsection (A) can be conditioned or unconditioned.[151] This means that "consent" can be the product of completely free decision making (unconditioned),[152] or it can be the product of decision making driven by external pressures placed on the person giving consent (conditioned).[153] Conditioned "consent" may be present even when there is an extreme or normatively disturbing condition that induces a person's agreement, which makes the "consent" not freely given.[154] In the RCC, the degree to which "consent" may be subject to conditions is specified by the elements of particular offenses or by the requirement of "effective consent."[155]

Per subsection (B), consent must be not be given by a person who is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof or by a person who because of youth, mental illness or disorder, or intoxication, is

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[151] This characteristic of consent is important: often, the term "consent" used both casually and in the law can mean one of two things. It can mean "agreeing to something," and it can also mean, "agreeing to something with sufficient freedom and knowledge." Imagine, for example, a person who is tricked by a fraudster into giving over her life savings. It would be correct in one sense to say that she consented to giving the money, because she voluntarily handed over her fortune. On the other hand, it could also be correct to say that she did not consent to the transaction, because her consent was vitiated by the fraudster's deception.

Both descriptions are arguably correct: if one takes "consent" to mean "agreement," then the victim has consented because she has agreed. But if one takes "consent" to mean "agreement given pursuant to certain normative conditions, such as having sufficient knowledge about the nature of the transaction," then the victim has not given consent, because she did not have sufficient knowledge about the actual nature of the transaction. She had no idea, after all, that her money was getting put in a fraudulent scheme. Both descriptions of the hypothetical are equally valid depending on what the definition of "consent" in use.

Unfortunately, having dual, competing, and equally valid meanings for a single term is a recipe for confusion. How can one know which sense of "consent" is being used at a given time? It is impossible to say. Therefore, rather than persist in confusing these two distinct but useful concepts by employing a single word to describe them, the Revised Criminal Code distinguishes them. "Consent" is employed to refer to mere agreement, while "effective consent" is employed to refer to consent given under sufficient conditions of knowledge and freedom (i.e., consent free from problematic coercion and deception).

[152] E.g., if a person went to a store and said, "I am going to buy the largest television in this store, no matter the cost!" This is an expression of an unconditional preference - the person has stated that he or she will purchase the property no matter what.

[153] E.g., if a person went to a store and said, "I would like to buy the largest television in this store - but because the largest television is too expensive, I'll settle for this smaller one." The person here has an unconditional preference for the largest television, just as the person in the previous footnote does; but here, the person's budget is an external condition that has pressured the person to choose something other than his or her unconditional preference.

[154] E.g., a defendant walks into the victim's store and says, "You better pay me some protection money, or you might find you suffer an unfortunate accident!" The victim's preference in this situation may well be to pay the protection money, rather than risk being murdered or assaulted -- therefore, the victim hands the cash over to the extortionist. In this case, the victim has given consent to the transaction. Admittedly, the victim's unconditioned preference is likely that he have to provide the money at all. But faced with either giving the money or suffering a physical harm, the person may well consent to giving the money. This is not to say that the extortionist in this hypothetical will avoid liability, of course: under the RCC, the extortionist would have obtained the victim's consent by means of coercion.

[155] The RCC defines "effective consent" in RCC § 22E-701 as agreements that are obtained by means other than the use of a coercive threat, or deception. Thus, an agreement that is not freely or voluntarily given may constitute "consent," but it would not constitute "effective consent." The commentary to the RCC definition "effective consent" further discusses the definition and its role in the RCC.

known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof. What precise age, mental illness, intoxication, etc. is sufficient to undermine consent is a highly fact-dependent inquiry, and may vary according to the nature of the conduct at issue.[156]

"Consent" is statutorily defined in D.C. Code § 22-3001(4)[157] for sexual abuse offenses and related provisions in Chapter 30, Sexual Abuse, although the undefined term is used in other statutes[158] in Title 22. The RCC definition of "consent" replaces in relevant part[159] the definition of "consent" in in D.C. Code § 22-3001(4), applicable to provisions in Chapter 30, Sexual Abuse, and undefined references in other statutes revised in the RCC. The RCC definition of "consent" is used in the RCC definition of "effective consent"[160] and the many statutes which use that term,[161] defenses to various revised statutes,[162] as well as the revised offenses of theft,[163] fraud,[164] payment card fraud,[165] identity theft,[166] financial exploitation of a vulnerable adult,[167] and extortion.[168]

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[156] For example, with respect to an agreement to play a game of touch football, a thirteen year old may be both legally competent and able to make a reasoned judgment as to participation, while a three year old would be neither legally competent nor able to make a reasoned judgment about such conduct.

[157] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[158] *See, e.g.,* Voyeurism, D.C. Code § 22-3001(3) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…."); First degree and second degree unlawful publication, D.C. Code §§ 22-3053, 3054 ("It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another identified or identifiable person when . . . the person depicted did not consent to the disclosure or publication of the sexual image . . . ."); Exception to abuse and neglect of vulnerable adults provisions, D.C. Code § 22-935 ("'A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person.").

[159] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[160] RCC § 22E-701.

[161] RCC §§ 22E-1202 (assault); 22E-1203 (menace); 22E-1204 (criminal threats); 22E-1205 (offensive physical contact); 22E-1301 (sexual assault); 22E-1307 (nonconsensual sexual conduct); 22E-1401 (kidnapping); 22E-1402 (criminal restraint); 22E-1503 (abuse of a vulnerable adult or elderly person); 22E-1504 (neglect of a vulnerable adult or elderly person).

[162] [RCC § 22E-40X.]

[163] RCC § 22E-2101.

[164] RCC § 22E-2201.

[165] RCC § 22E-2202.

[166] RCC § 22E-2205.

[167] RCC § 22E-2208.

[168] RCC § 22E-2301.

Relation to Current District Law. The RCC breaks the current definition of "consent" in D.C. Code § 22-3001(4) and the general concept of consent into two terms. The RCC definition of "consent" refers to the bare fact of an agreement between parties obtained by any means, while the RCC definition of "effective consent" (see commentary entry below) refers to agreements that are obtained by means other than the use of physical force, a coercive threat, or deception.[169] While the RCC definition of "effective consent" may change current District law with respect to some aspects of "consent" per D.C. Code § 22-3001(4) and other current statutory provisions, the revised definition of "consent" does not substantively change these aspects of current District law.

The RCC definition of "consent" makes several clarificatory changes to the current definition of "consent" in D.C. Code § 22-3001(4), which applies only to sex offense provisions. First, the revised definition omits the word "overt" in the current definition as redundant. The plain meaning of the current and RCC definitions of "consent" is that there must be something that "indicates" that there is an "agreement," precluding any reliance on covert words or actions. Second, the RCC defines "consent" as a "word" or "act" instead of "words" or "actions." This revision clarifies that a single word or act may suffice for "consent." Third, the RCC specifies that the word or act may express agreement either expressly or implicitly. This revision clarifies that the word or act is not limited to a "yes" or a nod in response, but includes any other words or acts that indirectly indicate agreement. Fourth, the RCC defines consent to include consent to a "particular result" in addition to "particular conduct," whereas the current definition of "consent" for the sex offense statutes requires consent to "the sexual act or sexual contact in question," and it is unclear whether this includes the result, conduct, or both. Fifth, the RCC restrictions in subsection (B) codifies District sex offense case law indicating that at some age, a minor's age simply prohibits them from giving consent to certain actions. The DCCA, relying on various indications of legislative intent, has held that persons under 16 years of age categorically cannot consent to the use of force by an adult that is at least four years older in a sexual encounter.[170]

The RCC definition of "consent" also clarifies uses of the term in various offenses against persons in current Title 22 of the D.C. Code. Current District law does not

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[169] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[170] The DCCA has held that in a prosecution under the current general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a "consent" defense. In such a case, the child's consent is not valid." *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). "Child" is defined in D.C. Code § 22-3001 as "a person who has not yet attained the age of 16 years." D.C. Code § 22-3001(3). "Adult" is not statutorily defined in the current sex offenses, and the DCCA does not provide a definition in *Davis*. The DCCA further noted that the four-year age gap requirement in the current child sexual abuse statutes "appears [to] modify the traditional rule [that a child is legally incapable of consenting to sexual conduct with an adult] so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child." *Id.* at 1105 n.8.

codify a definition of "consent" for offenses against persons outside of Chapter 30 Sex Offenses, however the term has been used in case law concerning some offenses against persons. For example, two DCCA rulings state that, in certain circumstances, "consent" is a defense to the District's simple assault statute and is not a defense to the District's felony assault statute,[171] but the rulings do not define the precise meaning of "consent." Regarding a consent defense to the non-violent sexual touching form of simple assault, case law has said the consent may be "actual or apparent"[172] without discussing the difference between these terms.[173] The RCC definition of "consent" is consistent with and further clarifies existing the meaning of the term for offenses against persons.

The RCC definition of "consent" also clarifies references to the term in connection with various property offenses in current Title 22 of the D.C. Code. Current District law has not codified a definition of "consent" for property offenses, nor does case law discuss the term or concept at length in property offenses. However, there are similar terms and phrases in current property statutes and case law. On a few occasions, the DCCA has recognized the relevance of consent in proving many property offenses.[174] Consent is also an explicit element in several of the District's current property offenses, such as the current extortion offense[175] and unauthorized use of a motor vehicle offense.[176] Further, the current definition of "appropriate" in Chapter 30 of the D.C. Code makes use of "without authority or right," which is roughly in line with the RCC's definition of consent.[177] Additionally, DCCA case law has acknowledged that an agent's

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[171] *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) ("Generally where there is consent, there is no assault."); see also *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2014) (declining to determine "whether and when consent is an affirmative defense to charges of simple assault" while rejecting consent as a defense to assault in a street fight resulting in significant bodily injury [i.e., felony assault]).

[172] *Guarro*, 237 F.2d at 581.

[173] The language, however, suggests that "actual consent" refers to the internal, subjective wishes of the person giving consent, whereas the "apparent consent" refers to the *expressed* wishes or desires of the person giving consent. *See Guarro*, 237 F.2d at 581 ("In a case like the present, to *let the suspect think there is consent* in order to encourage an act which furnishes an excuse for an arrest will defeat a prosecution for assault.") (emphasis added). To the extent that "apparent consent" refers to expressed consent, the RCC definition is consistent with current District case law.

[174] *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly."). All of these cases distinguish "consent" from the conditions used to obtain consent ("ruse" in *McKinnon*, "trickery, fraud, or misrepresentation" in *Jeffcoat*, and "pretext" in *Kearney*). See also, *Fussell v. United States*, 505 A.2d 72, 73 (D.C. 1986).

[175] D.C. Code § 22-3251(a) ("A person commits the offense of extortion if: (1) That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or (2) That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right.").

[176] 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.").

[177] D.C. Code § 22-3201. *See* D.C. Crim. Jur. Instr. § 5.300. According to the Redbook, theft requires proof of "taking . . . property against the will or interest of" the owner. The Redbook Committee "included

consent is relevant to determining whether a defendant has been given consent by the actual owner of the property,[178] and some current offense definitions explicitly include agents.[179] The RCC definition of "consent" is consistent with and further clarifies existing the meaning of the term for property offenses.

The commentaries to relevant RCC provisions further discuss the effect of the RCC definition of "consent" on current District law.

"Correctional facility" means any building or building grounds located in the District of Columbia, operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense.

Explanatory Note. Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter. The word "secure" makes clear that a placement in an unsecured inpatient drug treatment program or independent living program is excluded. The definition does not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. The definition does not include buildings used by private businesses to detain suspected criminals, such as a booking room in a retail store.

The RCC definition of "correctional facility" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current escape from institution or officer[180] and unlawful possession of contraband[181] offenses). The term "building" that is used in the definition of "correctional facility" is defined elsewhere in RCC § 22E-701. The RCC definition of "correctional facility" is used in the revised escape from a correctional facility or officer[182] and correctional facility contraband[183] offenses.

Relation to Current District Law. The RCC definition of "correctional facility" is new and does not substantively change District law.

As applied in the revised escape from a correctional facility or officer offense, the term "correctional facility" may substantively change District law. D.C. Code § 22-2601 uses the phrase "penal or correctional institution or facility" but does not define it. Case law has held that the phrase includes the District's halfway houses.[184] In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. This change

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'against the will'" because "the [Judiciary] Committee report making clear that the concept of 'taking control' was supposed to cover common law larceny, which only could be committed by taking property against the will of the complainant." *Id*. Indeed, the Judiciary Committee report states that "the term 'wrongfully' [in theft] is used to indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property." Committee on the Judiciary, Extend Comments on Bill 4-133, the D.C. Theft and White Collar Crime Act of 1982, at 16-17.

[178] *Russell v. United States*, 65 A.3d 1172, 1174 (D.C. 2013).

[179] E.g., D.C. Code § 22-3302. Trespass requires that entry into land be "against the will of the lawful occupant or of the person lawfully in charge thereof." *Id*.

[180] D.C. Code § 22-2601.

[181] D.C. Code D.C. Code § 22-2603.01, et seq.

[182] RCC § 22E-3401.

[183] RCC § 22E-3403.

[184] *See Demus v. United States,* 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States,* 498 A.2d 1172, 1174 (D.C.1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).

applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

As applied in the revised correctional facility contraband offense, the term "correctional facility" may substantively change District law. D.C. Code § 22-2603.01 defines "penal institution" to mean "any penitentiary, prison, jail, or secure facility owned, operated, or under the control of the Department of Corrections, whether located within the District of Columbia or elsewhere." It defines "grounds" to mean "the area of land occupied by the penal institution or secure juvenile residential facility and its yard and outbuildings, with a clearly identified perimeter." In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. Each definition includes buildings (also defined in RCC § 22E-701) and building grounds. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Counterfeit mark" means any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement or any combination of these adopted or used by a person to identify such person's goods or services and which is lawfully filed for record in the Office of the Secretary of State of any state or which the exclusive right to reproduce is guaranteed under the laws of the United States or the District of Columbia, that is used without the permission of the owner of the trademark, service mark, trade name, label, term, picture, seal, word, or advertisement.

Explanatory Note. The term "counterfeit mark" defines specific types of marks, when used without the permission of the owner of the mark. Invalid marks, or marks used with the permission of the mark's owner are not included in the definition of "counterfeit mark."

Relation to Current District Law. The definition of "counterfeit mark" does not substantively change current District law. The term "counterfeit mark" replaces the current terms "counterfeit mark" and "intellectual property." The current definition of "counterfeit mark" includes "any *unauthorized* reproduction or copy of intellectual property" or "intellectual property affixed to any item knowingly sold, offered for sale, manufactured, or distributed, or identifying services offered or rendered *without the authority* of the owner of the intellectual property[.]"[185] In turn, "intellectual property" is defined as "any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement or any combination of these adopted or used by a person to identify such person's goods or services and which is lawfully filed for record in the Office of the Secretary of State of any state or which the exclusive right to reproduce is guaranteed under the laws of the United States or the District of Columbia."[186] The revised definition of "counterfeit mark" incorporates the current definition of "intellectual property," and requires that the mark be used "without the permission of the owner[.]" The term "without the permission" is intended to have the same meaning as "without authority" or "unauthorized." The revised definition of "counterfeit mark" is not intended to substantively change current District law.

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[185] D.C. Code § 22-901 (emphasis added).
[186] D.C. Code § 22-901.

"Culpable mental state" has the meaning specified in RCC § 22E-205.

Explanatory Note. The definition of "culpable mental state" is addressed in the Commentary accompanying RCC § 22E-205.

"Culpability requirement" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "culpability requirement" is addressed in the Commentary accompanying RCC § 22E-201.

"Custody" means full submission after an arrest or substantial physical restraint after an arrest.

Explanatory Note. Custody may include, for example, being detained by an officer on the street, being securely confined to a holding cell, and being securely transported to a court appearance or medical facility. Custody is not established merely because officers tell a suspect he is under arrest or seize him for investigative purposes.[187] There must be a completed arrest.[188] A defendant is in custody when he is physically restrained by an officer pursuant to a lawful arrest or when he fully[189] submits to a lawful arrest.[190]

The RCC definition of "custody" is new; the term is not currently defined in Title 22 of the D.C. Code (although an undefined reference to "custody" appears in the escape from institution or officer offense[191]). The RCC definition of "custody" is used in the revised escape from a correctional facility or officer[192] offense.

Relation to Current District Law. The RCC definition of "custody" is new and does not substantively change District law.

As applied in the revised Escape from a Correctional Facility or Officer offense, the term "custody" does not substantively change District law. Case law has interpreted the term to require physical restraint.[193] The revised code adds a definition of "custody" that incorporates this current District case law. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Dangerous weapon" means:

(A) A firearm;

(B) A restricted explosive;

(C) A knife with a blade longer than 3 inches, sword, razor, stiletto, dagger, or dirk; or

(D) A blackjack, billy club, slungshot, sand club, sandbag; or false knuckles;

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[187] *Davis v. United States*, 166 A.3d 944, 947 (D.C. 2017).

[188] *Id*. (reversing an escape conviction where police told the defendant he was arrested and touched his arm and the defendant lunged free and began running).

[189] *Mack v. United States*, 772 A.2d 813, 817 (D.C. 2001) (reversing an escape conviction where police ordered the defendant to kneel and grabbed him by his jacket and the defendant kneeled, sprang up, removed his jacket, threw punches, and ran away).

[190] *Id*.

[191] D.C. Code § 22-3401.

[192] RCC § 22E-3401.

[193] *Mack v. United States*, 772 A.2d 813, 817 (D.C. 2001).

(E) A stun gun; or

(F) Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person.

Explanatory Note. The RCC defines "dangerous weapon" to include enumerated weapons and any object that in the manner of its actual, attempted, or threatened use is likely[194] to cause death or serious bodily injury. The enumeration of items in the definition of "dangerous weapon" does not mean that the simple possession of these items is criminal. In fact, possession of some enumerated items is constitutionally protected in certain circumstances. Besides firearms, stun guns are arms protected for use in self-defense under the Second Amendment to the United States Constitution[195] and knives may also be afforded protection.[196]

The phrase "[a]ny object" is to be interpreted broadly, including, for example, not only solid objects[197] but fluids and gases. Stationary fixtures such as floors, curbs, and sinks are not dangerous weapons, regardless of how they are used.[198] Body parts such as teeth, nails, hands, and feet are not dangerous weapons, regardless of how they are used. However, objects used by a person's hands or feet (e.g., steel-toed boots) or expelled from the body (e.g., bodily fluids) potentially may be dangerous weapons. Whether an object or substance "in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury" is a question of fact, not a question of law.

The RCC definition of "dangerous weapon" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "dangerous weapon" are in the possession of dangerous weapons offense[199] and the unlawful possession of contraband offense,[200] and an apparently non-exhaustive list of "dangerous or deadly" weapons is in the penalty enhancement provision for committing crime while armed[201]). The terms "false knuckles," "firearm," "restricted explosive," "serious bodily injury," and "stun gun" that are used in the definition of "dangerous weapon" are defined elsewhere in RCC § 22E-701. The RCC definition of "dangerous weapon" is used in the revised definitions of "Class A contraband" and "imitation dangerous weapon" as well as the

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[194] *See Johnson v. United States*, 17-CM-1117, 2019 WL 2041278, at *4 (D.C. May 9, 2019) (explaining that while the *actual* injury inflicted by the object in question is an important factor in establishing its dangerousness (and in some cases the determining factor), the absence of such injury does not necessarily indicate that the object was not dangerous because legal standard is whether such injury is *likely* to occur) (citing *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004); *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005)).

[195] *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016).

[196] *See Wooden v. United States*, 6 A.3d 833, 839–40 (D.C. 2010).

[197] E.g., candlestick, lead pipe, wrench, rope.

[198] *Edwards v. United States*, 583 A.2d 661 (D.C. 1990).

[199] D.C. Code § 22-4514 makes it unlawful to possess with intent to use unlawfully against another "an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon." However, the phrase "other dangerous weapon" is not defined.

[200] D.C. Code § 22-2603.01(2)(A)(iii).

[201] D.C. Code § 22-4502 provides a heightened penalty where a person commits a crime of violence or dangerous crime 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, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)." However, the statute does not specify that the list provided is exhaustive.

revised offenses of robbery,[202] assault,[203] menacing,[204] sexual assault,[205] sexual abuse of a minor,[206] kidnapping,[207] criminal restraint,[208] correctional facility contraband,[209] carrying a dangerous weapon,[210] possession of a dangerous weapon with intent to commit crime,[211] and possession of a dangerous weapon during a crime,[212] as well as the revised civil provisions for taking and destruction of dangerous articles.[213]

Relation to Current District Law. The RCC definition of "dangerous weapon" is new and does not substantively change an existing statute.

As applied in the revised offenses of robbery, assault, menacing, sexual assault, kidnapping, criminal restraint, possession of a prohibited weapon or accessory, carrying a dangerous weapon, possession of a dangerous weapon with intent to commit crime, and possession of a dangerous weapon during a crime, the term "dangerous weapon" is generally consistent with, but in several ways changes or may change, current District law.

First, subsections (A) - (E) of the revised definition specify a complete list of items which constitute inherently "dangerous weapons." Together, subsections (A) - (E) include nearly all the objects specifically listed in the District's current possession of a prohibited weapon offense[214] and while armed penalty enhancement.[215] However, there are various differences between the items listed in these current statutes and the RCC statute. For the RCC offenses against persons subtitle, an "imitation dangerous weapon" is a separately defined term in RCC § 22E-701 that is incorporated into various specific offenses,[216] but is not a *per se* dangerous weapon.[217] District case law has recognized that many of the objects listed in the possession of a prohibited weapon offense and while armed penalty enhancement are inherently dangerous.[218] However, District case law has

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[202] RCC § 22E-1201.
[203] RCC § 22E-1202.
[204] RCC § 22E-1203.
[205] RCC § 22E-1301.
[206] RCC § 22E-1302.
[207] RCC § 22E-1401.
[208] RCC § 22E-1402.
[209] RCC § 22E-3403.
[210] RCC § 22E-4102.
[211] RCC § 22E-4103.
[212] RCC § 22E-4104.
[213] RCC § 22E-4117.
[214] D.C. Code § 22-4514.
[215] D.C. Code § 22-4502(a).
[216] *See, e.g.*, RCC §§ 22E-1201 (robbery); 22E-1203 (menacing); 22E-1301 (sexual assault); 22E-1401 (kidnapping).
[217] The commentaries for relevant RCC offenses against persons discuss further, below, how excluding imitation firearms affects current District law. Besides the current while-armed penalty enhancement statute, DCCA case law currently establishes that an imitation pistol may be sufficient for ADW liability. *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975).
[218] *See Dade v. United States*, 663 A.2d 547, 553 (D.C. 1995) ("The only grammatical way to construe this statute [D.C. Code § 22-4502(a)] is to read it, first, as including all pistols and other firearms (or imitations thereof) within the category of dangerous or deadly weapons, and second, as identifying a dozen other objects as dangerous or deadly weapons, in addition to pistols and other firearms. Thus any pistol or other firearm is, by statutory definition, a dangerous or deadly weapon, and the jury need not find specifically that a particular pistol is a dangerous or deadly weapon in order to find the defendant guilty of an armed

been unclear as to what other weapons may be *per se* dangerous weapons besides those listed in the statutes, and at times has appeared to say that inherently dangerous weapons, even those included in the statutes, are actually dangerous only in certain circumstances and ordinarily the matter of weather a weapon is dangerous is a question of fact.[219] Under the RCC "dangerous weapon" definition, only the items listed in subsections (A) - (E) are considered inherently or *per se* dangerous weapons, based on their design rather than the manner of their use.[220] Providing a single, complete list of items that are inherently dangerous clarifies District law.

Second, the RCC definition in subsection (F) provides a functional definition of ways any item may be deemed a dangerous weapon. Any "object or substance, other than a body part" can be a "dangerous weapon" if "the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury." The DCCA has said that, to determine whether an item is a dangerous weapon, "the manner [in which an item] is used, intended to be used, or threatened to be used"[221] should be considered. However, there is also District case law which suggests that "intended use" may be the same as "attempted use."[222] Subsection (F) of the RCC definition of "dangerous weapon" codifies actual use, threatened use, and "attempted use" (instead of "intended use"). Under the RCC definition, a mere "intended use" of an item as a dangerous weapon (separate from an actual, threatened, or attempted use) still may be sufficient to make that item a dangerous weapon, but only if such an intended use of the weapon is sufficient to

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offense."); *Jones v. United States*, 67 A.3d 547, 550–51 (D.C. 2013) ("We have acknowledged that § 22–4515(b) includes a "non-exhaustive list of weapons readily classifiable as dangerous *per se*." (citing *In re D.T.*, 977 A.2d 346, 349, 353 (D.C.2009)).

[219] *See Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) ("Some weapons, under appropriate circumstances, are so clearly dangerous that it is prudent for the court to declare them to be such, as a matter of law. Included in this class are rifles, pistols, swords, and daggers, when used in the manner that they were designed to be used and within striking distance of the victim. Whether an object or material which is not specifically designed as a dangerous weapon is a "dangerous weapon" under an aggravated assault statute, however, is ordinarily a question of fact to be determined by all the circumstances surrounding the assault. See generally 2 C. Torcia, Wharton's Criminal Law § 200 (14th ed. 1979). The trier of fact must consider whether the object or material is known to be "likely to produce death or great bodily injury" in the manner it is used, intended to be used, or threatened to be used. The jurors' knowledge of the dangerous character of the weapon used generally can be based on "familiar and common experience." [citation omitted].)"

[220] The design of an object may be an important fact in determining whether the object is a "dangerous weapon" per subsection (I), but it is not determinative.

[221] *See, e.g.*, *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (emphasis in original omitted) (internal quotations omitted). Although *Williamson* is an ADW case, several cases use the same standard to determine whether an object is a "dangerous weapon" under the "while armed" enhancement in D.C. Code § 22-4502. its standard for determining whether an object is a "dangerous weapon" is used in "while armed" enhancement cases under D.C. Code § 22-4502. *See, e.g.*, *Arthur v. United States*, 602 A.2d 174, 177-78 (D.C. 1992) (discussing *Williamson v. United States*, 445 A.2d 975 (D.C. 1982) and other District precedent for determining whether an object is a "dangerous weapon" in an assault with intent to kill while armed case charged under the "while armed" enhancement in D.C. Code § 22-4502).

[222] *McGill v. United States*, 270 F.2d 329, 331 (D.C. Cir. 1959) ("A pistol [used as a club] is undoubtedly a dangerous weapon; and the fact that the attempt to pistol-whip the complaining witness did not result in physical injury does not make the action any less an assault with a dangerous weapon.").

satisfy the requirements of a criminal attempt.[223] Notably, current District practice with respect to charges of assault with a dangerous weapon does not appear to distinctly recognize as dangerous weapons either objects that are "intended to be used" or are involved in an "attempted" use to cause serious bodily injury or death.[224] Creating a functional test as to whether an item is a dangerous weapon based on its actual, attempted, or threatened use clarifies District law with respect to attempts, and may provide a more objective basis for determining liability as compared to a general inquiry, per current law, as to the defendant's intent for the item.

Third, under the RCC definition of "dangerous weapon" in subsection (F) the object or substance must be "likely" to cause death or serious bodily injury. The DCCA has discussed whether an object or substance is a "dangerous weapon" both in terms of whether it is "capable" of producing death or serious bodily injury, as well as "likely" to produce death or serious bodily injury, without discussion.[225] The RCC definition adopts a "likely" standard as is consistent with current District practice[226] and long-established case law.[227] This change clarifies District law.

Fourth, the RCC definition of dangerous weapon in subsection (F) refers to the revised definition for "serious bodily injury." Current DCCA case law has discussed whether an object or substance is a "dangerous weapon" both in terms of causing death or "great bodily injury,"[228] and death or "serious bodily injury."[229] The DCCA has explicitly stated that in this context the terms "great" and "serious" are interchangeable.[230] Using "serious bodily injury" does not appear to constitute a change in District law, except to the extent the RCC definition of "serious bodily injury" differs from the current definition.[231] Referencing "serious bodily injury" in the RCC definition

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[223] *See* RCC § 22E-301. For example, if a person carries an iron spike in their pocket with intent to use that object as a weapon to cause serious bodily injury to an enemy, that person may be guilty of an attempted assault with a dangerous weapon if the person satisfies the requirements for attempt liability, including the requisite intent as to the result (i.e. causing serious bodily injury by means of the spike) and being "dangerously close" to completing the offense.

[224] *See,* D.C. Crim. Jur. Instr. § 4-101. ("An object is a dangerous weapon if it designed to be used, actually used, or threatened to be used, in a manner likely to produce death or serious bodily injury.").

[225] *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) ("A deadly or dangerous weapon is an object 'which is *likely* to produce death or great bodily injury by the use made of it.' Thus, an instrument capable of producing death or serious bodily injury by its manner of use qualifies as a dangerous weapon whether it is used to effect an attack or is handled with reckless disregard for the safety of others.") (internal citations omitted)).

[226] D.C. Crim. Jur. Instr. §§ 4.101 (jury instruction for ADW); 8.101 (jury instruction for "while armed" enhancement under D.C. Code § 22-4502).

[227] *See, e.g.*, *Tatum v. United States*, 110 F.2d 555, 556 (D.C. Cir. 1940) ("A dangerous weapon is one likely to produce death or great bodily injury.")

[228] *See, e.g.*, *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982).

[229] *Arthur v. United States*, 602 A.2d 174, 177 (D.C. 1992) ("Similarly, "an instrument capable of producing death or serious bodily injury *by its manner of use* qualifies as a dangerous weapon, whether it is used to effect an attack or is handled with reckless disregard for the safety of others.").

[230] *In re D.T.*, 977 A.2d 346, 356 (D.C. 2009) ("This court has interpreted the term "great bodily injury" to be equivalent to the term "serious bodily injury…") (citing *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004).

[231] *See* Commentary to "serious bodily injury."

of "dangerous weapon" improves the consistency of language and definitions across offenses.

Fifth, the RCC definition of a dangerous weapon does not include items that a complaining witness incorrectly perceives as a dangerous weapon, changing current District law.[232] Imitation dangerous weapons are now separately defined in RCC § 22E-701 and do not constitute *per se* dangerous weapons. Liability for use of such apparently dangerous objects is provided in specified RCC offenses, such as the revised menacing offense.[233] Excluding these objects from the scope of "dangerous weapon" does not change District case law holding that circumstantial evidence may be sufficient to establish an object or substance is a dangerous weapon.[234] These changes clarify and improve the proportionality of the definition of a dangerous weapon, basing the definition on objective criteria and increasing penalties based on the actual increased risk of harm.

Sixth, the RCC definition of a "dangerous weapon" in subsection (F) precludes a body part from being deemed a dangerous weapon. A panel of the DCCA has specifically upheld a conviction for assault of a police officer using a deadly or dangerous weapon based on the defendant's use of his teeth to bite an officer's leg.[235] Dicta in the case indicated that any other body part could similarly be a deadly or dangerous weapon depending on its usage,[236] although there does not appear to be an appellate ruling to date in the District on whether other body parts may be considered dangerous weapons. The DCCA ruling that some uses of a person's body parts—without an external item—may constitute use of a dangerous weapon creates uncertainty as to what types of physical contacts should and should not be subject to enhanced liability. The RCC definition, by contrast, clarifies that a person's body parts, including teeth, nails, feet, hands, etc., categorically cannot constitute a dangerous weapon.[237] This change clarifies the law by providing a bright-line distinction as to what may be a dangerous weapon, penalizing more severely a defendant's use of external objects to inflict damage.

The revised definition of a "dangerous weapon" does not change other DCCA case law as to whether certain objects—be they cars,[238] flip flops[239] or stationary

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[232] D.C. Code § 22-4502(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 (or imitation thereof)…"). *See, also Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."); *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) ("[P]resent ability of the weapon to inflict great bodily injury is not required to prove an assault with a dangerous weapon. Only apparent ability through the eyes of the victim is required.").

[233] RCC § 22E-1203.

[234] *See, e.g.*, *In re M.M.S.*, 691 A.2d 136, 138 (D.C. 1997) ("Finally, without direct evidence, the government may prove the existence of a weapon by adequate circumstantial evidence.").

[235] *In re D.T.*, 977 A.2d 346 (D.C. 2009).

[236] *In re D.T.*, 977 A.2d 346, 352 (D.C. 2009) ("We no more implied that bare feet were not dangerous weapons in our shod foot cases by highlighting the presence of the shoe, than we intimated that a cold clothes iron could not be a dangerous weapon when we held that a "hot" one was.").

[237] However, as noted above, bodily fluids are not considered a body part and may constitute a "dangerous weapon" under the RCC definition. For example, a defendant who recklessly exposes another person to infectious bodily fluids that results in harm to that person may be liable for assault by means of a dangerous weapon—his or her own bodily fluid.

[238] *See, e.g.*, *Frye v. United States*, 926 A.2d 1085, 1097 (D.C. 2005) ("The complainant's testimony concerning the manner in which appellant used his vehicle, trying to run her off the road and force her into

bathroom fixtures[240]—constitute dangerous weapons under the facts in those cases. Inoperable and unloaded firearms also remain dangerous weapons under subsection (A) of the RCC definition.

Seventh, the revised definition of dangerous weapon includes any object that is actually likely to cause death likely to cause death or serious bodily injury. The DCCA has explained that when an object is not dangerous *per se,* the trier of fact must consider whether that object is "known" to be likely to produce death or "great" bodily injury in the manner it is used or threatened to be used. *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) (quoting *Arthur v. United States,* 602 A.2d 174, 177 (D.C.1992) (citing *Williamson v. United States,* 445 A.2d 975, 979 (D.C.1982); *Harper v. United States,* 811 A.2d 808, 810 (D.C. 2002))). In contrast, the revised definition uses an objective analysis of likelihood and a standardized definition of the term "serious bodily injury" used across the RCC. This change improves the clarity and consistency of the revised code.

"Debt bondage" means the status or condition of a person who provides labor, services, or commercial sex acts, for a real or alleged debt, where:

(A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt;

(B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or

(C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.

***Explanatory Note*.** The term "debt bondage" is defined as the status or condition of a person who provides labor, services, or commercial sex acts for real or alleged debt under one of three specified circumstances where such a transaction is unfair.

"Debt bondage" is currently defined in D.C. Code § 22-1831(5) for human trafficking statutes. The RCC definition of "debt bondage" replaces the current definition of "debt bondage" in D.C. Code § 22-1831 and is used the revised versions of the forced

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oncoming traffic, over a substantial stretch of roadway was sufficient to permit the jury to find reasonably that appellant used his vehicle as a dangerous weapon in committing an assault against [the complaining witness]."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (finding the evidence sufficient for ADW and the "while armed" enhancement because the "evidence adduced at trial permitted the jury to conclude beyond a reasonable doubt that the Cadillac, driven at the speeds and in the manner that appellant employed, was likely to produce death or serious bodily injury because of the wanton and reckless manner of its use in disregard of the lives and safety of others.").

[239] *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) ("Even viewing the evidence in a light most favorable to the government, we hold as a matter of law that the flip flop was not a prohibited weapon under § 22-4514(b) [possession of a dangerous weapon]."

[240] *Edwards v. United States*, 583 A.2d 661, 662 (D.C. 1990) ("We hold that the evidence was insufficient to support the jury's finding that Edwards inflicted his wife's injuries while armed, within the meaning of Section 22-3202, when his alleged weapon consisted of one or more fixed or stationary plumbing fixtures against which he hurled his hapless wife.").

labor or services statute[241]; the forced commercial sex statutes[242]; the trafficking in labor or services statute[243]; and the trafficking in commercial sex statutes.[244]

Relation to Current District Law. The RCC's definition of "debt bondage" is identical to the definition under current law and is not intended to substantively change District law.

"Deceive" and "deception" mean:

(A) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions;

(B) Preventing another person from acquiring material information;

(C) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or

(D) For offenses against property in Subtitle III of this Title, failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record.

(E) The terms "deceive" and "deception" do not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.

Explanatory Note. This definition enumerates means by which a person can deceive another. Although other conduct may be deemed deceptive in the ordinary use of the word, for purposes of the RCC, "deceive" and "deception" only include the means listed in this definition.

Subsection (A) defines "deception" to include creating or reinforcing a false impression. It is not necessary that the defendant create the false impression. Even if another person has a pre-conceived false impression, a person can deceive by merely reinforcing that false impression. "Deception" requires a false impression, but not necessarily false statements. A person can "deceive" by making statements that are factually true to create or reinforce a false impression. Creating or reinforcing a false impression does not require any oral or written communications. Acts and gestures that create or reinforce false impressions can also constitute deception under this definition.

Subsection (A) also requires that the creation or reinforcement of a false impression be about a material fact, a fact that a reasonable person would deem relevant

[241] RCC § 22E-1601.
[242] RCC § 22E-1602.
[243] RCC § 22E-1603.
[244] RCC § 22E-1604.

under the circumstances. A material fact can include a false impression as to law[245] or the value of the property.

Subsection (A) also defines "deception" to include creating or reinforcing false impressions as to an intention to perform future actions. However, mere failure to perform the promised future action does not constitute deception. The person must have had the requisite mental state as to whether he would not perform at the time he or she made the promise.[246]

Subsection (B) defines "deception" to include preventing a person from acquiring material information.[247]

Subsection (C) includes two exceptions to the general rule that there is no duty to correct a false impression. Ordinarily, a person has no duty to correct another's pre-existing false impression, and is free to take advantage of that false impression.[248] However, if a person had previously created or reinforced a false impression, even if innocently, that person can "deceive" by later failing to correct that false impression. Subsection (C) also states that a person can "deceive" if he or she has a fiduciary or other confidential relationship with another person, and fails to correct a false impression held by that person.

Subsection (D) defines "deception" to include failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not the impediment is a matter of official record. This is a specialized form of deception that only arises in the context of real estate transactions.

Subsection (E) provides one limitation to the definition of "deception," and an evidentiary rule regarding false intentions to perform a future act. First, "deception" excludes puffery that is unlikely to deceive ordinary persons. Such statements that exaggerate or heighten the attractiveness of a product or service do not go so far as to constitute deception. When representations go beyond mere exaggeration to actually create or reinforce an explicit false impression, however, then an actor may cross the line into criminal deception. In many cases, this exception is unnecessary as puffery ordinarily does not, and is not intended to, actually create or reinforce a false impression. However, advertising may include puffing statements that will create a false impression in at least some listeners. In this context, there is no "deception" if the puffery is unlikely to deceive ordinary persons. With non-puffing statements however, there is no requirement that the deception be likely to fool an ordinary person.

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[245] For example, a person can deceive another by creating a false impression that a car for sale is street-legal, when in fact it is not.

[246] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]").

[247] For example, if a person selling a car that had been seriously damaged in an accident hides or destroys records of the accident to prevent a buyer from learning that information, he may have deceived the other person, even if he did not actually create or reinforce the false impression that the car had never been in an accident.

[248] For example, if a person is selling a ring that he believes is made of fool's gold, but a buyer realizes that the ring is made of real gold, the buyer has no obligation to correct the seller's false impression.

Notably, the "deception" definition does not itself require any culpable mental state. If a person creates a false impression, it is not required that he or she knew that the impression was false. However, specific statutes in the RCC that use the "deception" definition may specify a mental state for that particular offense. For example, if an offense requires a culpable mental state of "knowingly", and the deception is premised on creating or reinforcing a false impression, then the defendant must have been practically certain that the impression was false. If another offense requires a culpable mental state of "recklessly," and the deception is premised on creating or reinforcing a false impression, then the defendant must only have been consciously aware of a substantial and unjustifiable risk that the impression was actually false.

The RCC definition of "deceive" and "deception" is new; the terms are not statutorily defined in Title 22 of the D.C. Code (although the undefined terms are used in other statutes[249] in Title 22. The RCC definitions of "deceive" and "deception" are used in the revised definition of "effective consent,"[250] as well as the revised offenses of fraud,[251] forgery,[252] identity theft,[253] and nonconsensual sexual conduct.[254]

Relation to Current District Law. The RCC "deception" definition is new and does not itself change current District law, but may result in changes of law as applied to particular offenses (including through the definition of "effective consent").

As applied to the current D.C. Code fraud and theft offenses which specifically criminalize taking property of another by means of creating a false impression,[255] there is no substantive change to District law. The D.C. Court of Appeals (DCCA) has not explicitly held whether fraud or theft include obtaining property by reinforcing a false impression, preventing another from obtaining information, failing to correct a false impression that the defendant first created or when a person has a fiduciary or confidential relationship with another[256], or failing to disclose a lien or other adverse claim to property. However, the "deception" definition appears consistent with current theft and fraud law in several respects. First, the DCCA has held that both fraud and theft criminalize taking property of another by means of "false representation."[257] Second, the

[249] E.g., Financial exploitation of a vulnerable adult or elderly person (D.C. Code § 22-933.01); Definitions for Chapter 18A (D.C. Code § 22-1831).
[250] RCC § 22E-701.
[251] RCC § 22E-2201.
[252] RCC § 22E-2204.
[253] RCC § 22E-2205.
[254] RCC § 22E-1307.
[255] The current theft statute states that the offense "includes conduct previously known as . . . larceny by trick, larceny by trust . . . and false pretenses." D.C. Code § 22-3211. The current fraud statute criminalizes "engag[ing] in a scheme ort systematic course of conduct with intent to defraud or to obtain property of another by means of false or fraudulent pretense, representation, or promise[.]" D.C. Code 22-3221.
[256] Some federal courts however, have held that "[mail fraud statutes] are violated by affirmative misrepresentations or by omissions of material information that the defendant has a duty to disclose." *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000).
[257] *United States v. Blackledge*, 447 A.2d 46 (D.C. 1982) ("To convict a defendant for the crime of false pretenses, the government must prove that the defendant made a false representation"); *see also Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011) ("To convict for fraud, the jury had to conclude that the appellant engaged in 'a scheme or systematic course of conduct' composed of at least two acts calculated to

current fraud statute explicitly includes using a false promise to obtain property of another.[258] Third, the U.S. Supreme Court has held that the federal mail fraud statute, which served as a model for the District's current fraud statute,[259] "require[es] a misrepresentation or concealment of *material* fact."[260] Although the DCCA has never squarely held that fraud or theft requires a false impression as to a material fact, the Redbook Jury Instructions for fraud state that a "false representation or promise is any statement that concerns a material or important fact or a material or important aspect of the matter in question."[261]

"Demonstration" means marching, congregating, standing, sitting, lying down, parading, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief.

Explanatory Note. The RCC definition of "demonstration" is substantively identical[262] to the definition of "demonstration" in D.C. Code § 22-1307(b)(2). The RCC definition of "demonstration" is used in the revised offense of unlawful demonstration.[263]

Relation to Current District Law. The RCC definition of "demonstration" is identical to the definition of "demonstration" in D.C. Code § 22-1307(b)(2) and does not substantively change current District law.

"Deprive" means:

(A) Withhold property or cause it to be withheld from an owner permanently, or for so extended a period or under such circumstances that a substantial portion of its value or its benefit is lost to the owner; or

(B) Dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

Explanatory Note. The RCC definition includes "owner," itself a defined term in RCC § 22E-701 that means a person holding an interest in property that the actor is not privileged to interfere with.

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deceive, cheat, or falsely obtain property."); *See also* D.C. Crim. Jur. Instr. § 5-300 (stating that "deception" is any act or communication made by [the defendant] she s/he knows to be false[.]").

[258] D.C. Code § 22-3221.

[259] Commentary to the District of Columbia Theft and White Collar Crime Act of 1982 at 40 ("The language 'obtain property of another by means of false or fraudulent pretense, representation, or promise' is basically derived from the federal mail fraud statute.").

[260] *Neder v. United States*, 527 U.S. 1, 22 (1999) (emphasis original). See also, Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1 (1998); LAFAVE, WAYNE. 3 SUBST. CRIM. L. § 19.7.

[261] D.C. Crim. Jur. Instr. § 5-200.

[262] The sole difference between the RCC definition and the current definition of "demonstration" in D.C. Code § 22-1307(b)(2) is that the former deletes the circular reference to "demonstrating" in the latter. Currently, D.C. Code § 22-1307(b)(2) states: "Demonstration" means marching, congregating, standing, sitting, lying down, parading, *demonstrating*, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief." (emphasis added).

[263] RCC § 22E-4204.

The RCC definition of "deprive" replaces the current statutory definition of "deprive" in D.C. Code § 22-3201(2),[264] applicable to provisions in Chapter 32 of title 22.[265] The RCC definition of "deprive" is used in the revised offenses of robbery,[266] theft,[267] fraud,[268] financial exploitation of a vulnerable adult,[269] possession of stolen property,[270] and extortion.[271]

Relation to Current District Law. The revised definition of "deprive" makes one clear change to the statutory definition of "deprive" in in D.C. Code § 22-3201(2), applicable to certain property offenses.[272] Subsection (A) of the current definition of "deprive" requires, in part, that the property be withheld "for so extended a period or under such circumstances as to acquire a substantial portion of its value." It is unclear whether this language includes a situation where the actor does not actually gain any value or benefit from the property, but causes an owner to lose value or benefit. In contrast, subsection (A) of the revised definition of "deprive" replaces "as to acquire a substantial portion of its value" in the current definition with "that a substantial portion of its value or its benefit is lost to the owner." The revised definition clearly includes situations where the actor does not actually gain any value or benefit, but causes an owner to lose it. In the rare situation where an actor gains a substantial portion of the value or benefit of the property without causing an owner to lose it a substantial portion of its value or benefit,[273] the revised definition of "deprive" is not satisfied and the conduct would be covered by unauthorized use of property in RCC § 22E-2102.

The remaining changes to the statutory definition of "deprive" in in D.C. Code § 22-3201(2)[274] are clarificatory and not intended to change District law. The revised definition of "deprive" replaces two references to "a person" with "an owner," a defined term in 22E-701 meaning a person holding an interest in property with which the accused is not privileged to interfere without consent. Subsection (b) of the current definition of "deprive" uses the term "owner,"[275] but it is not a statutorily defined term in the current D.C. Code. Replacing the two references to "a person" with "an owner" clarifies the revised definition.

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[264] D.C. Code 22-3201(2) ("'Deprive' means: (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.").
[265] *See* D.C. Code Title 22, Chapter 32. Theft; Fraud; Stolen Property; Forgery; and Extortion.
[266] RCC § 22E-1201.
[267] RCC § 22E-2101.
[268] RCC § 22E-2201.
[269] RCC § 22E-2208.
[270] RCC § 22E-2401.
[271] RCC § 22E-2503.
[272] *See* D.C. Code Title 22, Chapter 32. Theft; Fraud; Stolen Property; Forgery; and Extortion.
[273] For example, in theft of intellectual property there may be situations that do not result in a substantial loss to the owner. Such unlawful uses of another's property would remain criminalized under unauthorized use of property in 22E-2102.
[274] D.C. Code 22-3201(2) ("'Deprive' means: (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.").
[275] D.C. Code 22-3201(2).

"Detection device" means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology.

Explanatory Note. The RCC defines "detection device" to mean any wearable equipment with electronic monitoring capability, global positioning system ("GPS"), or radio frequency identification ("RFID") technology. A detection device is any technology installed on a person's body or clothing that is capable of monitoring the person's whereabouts. It includes mechanisms such as bracelets, anklets, tags, and microchips. It explicitly includes the GPS that is currently used by the Pretrial Services Agency, Court Services and Offender Supervision Agency, and Court Social Services. It also explicitly includes the RFID technology that is currently used by the Department of Corrections.[276] It is also intended to capture other wearable equipment that may be developed in the future.

The word "wearable" modifies "electronic monitoring," "global positioning system," and "radio frequency identification technology." Accordingly, the definition does not include surveillance devices that are not worn, such as video cameras, infrared cameras, and international mobile subscriber identity-catchers (which intercept cellular phone traffic). The term refers to the physical device itself and does not include the records or reports that it generates.

The RCC definition of "detection device" replaces the current definition of "device" in D.C. Code § 22-1211(a)(2),[277] applicable to the offense tampering with a detection device. The RCC definition of "detection device" is used in the revised offense of tampering with a detection device.[278]

Relation to Current District Law. The RCC definition of "detection device" may change the current definition of "device" in D.C. Code § 22-1211(a)(2) in one main way. Current law defines the term "device" to "includes a bracelet, anklet, or other equipment with electronic monitoring capability or global positioning system or radio frequency identification technology." Case law has not addressed the term's meaning. The revised code completely defines the meaning of the term instead of providing a partial definition as to what is included, and specifies that a detection device means any "wearable" monitoring equipment. This change improves the clarity of the revised offense.

"District official" has the same meaning as "public official" in D.C. Code § 1-1161.01(47)(A) – (H).

Explanatory Note. The RCC definition of "District official" is new, the term is not currently defined in Title 22 of the D.C. Code (although the current protection of District public officials statute defines "official or employee" in D.C. Code § 22-851[279]).

[276] *See* Report on Bill 18-963, the "Criminal Code Amendment Act of 2010," Committee on Public Safety and the Judiciary (December 6, 2010) at Page 3.

[277] D.C. Code § 22-1211(a)(2) ("For the purposes of this subsection, the term "device" includes a bracelet, anklet, or other equipment with electronic monitoring capability or global positioning system or radio frequency identification technology.").

[278] RCC § 22E-3402.

[279] D.C. Code § 22-851(a)(2) ("'Official or employee' means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.").

The RCC definition of "District official" replaces the current definition of "official or employee" in D.C. Code § 22-851, applicable to the current protection of District public officials statute. The RCC definition of "District official" is used in the RCC definition of a "protected person,"[280] and in the revised offenses of murder,[281] manslaughter,[282] assault,[283] offensive physical contact,[284] aggravated kidnapping,[285] and aggravated criminal restraint.[286]

Relation to Current District Law. The RCC definition of "District official" makes one clear change to the statutory definition of "official or employee" in D.C. Code § 22-851.[287] The current definition of "employee or official" is "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions."[288] In contrast, the revised definition, by incorporating the definition of "public official" in D.C. Code § 1-1161.01(47)(A) – (H)[289] is limited to District officials and employees that have special obligations in District government.[290] The RCC definition of "District official" improves the proportionality of the revised offenses against persons.

As applied to several RCC offenses against persons, the RCC definition of "District official" substantively changes current District law. For example, the RCC assault statute (RCC § 22E-1202) incorporates enhanced penalties for assaults committed against a "District official" while in the course of official duties (through the RCC definition of "protected person"), as well as for assaults committed "with the purpose of harming" a "District official" due to his or her status as a "District official." The District's current assault and related statutes do not have any such enhanced penalties, although such assaultive conduct is prohibited under D.C. Code § 22-851.[291] In contrast,

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[280] RCC § 22E-701.
[281] RCC § 22E-1101.
[282] RCC § 22E-1102.
[283] RCC § 22E-1202.
[284] RCC § 22E-1205.
[285] RCC § 22E-1401.
[286] RCC § 22E-1403.
[287] D.C. Code § 22-851(a)(2).
[288] D.C. Code § 22-851(a)(2).
[289] D.C. Code § 1-1161.01(47) (47)(A) – (H) ("'Public official' means: (A) A candidate; (B) The Mayor, Chairman, and each member of the Council of the District of Columbia holding office under Chapter 2 of this title; (C) The Attorney General; (D) A Representative or Senator elected pursuant to § 1-123; (E) An Advisory Neighborhood Commissioner; (F) A member of the State Board of Education; (G) A person serving as a subordinate agency head in a position designated as within the Executive Service; (G-i) Members of the Washington Metropolitan Area Transit Authority Board of Directors appointed appointed by the Council pursuant to § 9-1107.01(5)(a); (G-ii) A Member or Alternate Member of the Washington Metrorail Safety Commission appointed by the District of Columbia pursuant to Article III.B. of the Metrorail Safety Commission Interstate Compact enacted pursuant to D.C. Law 21-250; (H) A member of a board or commission listed in § 1-523.01(e).").
[290] For example, many of the individuals in the definition of "public official" are required to file annual public financial disclosures, D.C. Code § 1-1162.24, and all public officials are subject to possible censure for certain ethical violations. D.C. Code § 1-1162.22(a).
[291] D.C. Code § 22-851(c) ("A person who . . . injures any official or employee . . . while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3

the RCC assault statute incorporates enhanced penalties for assaults against a "District official" directly into the gradations of the offense, part of the general repeal of D.C. Code § 22-851. The revised definition of "District official," limited to District officials and employees that have special obligations in District government,[292] improves the consistency and proportionality of the revised offense.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "District official" on current District law.

"Domestic partner" has the same meaning as provided in D.C. Code § 32-701(3).

Explanatory Note. The RCC definition of "domestic partner" replaces the current definition of "domestic partner" in D.C. Code § 22-3001(4A),[293] applicable to the applicable to the provisions in Chapter 30, Sexual Abuse. The RCC definition of "domestic partner" is used in is used in the RCC definition of "position of trust with or authority over"[294] and the revised admission of evidence in sexual assault and related cases provision.[295]

Relation to Current District Law. The RCC definition of "domestic partner" is identical to the statutory definition in current law.[296]

"Domestic partnership" has the same meaning as provided in D.C. Code § 32-701(4).

Explanatory Note. The RCC definition of "domestic partnership" replaces the current definition of "domestic partnership" in D.C. Code § 22-3001(4B),[297] applicable to the provisions in Chapter 30, Sexual Abuse. The RCC definition of "domestic partnership" is used in is used in the RCC definition of "position of trust with or authority over"[298] as well as in the revised sexual abuse of a minor statute,[299] the revised sexual

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years, or both, in addition to any other penalties authorized by law."); D.C. Code § 22-851(a)(2) ("'Official or employee' means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.").

[292] For example, many of the individuals in the definition of "public official" are required to file annual public financial disclosures, D.C. Code § 1-1162.24, and all public officials are subject to possible censure for certain ethical violations. D.C. Code § 1-1162.22(a).

[293] D.C. Code § 22-3001(4A) ("'Domestic partner' shall have the same meaning as provided in § 32-701(3)."). The current definition of "domestic partner" in D.C. Code § 32-701(3) is: "'Domestic partner' means a person with whom an individual maintains a committed relationship as defined in paragraph (1) of this section and who has registered under § 32-702(a) or whose relationship is recognized under § 32-702(i). Each partner shall: (A) Be at least 18 years old and competent to contract; (B) Be the sole domestic partner of the other person; and (C) Not be married."

[294] RCC § 22E-701.

[295] RCC § 22E-1311.

[296] D.C. Code § 22-3001(4A).

[297] D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4)."). D.C. Code § 32-701(4) defines "domestic partnership" as: "the relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i)."

[298] RCC § 22E-701.

[299] RCC § 22E-1302.

abuse by exploitation statute,[300] the revised sexually suggestive contact with a minor statute,[301] the revised enticing a minor statute,[302] and several obscenity offenses in RCC Chapter 18.[303]

Relation to Current District Law. The RCC definition of "domestic partner" is identical to the statutory definition in current law.[304]

"Dwelling" means a structure that is either designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each individual unit is a dwelling.

Explanatory Note. The word "structure" is notably broader than the term "building," which is also defined in RCC § 22E-701. A structure need not be affixed to land and includes vehicles and tents, if used as housing.

The RCC definition of "dwelling" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "dwelling" are in several current property offenses[305]). The RCC definition of "dwelling" is used in the revised definition of "position of trust with or authority over,"[306] as well as the revised offenses of arson,[307] reckless burning,[308] trespass,[309] and burglary.[310]

Relation to Current District Law. The RCC definition of "dwelling" is new and does not substantively change District law.

As applied in the revised burglary statute, the term "dwelling" clarifies, but does not substantively change, District law. The current burglary statute does not define the term. Case law has not directly addressed its meaning, but has interpreted the phrase "dwelling, or room used as a sleeping apartment."[311] The revised code adds a definition of "dwelling" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Effective consent" means consent other than consent induced by physical force, an express or implied coercive threat, or deception.

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300 RCC § 22E-1303.
301 RCC § 223-1304.
302 RCC § 22E-1305.
303 Creating or trafficking an obscene image of a minor (RCC § 22E-1807); Possession of an obscene image of a minor (RCC § 22E-1808); Arranging for a live sexual performance of a minor (RCC § 22E-1809); Attending or viewing a live sexual performance of a minor (RCC § 22E-1810).
304 D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4)."). D.C. Code § 32-701(4) defines "domestic partnership" as: "the relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i).").
305 *E.g.*, trespass (D.C. Code § 22-3302), burglary (D.C. Code § 22-801).
306 RCC § 22E-701.
307 RCC § 22E-2501.
308 RCC § 22E-2502.
309 RCC § 22E-2601.
310 RCC § 22E-2701.
311 *See Newman v. United States*, 705 A.2d 246, 264 (D.C. 1997) (finding a reasonable jury could have concluded that an apartment was a sleeping apartment, not merely a base for prostitution).

Explanatory Note. The RCC definition of "effective consent" is new, the term is not currently defined in Title 22 of the D.C. Code (although the closely-related term "consent" is currently codified in D.C. Code § 22-3001(4),[312] applicable to provisions in Chapter 30, Sexual Abuse, and the undefined term is used in numerous other Title 22 statutes[313]). The RCC definition of "effective consent" replaces, in relevant part,[314] the current definition of "consent" in D.C. Code § 22-3001(4) and is used in several defense statutes in the RCC,[315] as well as the revised offenses of unauthorized use of property,[316] unauthorized use of a motor vehicle,[317] unlawful creation or possession of a recording,[318] unlawful operation of a recording device in a motion picture theater,[319] criminal damage to property,[320] criminal graffiti,[321] sexual assault,[322] nonconsensual sexual conduct,[323] the admission of evidence in sexual assult and related cases provision,[324] criminal abuse of a vulnerable adult or elderly person,[325] criminal neglect of a vulnerable adult or elderly person,[326] and several obscenity offenses in RCC Chapter 18.[327]

Relation to Current District law. The RCC breaks the current D.C. Code definition of "consent" in D.C. Code § 22-3001(4), applicable to sex offense provisions,

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[312] D.C. Code § 22-3001 ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[313] *See, e.g.,* Voyeurism, D.C. Code § 22-3001(3) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…."); First degree and second degree unlawful publication, D.C. Code §§ 22-3053, 3054 ("It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another identified or identifiable person when . . . the person depicted did not consent to the disclosure or publication of the sexual image . . . .").

[314] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[315] [RCC § 22E-40X.]

[316] RCC § 22E-2102.

[317] RCC § 22E-2103.

[318] RCC § 22E-2105.

[319] RCC § 22E-2106.

[320] RCC § 22E-2503.

[321] RCC § 22E-2504.

[322] RCC § 22E-1301.

[323] RCC § 22E-1309.

[324] Sexual assault (RCC § 22E-1301); Sexual abuse of a minor (RCC § 22E-1302); Sexual abuse by exploitation (RCC § 22E-1303); Sexually suggestive conduct with a minor (RCC § 22E-1304); Enticing a minor (RCC § 22E-1305); Arranging for sexual conduct with a minor (RCC § 22E-1306); Nonconsensual sexual conduct (RCC § 22E-1307); Admission of evidence in sexual assault and related cases (RCC § 22E-1311); Incest (RCC § 22E-1312).

[325] RCC § 22E-1503.

[326] RCC § 22E-1504.

[327] Creating or trafficking an obscene image of a minor (RCC § 22E-1807); Possession of an obscene image of a minor (RCC § 22E-1808); Arranging for a live sexual performance of a minor (RCC § 22E-1809); Attending or viewing a live sexual performance of a minor (RCC § 22E-1810).

and the general concept of consent into two terms. The RCC definition of "consent" (see commentary entry above) refers to the bare fact of an agreement between parties obtained by any means, while the RCC definition of "effective consent" refers to agreements that are obtained by means other than the use of physical force, an express or implied coercive threat, or deception.[328] While the RCC definition of "consent" does not substantively change current District law with respect to D.C. Code § 22-3001(4) and does not substantively change District law referencing the term in connection with other statutory provisions, the RCC definition of "effective consent" may substantively change these aspects of current District law.

The RCC definition of "effective consent" makes one possible substantive change to the current definition of "coercion" in D.C. Code § 22-3001(4), applicable to sex offense provisions. The current definition of "consent" in D.C. Code § 22-3001(4) for the sex offense statutes requires that the agreement between the actor and the complainant to engage in sexual conduct be "freely given." The meaning of "freely given" is ambiguous as to whether it includes agreements based on deception, and DCCA case law does not address the matter. The RCC definition of "effective consent" resolves this ambiguity by stating that an agreement caused by deception is *not* "effective consent." "Deception" is a defined term in RCC § 22E-701 that explicitly excludes minor "puffery."[329] To the extent that a person agrees to conduct based on a deception, it is questionable whether there is an "agreement," let alone one that is "freely given" under current District law. This change clarifies and improves the consistency of the revised statutes.

The RCC definition of "effective consent" also clarifies the current definition of "consent" in D.C. Code § 22-3001(4), which applies to sex offense provisions in Chapter 30. The current statute, besides saying that consent must be "freely given," states separately that: "Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent."[330] However, the RCC definition of "effective consent" eliminates this second sentence as unnecessary and potentially confusing. The sentence in the current statute appears to provide a specific example of when a "freely given agreement" is not reached—namely, when there is a "lack of verbal or physical resistance or submission by the victim resulting from the use of force, threats, or coercion…." The RCC definition of "effective consent" generally excludes consent obtained by physical force, an express or implied coercive threat, and deception, and communicates the same point in a more

[328] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[329] In addition, the RCC nonconsensual sexual conduct offense (RCC § 22E-1307) limits liability for engaging in a sexual act or sexual contact by deception to instances where the actor used deception as to the nature of the sexual act or sexual contact. Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to: the object or body part that is used to penetrate the other person; a person's current use of birth control (e.g. use of a condom or IUD); and a person's health status (e.g. having a sexually transmitted disease). See commentary to RCC § 22E-1307 for further discussion.

[330] D.C. Code § 22-3001(4).

general way that is applicable to all offenses in the RCC. This change clarifies the revised statute.

The RCC definition of "effective consent" also clarifies references to the term "consent" in various offenses against persons in Title 22 of the current D.C. Code. Current District law has not codified a definition of "consent" for offenses against persons outside of Chapter 30 Sex Offenses, however the term has been used in case law concerning some offenses against persons. For example, two DCCA rulings state that, in certain circumstances, "consent" is a defense to the District's simple assault statute and is not a defense to the District's felony assault statute.[331] Although the rulings do not define the precise meaning of "consent," there was a recognition in one case that forms of forced consent are clearly not intended to be a defense to assaultive conduct.[332] Regarding a consent defense to the non-violent sexual touching form of simple assault, case law has said the consent may be "actual or apparent"[333] without discussing the difference between these terms.[334] The RCC definition of "effective consent" is consistent with and further clarifies existing the meaning of the term "consent" for offenses against persons.

The RCC definition of "effective consent" also clarifies references to the term "consent" in current Title 22 property offenses. Current District law has not codified a definition of either "effective consent" or "consent" for property offenses, nor does case law discuss these terms or concepts at length in property offenses. However, there are similar terms and phrases in current property statutes and case law. On a few occasions, the DCCA has recognized the relevance of consent in proving many property offenses.[335] Consent is also an explicit element in several of the District's current property offenses, such as the current extortion offense[336] and unauthorized use of a motor vehicle

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[331] *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) ("Generally where there is consent, there is no assault."); see also *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2014) (declining to determine "whether and when consent is an affirmative defense to charges of simple assault" while rejecting consent as a defense to assault in a street fight resulting in significant bodily injury [i.e., felony assault]).

[332] *Woods v. United States*, 65 A.3d 667, 672 (D.C. 2014) ("Taken to its logical conclusion, appellant's argument that consent should be a defense to assault where there is significant bodily injury would render non-prosecutable acts that are an affront to the public peace and order, such as a loan shark lending money on the condition that non-payment authorizes a beating or gang members who agree to settle old scores by a shootout.").

[333] *Guarro*, 237 F.2d at 581.

[334] The language, however, suggests that "actual consent" refers to the internal, subjective wishes of the person giving consent, whereas the "apparent consent" refers to the *expressed* wishes or desires of the person giving consent. *See Guarro*, 237 F.2d at 581 ("In a case like the present, to *let the suspect think there is consent* in order to encourage an act which furnishes an excuse for an arrest will defeat a prosecution for assault.") (emphasis added). To the extent that "apparent consent" refers to expressed consent, the RCC definition is consistent with current District case law.

[335] *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly."). All of these cases distinguish "consent" from the conditions used to obtain consent ("ruse" in *McKinnon*, "trickery, fraud, or misrepresentation" in *Jeffcoat*, and "pretext" in *Kearney*). See also, *Fussell v. United States*, 505 A.2d 72, 73 (D.C. 1986).

[336] D.C. Code § 22-3251(a) ("A person commits the offense of extortion if: (1) That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of

offense.[337] Further, the current definition of "appropriate" in Chapter 30 of the D.C. Code makes use of "without authority or right,"[338] which is roughly in line with the RCC's definition of consent. Additionally, DCCA case law has acknowledged that an agent's consent is relevant to determining whether a defendant has been given consent by the actual owner of the property,[339] and some current offense definitions explicitly include agents.[340] The RCC definition of "effective consent" is consistent with and further clarifies existing the meaning of the term for property offenses.

The commentaries to relevant RCC provisions further discuss the effect of the RCC definition of "effective consent" on current District law.

"Elderly person" means a person who is 65 years of age or older.

Explanatory Note. The RCC definition of "elderly person" replaces the current definition of "elderly person" in D.C. Code § 22-932(3),[341] applicable to provisions in Chapter 9A, Criminal Abuse and Neglect of Vulnerable Adults. The RCC definition of "elderly person" is used in the revised offenses of criminal abuse of a vulnerable adult or elderly person[342] and criminal neglect of a vulnerable adult or elderly person.[343]

Relation to Current District Law. The RCC definition of "elderly person" is identical to the statutory definition under current law.[344]

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actual or threatened force or violence or by wrongful threat of economic injury; or (2) That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right.").

[337] 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.").

[338] D.C. Code § 22-3201. *See* D.C. Crim. Jur. Instr. § 5.300. According to the Redbook, theft requires proof of "taking . . . property against the will or interest of" the owner. The Redbook Committee "included 'against the will'" because "the [Judiciary] Committee report making clear that the concept of 'taking control' was supposed to cover common law larceny, which only could be committed by taking property against the will of the complainant." *Id*. Indeed, the Judiciary Committee report states that "the term 'wrongfully' [in theft] is used to indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property." Committee on the Judiciary, Extend Comments on Bill 4-133, the D.C. Theft and White Collar Crime Act of 1982, at 16-17.

[339] *Russell v. United States*, 65 A.3d 1172, 1174 (D.C. 2013).

[340] E.g., D.C. Code § 22-3302. Trespass requires that entry into land be "against the will of the lawful occupant or of the person lawfully in charge thereof." *Id*.

[341] D.C. Code § 22-932(3) ("'Elderly person' means a person who is 65 years of age or older."). The current penalty enhancement for certain crimes committed against senior citizens does not define the term "senior citizen" or "elderly person," but also requires that the victim be "65 years of age or older." D.C. Code § 22-3601(a). The current enhancement for certain crimes committed against senior citizens does not apply to the current abuse of a vulnerable adult or elderly person statute (D.C. Code § 22-933) or neglect of a vulnerable adult or elderly person statute (D.C. Code § 22-934).

[342] RCC § 22E-1503.

[343] RCC § 22E-1504.

[344] D.C. Code § 22-932(3) ("'Elderly person' means a person who is 65 years of age or older."). The current penalty enhancement for certain crimes committed against senior citizens does not define the term "senior citizen" or "elderly person," but also requires that the victim be "65 years of age or older." D.C. Code § 22-3601(a). The current enhancement for certain crimes committed against senior citizens does not apply to the current abuse of a vulnerable adult or elderly person statute (D.C. Code § 22-933) or neglect of a vulnerable adult or elderly person statute (D.C. Code § 22-934).

"Factual cause" has the meaning specified in RCC § 22E-204.

Explanatory Note. The definition of "factual cause" is addressed in the Commentary accompanying RCC § 22E-204.

"Fair market value" means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied.

Explanatory Note. In the RCC, "fair market value" is defined as the price "which a purchaser who is willing, but not obligated to buy, would pay an owner who is willing, but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied."

The RCC definition of "fair market value" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "fair market value" is used in the RCC definition of "value."[345]

Relation to Current District Law. The RCC definition of "fair market value" is may substantively change current District law in one way.

The RCC definition of "fair market value" is taken from *Nichols v. United States*,[346] a malicious destruction of property case. It is also the definition that the jury instructions use for "value."[347] However, he DCCA has recognized at least two other definitions of fair market value in the context of other property offenses.[348] These definitions of "fair market value" differ from the *Nichols* definition by not specifically requiring that the buyer and seller be willing, but not obligated, or that all reasonable uses of the property be considered. There is no DCCA case law that discusses whether the variations between the definitions of fair market value are substantive. Given the ambiguity of the case law, adopting the more expansive *Nichols* definition of "fair market value" could be viewed as a substantive change in law.

"False knuckles" means an object, whether made of metal, wood, plastic, or other similarly durable material that is constructed of one piece, the outside part of which is designed to fit over and cover the fingers on a hand and the inside part of which is designed to be gripped by the fist.

Explanatory Note. The RCC definition of "false knuckles" replaces the current definition of "knuckles" in D.C. Code § 22-4501, applicable to provisions in Chapter 45,

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[345] RCC § 22E-701.

[346] 343 A.2d 336, 341 (D.C. 1975) (stating that the "normal definition" of "fair market value" is the price which a purchaser who is willing but not obliged to buy would pay an owner who is willing but not obliged to sell, considering all the uses to which the property is adapted and might reasonably be applied.").

[347] D.C. Crim. Jur. Instr. § 3.105 & cmt. at 3-12.

[348] In the context of receiving stolen property, the DCCA has stated that "property value is its market value at the time and place stolen, if there is a market for it. *Long v. United States*, 156 A.3d 698, 714 (D.C. 2017) (quoting *Hebron v. United States*, 837 A.2d 910, 913 n.3 (quoting Lafave, Criminal Law, § 8.4(b) (3d ed. 2000)), and has also applied the definition typically used in theft cases, *Curtis v. United States*, 611 A.2d 51, 52 and n.1. (D.C. 1992) (discussing the "fair market value" and citing to a theft case, *Williams v. United States*, 376 A.2d 442 (D.C. 1977)). The definition typically used in theft cases is the "price at which a willing seller and a willing buyer will trade." *Williams v. United States*, 376 A.2d 442, 444 (D.C. 1977); *see also Foreman v. United States*, 988 A.2d 505, 507 (D.C. 2010).

Weapons and Possession of Weapons. The RCC definition of "false knuckles" is used in the revised definition of "dangerous weapon" and in the revised offense of possession of a prohibited weapon or accessory.[349]

Relation to Current District Law. The RCC definition of "false knuckles" is identical to the statutory definition of "knuckles" under current law.[350] The word "false" clarifies that the term does not include a body part.

"Financial injury" means the reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act, including:

- **(A) The costs of clearing a name, debt, credit rating, credit history, criminal record, or any other official record;**
- **(B) The costs of repairing or replacing any property that was taken or damaged;**
- **(C) Medical bills;**
- **(D) Relocation costs;**
- **(E) Lost wages or compensation; and**
- **(F) Attorneys' fees.**

Explanatory Note. The RCC defines "financial injury" to include all financial losses sustained as a result of a crime. The list of examples provided in the definition is not exhaustive. The loss may be incurred by any natural person, including the victim of a crime, a person who is financially responsible for the victim, and a person other than the victim who is threatened by the criminal conduct.[351] However, the loss may not be incurred by an agency or organization.[352] The factfinder must determine that the expenditures were reasonably necessitated by the criminal conduct.[353]

The costs of clearing a record include the litigation costs necessitated by a civil or administrative proceeding. The costs of repairing or replacing property should be calculated based on the cost actually reasonably incurred and not limited by market value at the time of the loss. Medical bills include health expenses paid by a natural person but exclude expenses paid by an insurance company. Relocation costs may include penalties for breaking a lease. Lost wages or compensation includes salaries, other earnings, and benefits. Attorneys' fees must reasonably result from the criminal act and must be reasonable in amount.

The RCC definition of "financial injury" replaces the current definition of "financial injury" in D.C. Code §§ 22-3132(5) and 22-3227.01(1). The term "act" that is

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[349] RCC § 22E-4101.

[350] D.C. Code § 22-4501.

[351] Consider, for example, a criminal offense in which an actor stalks a victim by repeatedly threatening to injure the victim's sibling, causing the sibling to relocate to a hidden residence. Although the sibling is not a victim of stalking conduct *per se*, the costs of relocation may qualify as a financial injury resulting from the stalking.

[352] For example, the costs incurred by a police department or court system are excluded from the calculation of a financial injury.

[353] Consider, for example, a person who relocates to an expensive, high-security apartment to avoid a stalker. The jury will first have to decide whether it was reasonable to relocate under the circumstances. Then the jury will have to decide which expenses incurred as a result of the move were reasonably necessary, e.g., the moving truck, the rent increase, the cost of furnishing the new apartment.

used in the definition of "financial injury" is defined elsewhere in RCC § 22E-701. The RCC definition of "financial injury" is used in the revised offenses of stalking,[354] identity theft,[355] and financial exploitation of a vulnerable adult.[356]

Relation to Current District Law. The RCC definition of "financial injury" makes two substantive changes to the current definition of "financial injury" in D.C. Code §§ 22-3132(5) and 22-3227.01(1).

First, the revised definition includes costs incurred by any natural person. Current D.C. Code § 22-3132(5) limits the calculation of financial injury to expenses incurred by the victim, a member of the victim's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the victim. In contrast, the revised definition includes costs incurred by anyone, so long as they are reasonably related to the criminal act. This change applies consistent, clearly articulated definitions, improves the clarity of the revised offenses, and fills an unnecessary gap in liability.

Second, the revised definition explicitly requires that the costs be "reasonably incurred" as a result of the criminal act. The current statutes do not specify that the calculation of financial injury must be objectively reasonable. In contrast, the revised statute explicitly requires a rational and justifiable nexus between the criminal act and the resulting expenditures. This change applies consistent, clearly articulated definitions and improves the clarity and proportionality of the revised offenses.

"Firearm" has the meaning specified in D.C. Code § 7-2501.01, except that in Chapter 41 of Title 22 the term "firearm":

(A) Shall not include a firearm frame or receiver;

(B) Shall not include a firearm muffler or silencer; and

(C) Shall include operable antique pistols.

Explanatory Note. The RCC definition of "firearm" replaces the current definition of "firearm" in D.C. Code § 22-4501 and the exceptions provision in D.C. Code § 22-4513. The RCC definition of "firearm" is used in the revised definitions of "dangerous weapon" and "imitation firearm" and in the revised offenses of possession of a prohibited weapon, or accessory,[357] carrying a dangerous weapon,[358] possession of a dangerous weapon with intent to commit crime,[359] possession of a dangerous weapon during a crime,[360] possession of a firearm by an unauthorized person,[361] negligent discharge of firearm,[362] alteration of a firearm identification mark,[363] possession of an unregistered firearm, destructive device, or ammunition,[364] carrying a pistol in an

[354] RCC § 22E-1206.
[355] RCC § 22E-2205.
[356] RCC § 22E-2208.
[357] RCC § 22E-4101.
[358] RCC § 22E-4102.
[359] RCC § 22E-4103.
[360] RCC § 22E-4104.
[361] RCC § 22E-4105.
[362] RCC § 22E-4106.
[363] RCC § 22E-4107.
[364] RCC § 7-2502.01.

unlawful manner,[365] unlawful storage of a firearm,[366] unlawful sale of a pistol,[367] unlawful transfer of a firearm,[368] sale of firearm without a license,[369] and use of false information for purchase or licensure of a firearm,[370] as well as the revised civil provisions for lawful transportation of a firearm or ammunition,[371] and the revised civil provisions for licenses of firearms dealers[372] and exclusions from liability for weapon offenses.[373]

Relation to Current District Law. The RCC definition of "firearm" is identical to the statutory definition of "firearm" under current D.C. Code Title 22 Chapter 45,[374] except that it does not include frames, receivers, mufflers, or silencers. The RCC instead separately criminalizes silencers as a firearm accessory in the revised possession of a prohibited weapon or accessory offense.[375]

As applied in the revised possession of a dangerous weapon during a crime offense, the revised definition may change current law in one way. The revised definition categorically excludes toy and antique pistols unsuitable for use as firearms. Current D.C. Code § 22-4513 excludes toys and antiques for all sections in Chapter 45 of Title 22 except possession of a firearm during a crime of violence or dangerous crime,[376] possession of a prohibited weapon with intent to use unlawfully against another,[377] and the while armed enhancement.[378] In contrast, the revised code combines these three provisions into two offenses titled possession of a dangerous weapon with intent to commit crime[379] and possession of a dangerous weapon during a crime.[380] The revised offenses criminalize possession of a toy or antique firearm if used as an imitation firearm or as a dangerous weapon. An imitation firearm is "any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real."[381] Dangerous weapons include "any object, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."[382]

"Firearms dealer" has the meaning specified in D.C. Code § 7-2505.03.

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[365] RCC § 7-2509.06.
[366] RCC § 7-2507.02.
[367] RCC § 22E-4111.
[368] RCC § 22E-4112.
[369] RCC § 22E-4113.
[370] RCC § 22E-4116.
[371] RCC § 22E-4109.
[372] RCC § 22E-4114.
[373] RCC § 22E-4118.
[374] D.C. Code § 22-4501.
[375] RCC § 22E-4101.
[376] D.C. Code § 22-4504(b).
[377] D.C. Code § 22-4514(b).
[378] D.C. Code § 22-4502.
[379] RCC § 22E-4103.
[380] RCC § 22E-4104.
[381] RCC § 22E-701.
[382] RCC § 22E-701.

Explanatory Note. The RCC definition of "firearms dealer" is new, the term is not currently defined in Title 22 of the D.C. Code[1] (although undefined references to "dealer," "seller," or "licensee" are in some current Title 22 provisions[1]). The RCC definition of "firearms dealer" cross-references the definition of "firearms dealer" in D.C. Code § 7-2505.03 in the District's Firearms Control Regulations chapter. The RCC definition of "firearms dealer" is used in the revised offenses of sale of firearm without a license[383] and unlawful sale of a firearm by a licensed dealer[384] and in revised exclusions from liability for weapons offenses provision.[385]

Relation to Current District Law. The RCC definition of "firearms dealer" cross-references the definition of "firearms dealer" in D.C. Code § 7-2505.03 and does not substantively change current District law.

"Halfway house" means any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program under D.C. Code § 24-241.01.

Explanatory Note. Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter. A work release program is a program established under D.C. Code § 24-241.01.
The RCC definition of "halfway house" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current escape from institution or officer[386] offense). The term "building" that is used in the definition of "halfway house" is defined elsewhere in RCC § 22E-701. The RCC definition of "halfway house" is used in the revised escape from a correctional facility or officer[387] offense.

Relation to Current District Law. The RCC definition of "halfway house" is new and does not substantively change District law.

As applied in the revised escape from a correctional facility or officer offense, the term "halfway house" may substantively change District law. D.C. Code § 22-2601 uses the phrase "penal or correctional institution or facility" but does not define it. Case law has held that the phrase includes the District's halfway houses.[388] In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Healthcare provider" means a person referenced in D.C. Code § 16–2801.

[383] RCC § 22E-4113.
[384] RCC § 22E-4115.
[385] RCC § 22E-4118.
[386] D.C. Code § 22-2601.
[387] RCC § 22E-3401.
[388] *See Demus v. United States,* 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States,* 498 A.2d 1172, 1174 (D.C.1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).

Explanatory Note. The RCC definition of "healthcare provider" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "healthcare provider" is used in the revised offense of sexual abuse by exploitation.[389]

Relation to Current District Law. The RCC definition of "healthcare provider" may substantively change current District law as applied to the revised sexual abuse by exploitation statute. The current sexual abuse of a patient or client statutes do not specify the medical professionals that fall within the scope of the statute.[390] The revised sexual exploitation of an adult statute, by using a defined term in current District civil law for "healthcare provider," clarifies the scope of the revised statute. The commentary to the revised sexual abuse by exploitation statute discusses this change further.

"Health professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3–1205.01.

Explanatory Note. The RCC definition of "health professional" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "health professional" is used in the revised offense of sexual abuse by exploitation.[391]

Relation to Current District Law. The RCC definition of "health professional" may substantively change current District law as applied to the revised sexual abuse by exploitation statute. The current sexual abuse of a patient or client statutes do not specify the medical professionals that fall within the scope of the statute.[392] The revised sexual abuse by exploitation statute, by using a defined term in current District civil law for "health professional," clarifies the scope of the revised statute. The commentary to the revised sexual abuse by exploitation statute discusses this change further.

"Identification number" means a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for purposes of identification.

Explanatory Note. The RCC definition of "identification number" is taken verbatim from the current altering or removing motor vehicle identification numbers statute in D.C. Code § 22-3233(c)(1),[393] and is intended to have the same meaning as under current law. The RCC definition of a "identification number" replaces the definition of "identification number" in D.C. Code § 22-3233(c)(1). The RCC definition of "identification number" is used in the revised Alteration of Motor Vehicle Identification Number offense.[394]

Relation to Current District Law. The RCC definition of "identification number" does not change current District law.

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[389] RCC § 22E-1303.
[390] D.C. Code §§ 22-3015; 22-3016.
[391] RCC § 22E-1303.
[392] D.C. Code §§ 22-3015; 22-3016.
[393] D.C. Code § 22-3233.
[394] RCC § 22E-2403.

“**Image” means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram, whether in print, electronic, magnetic, or digital format.**

Explanatory Note. The RCC definition of “image” is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to “image” are in some current Title 22 offenses[395]). The RCC definition of “image” is used in the revised definitions of “audiovisual recording” and “personal identifying information;” in the revised offenses of electronic stalking,[396] voyeurism,[397] unauthorized disclosure of sexual recordings,[398] distribution of an obscene image,[399] distribution of an obscene image to a minor,[400] creating or trafficking an obscene image of a minor,[401] possession of an obscene image of a minor,[402] unlawful operation of a recording device in a motion picture theater[403] and unlawful labeling of a recording;[404] and in the revised identity theft civil provisions.[405]

Relation to Current District Law. *The RCC definition of “image” is new and does not itself substantively change existing District law. As applied in the revised voyeurism and unauthorized disclosure of sexual recordings statutes,*[406] *the revised definition may change current District law.* D.C. Code § 22-3531(d)(1) makes it unlawful to “capture an image” of a person’s private area without permission. The term “image” is not defined in the statute and District case law has not addressed its meaning. It is unclear whether “capture an image” has the same meaning as “electronically record” in § 22-3531(c)(1). It is also unclear whether “image” includes both refers to both “visual” and “aural images.”[407] It is also unclear whether the term “image” includes a “series of images”[408] or a derivative image (e.g., a photograph of a photograph, a screenshot). Resolving this ambiguity, the revised code defines the term “image,” as described herein. This definition may broaden the offense by including images that are captured without an electronic device (such as those captured using a mechanically-operated camera)[409] but may narrow the offense by excluding images that are hand-drawn

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[395] D.C. Code §§ 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception)l 22-2603.01 (Introduction of Contraband Into Penal Institution); 22-3051 – 3057 (Non-consensual Pornography); 22-3214.01 (Deceptive Labeling); 22-3214.02 (Unlawful operation of a recording device in a motion picture theater); 22-3227.01 and 3227.05 (Identity Theft); and 22-3531 (Voyeurism).

[396] RCC § 22E-1802.

[397] RCC § 22E-1803.

[398] RCC § 22E-1804.

[399] RCC § 22E-1805.

[400] RCC § 22E-1806.

[401] RCC § 22E-1807.

[402] RCC § 22E-1808.

[403] RCC § 22E-2106.

[404] RCC § 22E-2207.

[405] RCC § 22E-2206.

[406] RCC §§ 22E-1803 and 22E-1804.

[407] *See* D.C. Code § 22-3531(a)(1). The revised offense does not criminalize creating an “aural image” of a person’s private areas or of a person undressing.

[408] *See* D.C. Code § 22-3531(f)(2).

[409] While the current voyeurism statute counterintuitively defines an “electronic device” in to include “mechanical” equipment D.C. Code § 22-3531(a)(1), the voyeurism statute restricts liability in D.C. Code §

or illustrated on an electronic device (such as a tablet). The definition also clarifies that a film or video constitutes a single image, not a series of images.

As applied in the creating or trafficking an obscene image of a minor and revised possession of an obscene image of a minor statutes,[410] *the revised definition may change current District law.* The current sexual performance of a minor statute defines "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."[411] There is no DCCA case law on the precise scope of "any visual presentation or exhibition," but the legislative history for the current statute seems to indicate that paintings, sculptures, and other hand rendered depictions would be included.[412] However, there are constitutional concerns with banning the creation, distribution, and possession of images that are hand-rendered because these depictions may not be based on real children engaged sexual conduct.[413] Resolving this ambiguity, through the definition of "image" in RCC § 22E-701, the revised creating or trafficking an obscene image of a minor statute and the revised possession of an obscene image of a minor statute are limited to images that are not hand-rendered. However, the RCC may still criminalize the underlying sexual conduct that is depicted in the hand-rendered image.[414] This change improves the clarity, consistency, and constitutionality of the revised statutes.

22-3531(c)(1) not to installation or use of an "electronic device" but to the act of "electronically record[ing]" which appears to exclude use of a mechanical or film-based camera. *See* D.C. Code § 22-3531(c)(1) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…"). Similarly, the exception to liability for images taken during medical procedures in the current D.C. Code is limited to "electronically recording" and appears to leave liability for use of a mechanical or film-based camera for no apparent reason. *See* D.C. Code § 22-3531(e)(4) ("Any electronic recording of a medical procedure which is conducted under circumstances where the patient is unable to give consent.").

[410] RCC §§ 22E-1807 and 1808.

[411] D.C. Code § 22-3101(3).

[412] *See* Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8 (stating that the definition of "performance" is mean to "to include any visual presentation or exhibition without regard to the medium.").

[413] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). Although *Ferber* was specific to the creation and distribution of visual sexual depictions of minors, the Court later held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography" due, in part, to the same rationales the Court accepted in *Ferber*. *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). In *Ashcroft v. Free Speech Coalition,* the Supreme Court struck down as unconstitutionally overbroad a federal statute on sexual images of minors in part because it applied to "any visual depiction" without regard to whether it was obscene, however, the ruling did not turn on the medium or method visual representation. This case law is discussed further in the commentaries to the revised creating or trafficking of an obscene image of a minor statute (RCC § 22E-1807) and the revised possession of an obscene image of a minor statute (RCC § 22E-1808).

[414] For example, if a defendant forced a minor to have sex with an adult and sketched a drawing of the encounter, there would be no liability under the creating or trafficking statute because a sketch is not an "image" as defined in the RCC. However, the defendant would be liable under the RCC sexual assault statute (RCC § 22E-1301) for the use of force.

As applied in the revised identity theft civil provisions RCC § 22E-2206, the revised definition of "image" clarifies current District law. The term "District of Columbia public record" is defined in D.C. Code § 22-3227.05 to include a "photographic image[.]"[415] Current law does not specify whether "photographic images" include images stored in print, electronic, magnetic, or digital formats. The term "photographic image" is not defined in the current statute, and there is no relevant DCCA case law. This corresponding RCC provision in RCC § 22E-2206 was copied verbatim from the current D.C. Code § 22-3227.05 and provides procedures to correct District of Columbia public records that contain false information as a result of identity theft. By use of the RCC definition of "image," the revised statute clarifies that photographic images includes print, electronic, magnetic, or digital formats.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Imitation dangerous weapon" means an object used or fashioned in a manner that would cause a reasonable person to believe that the object is a dangerous weapon.

Explanatory Note. The RCC definition of "imitation dangerous weapon" is new, the term is not currently defined in Title 22 of the D.C. Code (although the undefined term "imitation pistol" is used in two current statutes[416] and the undefined term "imitation firearm" is used in four others[417]). [The Commission has not yet issued recommendations for weapons offenses or enhancements.] The term "dangerous weapon" that is used in the definition of "imitation dangerous weapon" is defined elsewhere in RCC § 22E-701. The RCC definition of "imitation dangerous weapon" is used in the revised definition of "Class A contraband" as well as the revised offenses of robbery,[418] assault,[419] menacing,[420] sexual assault,[421] sexual abuse,[422] kidnapping,[423] criminal restraint,[424] and correctional facility contraband.[425]

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[415] RCC § 22E-2206.

[416] D.C. Code § 22-4510(a)(6) ("No pistol or imitation thereof or placard advertising the sale thereof shall be displayed…"); D.C. Code § 22-4514(b) ("No person shall within the District of Columbia possess, with intent to use unlawfully against another, an *imitation pistol*…").

[417] D.C. Code § 22-2603.01(2)(A) ("'Class A Contraband' means…A firearm or *imitation firearm*, or any component of a firearm;"); 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)*…"); D.C. Code § 22-3020 ("The defendant was armed with, or had readily available, a pistol or other *firearm (or imitation thereof)*…"); D.C. Code § 22-4502(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 (or imitation thereof)*…"); 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…").

[418] RCC § 22E-1201.

[419] RCC § 22E-1202.

[420] RCC § 22E-1203.

[421] RCC § 22E-1301.

[422] RCC § 22E-1302.

[423] RCC § 22E-1401.

[424] RCC § 22E-1402.

[425] RCC § 22E-3403.

Relation to Current District Law. The RCC definition of "imitation dangerous weapon" is new and does not substantively change District law.

As applied in the revised offenses against persons of robbery, assault, menacing, sexual assault, kidnapping, and criminal restraint, the term "imitation dangerous weapon" is generally, but not entirely, consistent with current District case law defining an imitation pistol or firearm, and current District practice.

In several cases, the DCCA has upheld jury instructions stating, with minor variations, that "[a]n imitation [pistol] is any object that resembles an actual firearm closely enough that a person observing it in the circumstances would reasonably believe it to be a [pistol]."[426] District practice appears to rely on a similar definition at present.[427] The revised definition similarly provides that any object may be an imitation weapon if it is used or fashioned in a manner that would cause a reasonable person to believe that the article is a dangerous weapon. Codification of this definition clarifies District law. However, the definition of "imitation dangerous weapon" is not included in the list of per se (inherently) dangerous weapons in RCC § 22E-701. Combined with the fact that the revised assault and robbery statutes criminalize causing bodily injury by means of a dangerous weapon, the RCC imitation dangerous weapon definition often[428] will preclude penalty enhancements for assaults or robberies involving imitation dangerous weapons.[429] However, the RCC does provide enhanced liability for use of imitation dangerous weapons in the aggravated criminal menace statute, RCC § 22E-1203, and in fourth degree robbery based on displaying an imitation weapon, in RCC § 22E-1201. The RCC's manner of addressing the use of imitation dangerous weapons ensures that such weapons are penalized the same as real dangerous weapons when used with intent to frighten victims. However, imitation dangerous weapons are not treated as automatically equivalent to real dangerous weapons when grading more serious assault and robbery charges involving actual harms and actual risks of death or serious bodily injury. By confining penalty enhancements for imitation dangerous weapons to intent-to-frighten offenses, the proportionality of District offenses involving an imitation weapon is improved.[430]

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[426] *Smith v. United States*, 777 A.2d 801, 810 n. 15 (D.C.2001). *See also Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016); Bates v. United States, 619 A.2d 984, 985 (D.C.1993).

[427] D.C. Crim. Jur. Instr. § 8.101 (jury instruction for "while armed" enhancement under D.C. Code § 22-4502, referring in comment to definition of "imitation firearm" in *Bates v. U.S.*, 619 A.2d 984, 985 (D.C. 1993)).

[428] Even though imitation weapons are not per se dangerous weapons in the RCC, it is still is possible, depending on the facts of a particular case, that an imitation weapon (e.g. a starter pistol) constitutes a dangerous weapon per RCC § 22E-1001(5)(F) due to the manner in which it is used (e.g. "pistol-whipping" a victim) to inflict injury.

[429] A defendant may still be liable for assault by virtue of causing the other person harm, even if the imitation weapon does not make the person liable for an enhanced assault gradation.

[430] The RCC definition of "imitation weapon" resolves judicial concern that has been expressed over whether to distinguish an object designed as an imitation dangerous weapon (e.g., a starter gun) and an object that merely appears to the victim to be a dangerous weapon (e.g., a cell phone, metal pipe, or finger used in a manner that it reasonably appears to be a dangerous weapon) for purposes of assessing penalties. See Washington v. United States, 135 A.3d 325, 332 (D.C. 2016) (C.J. Washington, concurring)(Concluding from legislative history that the actual design of the object rather than a victim's perception is the critical consideration for whether an object is an imitation firearm for purposes of District's assault with a deadly weapon and possession of firearm during crime of violence statutes). Under

As applied in the revised correctional facility contraband statute, the term "imitation dangerous weapon" clarifies, but does not substantively change, District law. The current statute uses the phrase "imitation firearm" but does not define it.[431]

"Imitation firearm" means any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real.

Explanatory Note. It is the actual design of the object rather than a victim's perception that is the critical consideration for whether an object is an imitation firearm.[432]

The RCC definition of "imitation firearm" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined reference to "imitation firearm" and "imitation pistol" are in some current Title 22 provisions[433]). The term "firearm" used in the definition of "imitation firearm" is defined elsewhere in RCC § 22E-701. The RCC definition of "imitation firearm" is used in the revised offenses of possession of a dangerous weapon with intent to commit crime[434] and possession of a dangerous weapon during a crime,[435] as well as the revised civil provisions for licenses of firearms dealers.[436]

Relation to Current District Law. The RCC definition of "imitation firearm" codifies the definition articulated by the D.C. Court of Appeals in *Bates v. United States*[437] and does not substantively change current District law.

"Innocent or irresponsible person" has the meaning specified in RCC § 22E-211.

Explanatory Note. The definition of "innocent or irresponsible person" is addressed in the Commentary accompanying RCC § 22E-211.

"In fact" has the meaning specified in RCC § 22E-207.

Explanatory Note. The definition of "in fact" is addressed in the Commentary accompanying RCC § 22E-207.

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the RCC definition of an imitation dangerous weapon, objects not fashioned or designed to look like a dangerous weapon (e.g., a finger jabbed into someone's back) may nonetheless be an "imitation dangerous weapon." However, such additional liability for the use of such "imitation dangerous weapons" is provided in the RCC only for aggravated criminal menace, second degree robbery based on an aggravated criminal menace, and [other revised offenses against persons], but not assault.

[431] D.C. Code § 22-2603.01(2)(A)(iii).

[432] *See Washington v. United States*, 135 A.3d 325, 332 (D.C. 2016) (C.J. Washington, concurring).

[433] D.C. Code §§ 22-2603.01 (Introduction of contraband into a penal institution); 22-4504 (Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty); 22-4514 (Possession of certain dangerous weapons prohibited; exceptions); *see also* D.C. Code §§ 16-2310 (Criteria for detaining children); 23-1322 (Detention prior to trial); and 23-1325 (Release in first degree murder, second degree murder, and assault with intent to kill while armed cases or after conviction).

[434] RCC § 22E-4103.

[435] RCC § 22E-4104.

[436] RCC § 22E-4114.

[437] 619 A.2d 984, 985 (D.C. 1993) (finding no error in an instruction reading, "[A] firearm is any weapon that will expel a projectile by means of an explosive. An imitation firearm is any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real.").

"Intentionally" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "intentionally" is addressed in the Commentary accompanying RCC § 22E-206.

"Intoxication" has the meaning specified in RCC § 22E-209.

Explanatory Note. The definition of "intoxication" is addressed in the Commentary accompanying RCC § 22E-206.

"Knowingly" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "knowingly" is addressed in the Commentary accompanying RCC § 22E-206.

"Labor" means work that has economic or financial value, other than a commercial sex act.

Explanatory Note. The RCC definition of "labor" includes any work that has economic or financial value. However, commercial sex acts are specifically excluded.

"Labor" is currently defined in D.C. Code § 22-1831(6) for human trafficking statutes. The RCC definition of "labor" replaces the current definition of "labor" in D.C. Code § 22-1831(6) and is used in the revised the revised versions of the forced labor or services statute,[438] the trafficking in labor or services statute[439]; the benefitting from human trafficking statute[440]; the misuse of documents statute.[441]

Relation to Current District Law. *The definition of "labor" makes one change that may constitute a substantive change to current District law that improves the clarity of the revised criminal code.*

The current D.C. Code definition of "labor" makes no reference to commercial sex acts, referring generally only to acts that have "economic or financial value." Neither DCCA case law nor legislative history address whether "labor" includes commercial sex acts.[442] However, it is notable that the current human trafficking statutes sometimes appear to use the term "labor" as if it did not include commercial sex acts.[443] The RCC's

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[438] RCC § 22E-1601.

[439] RCC § 22E-1602.

[440] RCC § 22E-1603.

[441] RCC § 22E-1604.

[442] However, at least one federal circuit court interpreting a similar federal provision has held that "labor" includes sexual activity. *United States v. Kaufman*, 546 F.3d 1242, 1260 (10th Cir. 2008).

[443] E.g., D.C. Code § 22-1833, entitled "Trafficking in labor or commercial sex acts" includes as an element that, "Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act". The specification of both "labor" and "commercial sex act" in the offense suggests the former does not include the latter. In addition, the current code defines "debt bondage" as "the status or condition of a person who provides labor, services*, or commercial sex acts*, for a real or alleged debt, where: **(A)** The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; **(B)** The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or **(C)** The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred." D.C. Code § 22-1831 (emphasis added). The inclusion of the words labor and commercial sex act may suggest that labor does not include commercial sex acts.

"labor" definition explicitly excludes commercial sex acts from the definition of "labor." Separates statutes address sex trafficking and trafficking in labor or services in the RCC[444] (and the current D.C. Code[445]). This change may reduce unnecessary overlap between and clarifies the revised offenses.[446]

"Large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition. The term "large capacity ammunition feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

Explanatory Note. The RCC definition of "large capacity ammunition feeding device" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "large capacity ammunition feeding device" is identical to the definition in D.C. Code § 7-2506.01 (Person permitted to possess ammunition). The term "ammunition" used in the definition of "large capacity ammunition feeding device" is defined elsewhere in RCC § 22E-701. The RCC definition of "large capacity ammunition feeding device" is used in the revised offense of possession of a prohibited weapon or accessory,[447] as well as the revised civil provisions for taking and destruction of dangerous articles.[448]

Relation to Current District Law. The RCC definition of "large capacity ammunition feeding device" is identical to the definition in D.C. Code § 7-2506.01 and does not substantively change current District law.

"Law enforcement officer" means:

(A) A sworn member, officer, reserve officer, or designated civilian employee of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;

(B) A sworn member or officer of the District of Columbia Protective Services;

(C) A licensed special police officer;

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[444] RCC § 22E-1603, § 22E-1604, § 22E-1605, § 22E-1606.

[445] D.C. Code §§ 22-1832, 22-1833.

[446] E.g., D.C. Code § 22-1833, entitled "Trafficking in labor or commercial sex acts" includes as an element that, "Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act". The specification of both "labor" and "commercial sex act" in the offense suggests the former does not include the latter. The current code also defines "debt bondage" as "the status or condition of a person who provides labor, services*, or commercial sex acts*, for a real or alleged debt, where: **(A)** The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; **(B)** The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or **(C)** The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred." D.C. Code § 22-1831 (emphasis added). The inclusion of the words service and commercial sex act may suggest that services do not include commercial sex acts.

[447] RCC § 22E-4101.

[448] RCC § 22E-4117.

(D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;
(E) Any officer or employee of the government of the District of Columbia charged with supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District;
(F) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Department of Youth Rehabilitation Services, the Family Court Social Services Division of the Superior Court, the Court Services and Offender Supervision Agency, or the Pretrial Services Agency;
(G) Metro Transit police officers; and
(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A) – (G) of this paragraph, including state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.

Explanatory Note. The RCC definition of "law enforcement officer" replaces the current statutory definitions of "law enforcement in D.C. Code § 22-405(a,)[449] applicable to assault on a police officer (APO), and D.C. Code § 22-2106(b)(1), applicable to murder of a law enforcement officer.[450] The RCC definition of "law enforcement officer" is used in the RCC definition of a "protected person,"[451] and in the revised

[449] D.C. Code § 22-405(a) ("For the purposes of this section, the term 'law enforcement officer' means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision.").
[450] D.C. Code § 22-2106(b)(1) ("'Law enforcement officer' means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.").
[451] RCC § 22E-701.

offenses of murder,[452] manslaughter,[453] assault,[454] offensive physical contact,[455] aggravated kidnapping,[456] and aggravated criminal restraint.[457]

Relation to Current District Law. The RCC definition of "law enforcement officer" makes two clear changes to the statutory definition of "law enforcement officer" in D.C. Code § 22-405(a,)[458] applicable to assault on a police officer (APO). First, the RCC definition of "law enforcement officer" no longer includes officers or members of a fire department operating in the District of Columbia or investigators or code inspectors employed by the government of the District of Columbia. These categories of individuals are included in the current definition of "law enforcement officer" for the APO statute, but not for the current murder of a law enforcement officer statute.[459] In contrast, in the RCC, these categories of individuals are included in the definition of "public safety employee," defined in RCC § 22E-701. This change clarifies District law by distinguishing persons who are regularly involved with criminal law enforcement from others who are not, and creating one broad, consistent definition as to who constitutes a "law enforcement officer."

Second, the revised definition of "law enforcement officer" includes sworn members or officers of the District of Columbia Protective Services, Metro Transit police officers, and officers covered by the broad catch-all provision in subsection (H) of the revised definition.[460] These categories of complainants are included in the current murder of a law enforcement officer statute,[461] but not the current APO statute.[462] This change improves the consistency and proportionality of the revised offenses against persons by creating a broad, consistent definition for "law enforcement officer."

The remaining changes to the definition of "law enforcement officer" in the current APO statute are non-substantive and clarificatory.[463] The RCC definition of "law

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[452] RCC § 22E-1101.
[453] RCC § 22E-1102.
[454] RCC § 22E-1202.
[455] RCC § 22E-1205.
[456] RCC § 22E-1401.
[457] RCC § 22E-1403.
[458] D.C. Code § 22-405(a).
[459] D.C. Code § 22-2106(b)(1).
[460] Deputy U.S. Marshals are an example of federal law enforcement officers that fall within the catchall of subsection (H).
[461] D.C. Code § 22-2106(b)(1).
[462] D.C. Code § 22-405(a).
[463] The revised definition of "law enforcement officer" makes three non-substantive, clarificatory wording changes to the definition of "law enforcement officer" in the current APO statute. First, subsection (A) of the revised definition requires a "sworn" officer or member of the Metropolitan Police Department, whereas the current definition in the current APO statute requires "operating and authorized to act in the District of Columbia." Second, subsection (D) of the revised definition refers to the "Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections," which is more specific than, but substantively identical to, the current definition in the current APO statute ("any officer or employee of any penal or correctional institution of the District of Columbia."). Third, subsection (F) of the revised definition of "law enforcement officer" refers to "[a]ny probation, parole, supervised release, community supervision, or pretrial services officer or employee" of the specified agencies, which is clearer than "any officer or employee" of the specified agencies "charged with intake, assessment, or community supervision" in the current definition in the current APO statute.

enforcement officer" is substantively identical to the definition in the District's murder of a law enforcement officer statute.[464]

As applied to certain RCC offenses, the RCC definition of "law enforcement officer" may substantively change current District law. For example, the revised assault statute, which replaces the District's current APO statute (D.C. Code § 22-405), varies in scope as compared to the current APO statute in terms of the complainants that constitute a "law enforcement officer." In addition, some RCC offenses against persons, such as robbery, include enhanced penalties for a complainant that is a "law enforcement officer" in certain circumstances through gradations for a "protected person," which is a change to current District law.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "law enforcement officer" on current District law.

"Legal cause" has the meaning specified in RCC § 22E-204.

Explanatory Note. The definition of "legal cause" is addressed in the Commentary accompanying RCC § 22E-204.

"Live broadcast" means a streaming video, or any other electronically transmitted image for simultaneous viewing by one or more other people.

Explanatory Note. The RCC definition of "live broadcast" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "live broadcast" is

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The remaining provisions in the RCC definition of "law enforcement officer," with the exception of subsection (B), subsection (G), and subsection (H), are taken directly from the definition of "law enforcement officer" in the current APO statute: 1) Any reserve officer or designated civilian employee of the Metropolitan Police Department (included in subsection (A)); 2) Any licensed special police officer (subsection C)); and 3) Officers or employees charged with the supervision of juveniles being confined in any District of Columbia facility (subsection (E)).

[464] The majority of the categories in the RCC definition of "law enforcement officer" are taken, in whole or in part, directly from the definition of "law enforcement officer" in the District's current murder of a law enforcement officer statute (D.C. Code § 22-2106(b)). These categories are: 1) A sworn member of the Metropolitan Police Department (included in subsection (A) of the RCC definition); 2) A sworn member or officer of the District of Columbia Protective Services (subsection (B) of the RCC definition); 3) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections (subsection (D) of the RCC definition); 4) Specified officers or employees of the Court Services and Offender Supervision Agency or Pretrial Services Agency (included in subsection (F) of the RCC definition); 5) Metro Transit police officers (subsection (G) of the RCC definition); and 6) the broad provision for categories of complainants that are not specifically included in the revised definition (subsection (H) of the RCC definition).

The remaining provisions in the RCC definition of "law enforcement officer" are not specifically included in the definition of "law enforcement officer" in the current murder of a law enforcement officer statute, but appear to be covered by the broad catchall provision in that definition (D.C. Code § 22-2106(b)(F)): 1) Any reserve officer or designated civilian employee of the Metropolitan Police Department (included in subsection (A) of the RCC definition); 2) A licensed special police officer (subsection (C) of the RCC definition); 3) Officers or employees charged with the supervision of juveniles being confined in any District of Columbia facility (subsection (E) of the RCC definition); and 4) Specified officers or employees of the Department of Youth Rehabilitation Services and the Family Court Social Services Division of the Superior Court (included in subsection (F) of the RCC definition).

used in the revised offense of attending or viewing a live sexual performance of a minor.[465]

Relation to Current District Law. The RCC definition of "live broadcast" is new and does not itself substantively change existing District law. The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Live performance" means a play, dance, or other visual presentation or exhibition for an audience, including an audience of one.

Explanatory Note. The RCC definition of "live performance" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "live performance" is used in the revised offenses of unlawful creation or possession of a recording,[466] arranging a live sexual performance of a minor,[467] and attending or viewing a live sexual performance of a minor.[468]

Relation to Current District Law. The RCC definition of "live performance" is new and does not itself substantively change existing District law. The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Monitoring equipment or software" means equipment or software with location tracking capability, including global positioning system and radio frequency identification technology.

Explanatory Note. Monitoring equipment or software is any technology that is capable of monitoring a person's whereabouts. Like the RCC definition of "detection device," "monitoring equipment" includes wearable mechanisms such as bracelets, anklets, tags, and microchips. However, unlike the RCC definition of "detection device," monitoring equipment also includes surveillance devices that are not worn. "Monitoring equipment or software" is intended to capture other equipment and software that may be developed in the future. The term refers to the equipment and software itself and does not include the records or reports that it generates.

The RCC definition of "monitoring equipment or software" is new; the term is not currently defined in Title 22 of the D.C. Code (although the current stalking statute[469] includes a definition of "any device"[470] and undefined references to "monitor" and "place under surveillance"). The RCC definition of "monitoring equipment or software" is used in the revised offense of electronic stalking.[471]

Relation to Current District Law. The RCC definition of "monitoring equipment or software" is new and does not itself substantively change existing District law. The

[465] RCC § 22E-1810.
[466] RCC § 22E-2105.
[467] RCC § 22E-1809.
[468] RCC § 22E-1810.
[469] D.C. Code § 22-3132.
[470] "Any device" means electronic, mechanical, digital or any other equipment, including: a camera, spycam, computer, spyware, microphone, audio or video recorder, global positioning system, electronic monitoring system, listening device, night-vision goggles, binoculars, telescope, or spyglass.
[471] RCC § 22E-1802.

commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, truck, truck tractor with or without a semitrailer or trailer, bus, or other vehicle designed to be propelled only by an internal-combustion engine or electricity.

Explanatory Note. The RCC defines "motor vehicle" to include most self-propelled vehicles used for the transportation of persons. "Other vehicle designed to be propelled only by an internal-combustion engine or electricity" is intended to include motorized boats and aircraft. The "designed to be" language includes vehicles that happen to be moved by human exertion in a given case, but are "designed" to be propelled only by an internal-combustion engine or electricity.[472]

The RCC definition of "motor vehicle" replaces the definitions of "motor vehicle" in D.C. Code § 22-3215(a),[473] applicable to the unauthorized use of a motor vehicle statute, and D.C. Code § 22-3233(c)(2),[474] applicable to the altering or removing motor vehicle identification numbers statute. The RCC definition of "motor vehicle" is used in the revised offenses of robbery,[475] theft,[476] unauthorized use of a motor vehicle,[477] arson,[478] reckless burning,[479] alteration of a motor vehicle identification number,[480] and trespass.[481]

Relation to Current District Law. The RCC definition of "motor vehicle" makes two clear changes to the statutory definitions of "motor vehicle" in D.C. Code § 22-3215(a)[482] and D.C. Code § 22-3233(c)(2).[483]

First, the revised definition of "motor vehicle" includes any vehicle "designed to be propelled only by an internal-combustion engine or electricity," which includes

[472] E.g., an electric bicycle, skateboard, or scooter that one can also operate manually.
[473] D.C. Code § 22-3215(a)("For the purposes of this section, the term "motor vehicle" means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus.").
[474] D.C. Code § 22-3233(c)(2) ("'Motor vehicle' means any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").
[475] RCC § 22E-1201.
[476] RCC § 22E-2101.
[477] RCC § 22E-2103.
[478] RCC § 22E-2501.
[479] RCC § 22E-2502.
[480] RCC § 22E-2403.
[481] RCC § 22E-2601.
[482] D.C. Code § 22-3215(a)(for the offense of unauthorized use of a motor vehicle, defining "motor vehicle" as "For the purposes of this section, the term "motor vehicle" means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus.").
[483] D.C. Code § 22-3233(c)(2) (for the offense of altering or removing vehicle identification numbers, defining "motor vehicle" as "'Motor vehicle' means any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semitrailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").

motorized boats and aircraft. The statutory definition of "motor vehicle" for the current unauthorized use of a motor vehicle (UUV) offense does not have such a provision.[484] The statutory definition for the alteration of a motor vehicle number (VIN) offense has a similar provision, but does not require that the vehicle be propelled "only" by internal-combustion engine or electricity.[485] In contrast, the revised definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity." This language includes motorized boats and aircraft and eliminates possible gaps in current District law.

Second, the revised definition of "motor vehicle" excludes vehicles such as mopeds, which are designed to be propelled, in whole or in part, by human exertion. The statutory definition of "motor vehicle" for the current UUV statute is limited to a list of specified vehicles,[486] although the DCCA has held that mopeds fall within this definition.[487] The statutory definition of "motor vehicle" for the VIN offense includes other vehicles "propelled by an internal-combustion engine, electricity, or steam."[488] In contrast, the revised definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity." This language excludes vehicles like mopeds, that are designed to be propelled, in part, by human exertion. These types of vehicles are generally not as expensive and do not pose the same safety risks to others that a "motor vehicle" does. Unauthorized use of vehicles such as mopeds, that fall outside the RCC definition of "motor vehicle," remains criminalized by the RCC unauthorized use of property offense (RCC § 22E-2102). This revision improves the clarity, consistency, and proportionality of the revised definition.

Other changes to the statutory definitions of "motor vehicle" in D.C. Code § 22-3215(a) and D.C. Code § 22-3233(c)(2) are clarificatory and are not intended to change current District law.

First, the revised definition of "motor vehicle" no longer states that the definition includes "any non-operational vehicle that is being restored or repaired." This language is present in the current definition of "motor vehicle" for the VIN offense.[489] There is no DCCA case law interpreting this language. The scope of this language is unclear and any non-operational vehicle that is being restored or repaired would still qualify as a "motor vehicle" if the other requirements of the revised definition are met. Deleting this language improves the clarity of the revised definition without changing current District law.

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[484] D.C. Code § 22-3215(a).

[485] D.C. Code § 22-3233(c)(2).

[486] D.C. Code § 22-3215(a).

[487] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[488] D.C. Code § 22-3233(c)(2).

[489] D.C. Code § 22-3233(c)(2).

Second, the revised definition includes a reference to all-terrain vehicles. The DCCA has held that all-terrain vehicles[490] fall within the current definition of "motor vehicle" for the purpose of the UUV statute, and such all-terrain vehicles would satisfy the current statutory definition of the VIN offense.[491] This revision improves the completeness of the revised definition without changing current District law.

Finally, the revised definition of "motor vehicle" includes a "truck tractor with or without a semitrailer or trailer." Both statutory definitions for "motor vehicle" in Title 22 of the current D.C. Code refer to a "truck tractor,"[492] and include a reference to either a truck tractor with a semitrailer or trailer[493] or with just a semitrailer.[494] The revised definition of "motor vehicle" deletes the reference to "truck tractor" and instead specifies that a truck tractor "with or without a semitrailer or trailer" constitutes a "motor vehicle." This language clarifies that the truck tractor, and not the semitrailer or trailer, is the "motor vehicle" and does not change current District law.

As applied to certain RCC offenses, the RCC definition of "motor vehicle" may substantively change current District law. For example, due to the revised definition of "motor vehicle," the revised unauthorized use of a motor vehicle offense (RCC § 22E-2103) no longer includes vehicles like mopeds that are designed to be propelled, in whole or in part, by human exertion, although the DCCA has held explicitly held that mopeds[495] fall within the current definition of "motor vehicle."
The commentaries to relevant RCC offenses discuss in detail the effect of the RCC definition of "motor vehicle" on current District law.

"Negligently" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "negligently" is addressed in the Commentary accompanying RCC § 22E-206.

"Obscene" means:

(A) Appealing to a prurient interest in sex, under contemporary community standards and considered as a whole;

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[490] In *Gordon v. United States*, the DCCA stated that the "trial judge concluded correctly, as a matter of statutory interpretation, that an ATV—a vehicle propelled by a motor—is a motor vehicle under [the UUV statute]." *Gordon v. United States*, 906 A.2d 862, 885 (D.C. 2006) The jury instruction for UUV adopts the holding in *Gordon* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[491] D.C. Code § 22-3233(c)(2).

[492] D.C. Code §§ 22-3215(a) (for the offense of unauthorized use of a motor vehicle, defining "motor vehicle," in part, as "any . . . truck tractor . . . ."); 22-3233(c)(2) (for the offense of altering or removing vehicle identification numbers, defining "motor vehicle," in part, as "any . . . truck tractor, ...").

[493] D.C. Code § 22-3215(a).

[494] D.C. Code § 22-3233(c)(2).

[495] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." *Stancil v. United States*, 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

(B) Patently offensive; and

(C) Lacking serious literary, artistic, political, or scientific value, considered as a whole.

Explanatory Note. The RCC definition of "obscene" is consistent with the multi-factor test for obscenity announced by the United States Supreme Court in *Miller v. California*.[496] Namely, to determine whether material is obscene, one must consider: (a) whether the average person,[497] applying contemporary community standards[498] would find that the work, taken as a whole, appeals to the prurient interest,[499] (b) whether the work depicts or describes, in a patently offensive way,[500] sexual conduct specifically

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[496] 413 U.S. 15 (1973); *see also Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[497] The phrase "average person" distinguishes the broader community from fetishists and persons with paraphilic disorders. *See also* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community—the young, the immature or the highly prudish—or, would leave another segment—the scientific or highly educated or so-called worldly wise and sophisticated—indifferent and unmoved.").

[498] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards"); *see also Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973); *see also* Ed Bruske, *Smut Work: Identifying Obscenity*, Washington Post (Feb. 16, 1982), pg. C1.

> More than four years have gone by since the last time prosecutors showed pornographic films to a jury in the city. As a result, prosecutors have no "community standards"—the benchmark established by the U.S. Supreme Court—on which to judge what is obscene.

[499] *See* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("'Prurient interest' is a morbid, degrading, or unhealthy interest in sex.").

[500] In *Parks v. United States*, 294 A.2d 858, 859–60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The RCC definition of "obscene" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "obscene" are in some current Title 22 offenses[501]). The RCC definition of "obscene" is used in the revised offenses of distribution of an obscene image,[502] distribution of an obscene image to a minor,[503] creating or trafficking an obscene image of a minor,[504] possession of an obscene image of a minor,[505] arranging a live sexual performance of a minor,[506] and attending or viewing a live sexual performance of a minor.[507]

Relation to Current District Law. The RCC definition of "obscene" is new and does not itself substantively change existing District law. The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Objective element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "objective element" is addressed in the Commentary accompanying RCC § 22E-201.

"Offense element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "offense element" is addressed in the Commentary accompanying RCC § 22E-201.

"Omission" has the meaning specified in RCC § 22E-202.

Explanatory Note. The definition of "omission" is addressed in the Commentary accompanying RCC § 22E-202.

"Open to the general public" means a location:

(A) To which the public is invited; and

(B) For which no payment, membership, affiliation, appointment, or special permission is required for an adult to enter, provided that the location may require entrants to show proof of age or identity and may require security screening for dangerous items.

Explanatory Note. The RCC defines "open to the general public" to mean no payment or permission is required to enter. For example, in a Metro train station, a location outside the fare gates normally would be open to the general public during business hours, but a location inside the fare gates would not be open to the general public. Locations for which the general public always needs special permission to enter,

[501] D.C. Code §§ 22-1312 (Lewd, indecent, or obscene acts; sexual proposal to a minor); 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception); 22-3312.01 (Defacing public or private property).
[502] RCC § 22E-1805.
[503] RCC § 22E-1806.
[504] RCC § 22E-1807.
[505] RCC § 22E-1808.
[506] RCC § 22E-1809.
[507] RCC § 22E-1810.

such as public schools while in session or the Central Detention Facility (D.C. Jail), are not "open to the general public."

The RCC definition of "open to the general public" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "open to the general public" appear in the current disorderly conduct[508] and aggressive panhandling[509] statutes and an undefined reference to "in public" appears in the current lewdness statute[510]). The RCC definition of "open to the general public" is used in the revised offenses of burglary,[511] disorderly conduct,[512] public nuisance,[513] indecent exposure,[514] distribution of an obscene image,[515] and distribution of an obscene image to a minor.[516]

Relation to Current District Law. The RCC definition of "open to the general public" is new and does not itself substantively change existing District law.

As applied in the revised burglary offense, the term "open to the general public" may change District law. The current burglary statute does not distinguish between public and private locations leading to some counterintuitive outcomes.[517] In contrast, the revised burglary statute requires a trespass into a dwelling or into a building or business yard that is not open to the general public at the time of the offense. The revised code adds a definition of "open to the general public" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

As applied in the revised disorderly conduct and public nuisance statutes, the term "open to the general public" clarifies, but does not change, District law. The current disorderly conduct statute (which includes public nuisances) uses the phrase "open to the general public" but does not define it. Case law does not address its meaning. The revised code adds a definition of "open to the general public" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Owner" means a person holding an interest in property with which the actor is not privileged to interfere without consent.

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[508] D.C. Code § 22-1321.
[509] D.C. Code § 22-2302.
[510] D.C. Code § 22-1312.
[511] RCC § 22E-2701.
[512] RCC § 22E-4201.
[513] RCC § 22E-4202.
[514] RCC § 22E-4401.
[515] RCC § 22E-4402.
[516] RCC § 22E-4403.
[517] For example, a witness who enters a courthouse intending to commit perjury, a government official who enters her office intending to accept a bribe, a drug user who enters his friend's home to use drugs with his companion, and a shoplifter who enters a store intending to steal a candy bar would all be guilty of burglary under current District law, even though their presence in the specified location was invited.

Explanatory Note. The RCC definition of "owner" specifies the requirements for being considered an "owner" in the RCC. Under the RCC definition, there can be more than one "owner" for a given piece of property. The RCC definition also includes a person whose interest in property is possessory but otherwise unlawful. For example, it is possible for a third party to rob from a thief.[518]

The RCC definition of "owner" replaces the current statutory definition in D.C. Code § 22-3214(a)(1),[519] applicable to the commercial piracy statute, and undefined references to "owner" in several current Title 22 property provisions and offenses.[520] The RCC definition of "owner" is used in the revised offenses of robbery,[521] theft,[522] unauthorized use of property,[523] unauthorized use of a motor vehicle,[524] unlawful creation or possession of a recoding,[525] unlawful operation of a recording device in a motion picture theater,[526] criminal damage to property[527] and criminal graffiti.[528]

Relation to Current District Law. Although several of the current property offenses in Title 22 of the D.C. Code use the term "owner," only one offense, commercial piracy, statutorily defines it. The RCC definition of "owner" may substantively change current District law for the commercial piracy offense, because the current definition[529] is very specific, referring either to the person who owns the original fixation, the exclusive licensee with reproduction and distribution rights, or in the case of a live performance, the performer. The revised unlawful creation or possession of a recording statute, through the RCC definition of "owner," is intended to more broadly identify the relevant person whose consent must be obtained. The definition of "owner" reduces potential gaps in the offense and improves the consistency of definitions across property offenses. The commentary to the revised unlawful creation or possession of a recording statute (RCC § 22E-2105) discusses this possible change further.

[518] The thief has an unlawful, but superior, possessory interest in the third party as to the third party.

[519] D.C. Code § 22-3214 (a)(1) ("'Owner', with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.").

[520] *See, e.g.*, D.C. Code §§ 22-3201(2)(B) (definition of "deprive."); 22-3215 (unauthorized use of a motor vehicle); 22-3214.02 (unlawful operation of a recording device in a motion picture theater); 22-3218.03 (presumptions and rebuttal evidence provisions for theft of a utility service); 22-3312.01 (defacing public or private property)' 22-3312.05(4) (definition of "graffiti.").

[521] D.C. Code § 22E-1201.

[522] D.C. Code § 22E-2101.

[523] D.C. Code § 22E-2102.

[524] D.C. Code § 22E-2103.

[525] D.C. Code § 22E-2105.

[526] RCC § 22E-2106.

[527] D.C. Code § 22E-2503.

[528] D.C. Code § 22E-2504.

[529] D.C. Code § 22-3214 (a)(1) ("'Owner', with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.").

For the other current property offenses that use the term "owner" without statutorily defining it,[530] there is no D.C. Court of Appeals (DCCA) case law discussing the term "owner" or a similar term. As the commentaries to the RCC property offenses discuss, the RCC definition of "owner" does not appear to change current District law. It should also be noted that the RCC definition of "owner" is also consistent with District practice apparently recognizing that in robbery, the victim need not have strict legal ownership of the item taken, but merely some legally superior custody and control over the item.[531] Codifying a definition of "owner" improves the clarity and consistency of District law.

"Payment card" means an instrument of any kind, whther tangible or intangible, including an instrument known as a credit card or debit card, issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card. "Payment card" includes the number or description of the instrument.

Explanatory Note. The RCC definition of "payment card" includes any instrument issued for use by the cardholder to pay for or obtain property. The definition includes credit cards and debit cards. The definition includes the physical cards themselves, intangible payment cards[532], and the number or description of the cards.

"Payment card" is not statutorily defined for Title 22 of the current D.C. Code. However, "credit card" is currently defined in D.C. Code § 22-3223(a)[533] for the current credit card fraud offense. The RCC definition of "payment card" replaces the definition of "credit card" in D.C. Code § 22-3223(a) and is used in the RCC definition of "value,"[534] as well as the revised offense of payment card fraud.[535]

Relation to Current District Law. The RCC definition of "payment card" clarifies, but makes no substantive changes, to current District law.

"Person with legal authority over the complainant" means:

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[530] *See, e.g.*, D.C. Code §§ 22-3201(2)(B) (definition of "deprive."); 22-3215 (unauthorized use of a motor vehicle); 22-3214.02 (unlawful operation of a recording device in a motion picture theater); 22-3218.03 (presumptions and rebuttal evidence provisions for theft of a utility service); 22-3312.01 (defacing public or private property)' 22-3312.05(4) (definition of "graffiti.").

[531] D.C. Crim. Jur. Instr. § 4.300 commentary ("While larceny remains an offense against possession, robbery is essentially a crime against the person. *U.S. v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972). Thus, "possession" under the robbery statute does not require strict legal ownership in the larcenous sense, but only some custody and control by the victim. *See, e.g.*, *U.S. v. Spears*, 449 F.2d 946 (D.C. Cir. 1971) (although money stolen did not belong to foreman, it was in his control at the time of a robbery); *U.S. v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975) (where different parties owned property taken, it was nevertheless either in the control of the complainant or under his custody and control at the time it was stolen); *Jones v. U.S.*, 362 A.2d 718 (D.C. 1976) (it is not required to show that victim of robbery owned property that was taken but only that the victim had custody and control of the property).").

[532] For example, an issuer may provide a credit card number attached to an account that allows payments on credit, without actually providing a physical card. This intangle "credit card" would be included in the definition of "payment card."

[533] D.C. Code § 22-3223 ("the term 'credit card' means an instrument or device, whether known as a credit card, debit card, or by any other name, issued for use of the cardholder in obtaining or paying for property or services").

[534] RCC § 22E-701.

[535] RCC § 22E-2202.

(A) **When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the general care and supervision of the complainant, or someone acting with the effective consent of such a parent or person; or**

(B) **When the complainant is an incapacitated individual, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian.**

Explanatory Note. [Explanation of this term is forthcoming, in conjunction with RCC § 22E-40X]

Relation to Current District Law. [Forthcoming.]

"Person acting in the place of a parent per civil law" means both a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption, and any person acting by, through, or under the direction of a court with jurisdiction over the child.

Explanatory Note. [Explanation of this term is forthcoming, in conjunction with RCC § 22E-40X]

Relation to Current District Law. [Forthcoming.]

Personal identifying information shall include the following:

(A) **Name, address, telephone number, date of birth, or mother's maiden name;**

(B) **Driver's license or driver's license number, or non-driver's license or non-driver's license number;**

(C) **Savings, checking, or other financial account number;**

(D) **Social security number or tax identification number;**

(E) **Passport or passport number;**

(F) **Citizenship status, visa, or alien registration card or number;**

(G) **Birth certificate or a facsimile of a birth certificate;**

(H) **Credit or debit card, or credit or debit card number;**

(I) **Credit history or credit rating;**

(J) **Signature;**

(K) **Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information;**

(L) **Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;**

(M) **Place of employment, employment history, or employee identification number; and**

(N) **Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property.**

Explanatory Note. The RCC definition of "personal identifying information" provides a non-exhaustive list of information that relates to a person's identity, and is taken verbatim from the current identity theft sub-chapter of the D.C. Code.[536] This definition is intended to have the same meaning as under current law.

"Personal identifying information" is currently defined in D.C. Code § 22-3227.01(3)[537] for the identity theft offense and related provisions. The RCC definition of "personal identifying information" replaces the definition of "personal identifying information" in D.C. Code § 22-3227.01(3) and is used in the revised identity theft statute.[538]

Relation to Current District Law. The RCC definition of "personal identifying information" does not substantively change current District law.

"Physically following" means maintaining close proximity to a complainant, near enough to see or hear the complainant's activities as they move from one location to another.

Explanatory Note. The phrase "close proximity" refers to the area near enough for the accused to see or hear the complainant's activities and does not require that the defendant be near enough to reach the complainant. Distances may vary widely, depending on facts including crowd density, noise, and height. Examples may include walking a couple of stores down the street from the complainant or driving near the complainant in a vehicle.

The RCC definition of "physically following" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language appears in the current stalking statute[539]). The RCC definition of "physically following" is used in the revised offense of stalking.[540]

Relation to Current District Law. The RCC definition of "physically following" is new and does not substantively change District law.

As applied in the revised offense stalking, the term "physically following" clarifies, but does not substantively change, District law. The current statute uses the word "follow"

[536] D.C. Code § 22-3227.01

[537] D.C. Code § 22-3227.01(3) ("'Personal identifying information' includes, but is not limited to, the following: (A) Name, address, telephone number, date of birth, or mother's maiden name; (B) Driver's license or driver's license number, or non-driver's license or non-driver's license number; (C) Savings, checking, or other financial account number; (D) Social security number or tax identification number; (E) Passport or passport number; (F) Citizenship status, visa, or alien registration card or number; (G) Birth certificate or a facsimile of a birth certificate; (H) Credit or debit card, or credit or debit card number; (I) Credit history or credit rating; (J) Signature; (K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information; (L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; (M) Place of employment, employment history, or employee identification number; and (N) Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property.").

[538] RCC § 22E-2205.

[539] D.C. Code § 22-3132(8) ("To engage in a course of conduct" means directly or indirectly, or through one or more third persons, in person or by any means, on 2 or more occasions, to: (A) Follow…").

[540] RCC § 22E-1206.

but does not define it. Case law has not directly addressed its meaning.[541] This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Physically monitoring" means being in close proximity to a person's residence, workplace, or school to detect the person's whereabouts or activities.

Explanatory Note. The phrase "close proximity" refers to the area near enough for the accused to see or hear the complainant's activities and does not require that the defendant be near enough to reach the complainant. Distances may vary widely, depending on facts including crowd density, noise, and height.

The RCC definition of "physically monitoring" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language appears in the current stalking statute[542]). The RCC definition of "physically monitoring" is used in the revised offense of stalking.[543]

Relation to Current District Law. The RCC definition of "physically monitoring" is new and does not substantively change District law.

As applied in the revised offense stalking, the term "physically monitoring" may change District law. The current statute uses the word "monitor" and the phrase "place under surveillance" but does not define these terms. Case law has not directly addressed their meanings. The revised code defines "physically monitoring" to require maintaining a close enough proximity to see or hear the complainant. Remotely following or monitoring another person will be separately punished as Electronic Monitoring in RCC § 22E-1804. This change applies consistent, clearly articulated definitions and improves the logical organization and clarity of the revised offenses.

"Person," in Subtitle III of this Title, means an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity.

Explanatory Note. This provision codifies a definition of "person" that applies only to Subtitle III of Title 22E (Property offenses). The definition establishes that "person" categorically includes natural persons and non-human legal entities such as trusts, estates, companies, etc. The definition applies to the property offenses and provisions in Subtitle III of Title 22E notwithstanding the definition of "person" in D.C.

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[541] However, the District of Columbia Court of Appeals discussed an allegation of following in *Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *2–3 (D.C. Mar. 7, 2019). In that case, the defendant sprinted across a baseball field and stood eight feet in front of the complainant, in her pathway. When the complainant left the field and walked home, the defendant also exited and remained outside the complainant's home long enough for a neighbor and a family member to each come outside and tell the defendant to leave. The defendant testified that he had not been intentionally following the complainant but had simply been "follow[ing] everyone else off the field" and trying to go to his own home. During these events, the defendant and the complainant were near enough to one another to engage in a conversation. The revised code defines "physically following" to require maintaining a close enough proximity to see or hear the complainant. Remotely following or monitoring another person will be separately punished as Electronic Monitoring in RCC § 22E-1804.

[542] D.C. Code § 22-3132(8).

[543] RCC § 22E-1206.

Code § 45-604 that appears to otherwise apply.[544] This definition of "person" replaces the current statutory definition of "person" in D.C. Code § 22-3201(2A),[545] applicable to Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions in Chapter 32 of the current Title 22. The definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions in Subtitle III of Title 22E, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on this definition of "person."

Relation to Current District Law. *The RCC definition of "person" for property offenses makes one possible substantive change to the current statutory definition of "person" in D.C. Code § 22-3201(2A).* The plain language of the current D.C. Code statutory definition of "person" makes no distinction in use of the definition for a complainant or an actor. However, legislative history at times suggests that the Council was focused on including businesses and similar non-natural entities as complainants who may be the victims of property loss, and there may not have been an intent to categorically include liability for such non-natural entities as actors who commit theft, etc.[546] The RCC resolves this ambiguity by following the plain language of the current statutory definition in D.C. Code § 22-3201(2A) and making the definition applicable to both complainants and actors—anywhere the definition of "person" appears in the

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[544] D.C. Code § 45-604 contains a more limited and flexible definition of "person" that includes partnerships and corporations "unless such construction would be unreasonable." *See* D.C. Code § 45-604 (stating that "person" shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). This definition in D.C. Code § 45-604 applies to the entire D.C. Code. *See* D.C. Code § 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."). As such, the definition of "person" in D.C. Code § 45-604 appears to apply to the current D.C. Code theft and related offenses in Chapter 32 of Title 22, notwithstanding the specific definition in Chapter 32 for those offenses. D.C. Code 22-3201(2A) ("For the purposes of this chapter, the term . . . 'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity."). There is no DCCA case law on the definition of "person" in D.C. Code § 22-3201(2A) or D.C. Code § 45-604, or any DCCA case law that addresses the apparent conflict between the two definitions.

[545] D.C. Code 22-3201(2A) ("'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.").

[546] Committee on Public Safety and the Judiciary, *Report on Bill 18-151, "Omnibus Public Safety and Justice Amendment Act of 2009"* (June 26, 2009) at 18 ("This provision would amend D.C. Official Code 22-3201 *et seq.* to: amend definitions to . . . ensure that businesses and entities that may be victimized are contemplated by law."). Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) at 3 (regarding the meaning of "property of another" protected by the statutes: "Paragraph (4) of this section defines the term "property of another". This term is defined as property in which another has an interest which the offender may not infringe upon or interfere with without consent, whether or not the offender also has an interest in the property. In this context, "person" not only means individuals, but includes corporations, partnerships, associations and other entities."). *But see id.* at 74 (Regarding a provision for enhanced penalties: "The term 'commits' as used in this section is meant to be interpreted to cover persons who act as principals as well as persons who aid or abet the commission of one of the offenses: The term "person" is intended to include individuals as well as corporations, partnerships, associations am other legal entities. Thus, individual defendants as well as corporate defendants are subject to the enhanced penalty.").

revised statutes, or is contained an RCC definition like "owner" or "property of another." This change clarifies the revised statutes.

The RCC definition of "person" for property offenses makes one clarificatory change to the current statutory definition of "person" in D.C. Code § 22-3201(2A). The RCC definition of "person" replaces "government department, agency, or instrumentality" in the current definition of "person" in D.C. Code § 22-3201(2A) with "government," and "government instrumentality." This language is consistent with other RCC provisions,[547] but does not change the meaning of the statute which reaches any "any other legal entity."[548]

As applied to several RCC property offenses, however, the RCC definition of "person" may be viewed as a substantive change in law. The current definition of "person" in D.C. Code § 22-3201(2A) establishes that "person" includes natural persons as well as non-human legal entities. The current definition in D.C. Code § 22-3201(2A) applies only to the offenses and provisions in Chapter 32 of the current D.C. Code Title 22—theft, fraud, receiving stolen property, extortion, etc. It does not apply to other property offenses codified elsewhere in the current D.C. Code, such as malicious destruction of property,[549] despite a similar scope of conduct. Limiting the specific definition of "person" to theft offenses leads to inconsistent liability and disproportionate penalties. For example, if an actor steals money from a donation box for a charity, the charity, as a non-human entity, clearly falls within the definition of "person," and the actor's conduct is criminalized. However, if the defendant chooses to set the money in the donation box on fire, it is unclear in the current D.C. Code whether the theft-specific definition of "person" would apply.[550] Similarly, applying the specific definition of "person" to theft ensures that corporations and other non-human entities can be held liable as actors for theft and other property crimes, whereas it is unclear in the current D.C. Code if corporations and other non-human entities could be held liable for property damage or destruction.[551] The RCC resolves this ambiguity by applying this specific definition of "person" to both the defendant and the complainant in all property offenses in Subtitle III of Title 22E.

[547] RCC § 22E-4203. Blocking a Public Way.
[548] D.C. Code 22-3201(2A).
[549] D.C. Code § 22-303.
[550] As was noted earlier in this commentary, D.C. Code § 45-604 would still apply to theft offenses in Chapter 32 of Title 22, but the definition in D.C. Code § 45-604 is not categorical. It includes partnerships and corporations in the definition of "person" "unless such construction would be unreasonable." *See* D.C. Code § 45-604. It is thus ultimately unclear whether a non-human legal entity would be included in the scope of current D.C. Code property offenses that are not in Chapter 32 of Title 22.
[551] As was noted earlier in this commentary, D.C. Code § 45-604 would still apply to theft offenses in Chapter 32 of Title 22, but the definition in D.C. Code § 45-604 is not categorical. It includes partnerships and corporations in the definition of "person" "unless such construction would be unreasonable." *See* D.C. Code § 45-604. It is thus ultimately unclear whether a non-human legal entity would be included in the scope of current D.C. Code property offenses that are not in Chapter 32 of Title 22.

"Position of trust with or authority over" means a relationship with respect to a complainant of:

- **(A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption, or an individual with whom such a person is in a romantic, dating, or sexual relationship;**
- **(B) A person acting in the place of a parent per civil law, the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship;**
- **(C) Any person, at least 4 years older than the complainant, who resides intermittently or permanently in the same dwelling as the complainant;**
- **(D) Any employee, contractor, or volunteer of a school, religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program that has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant; or**
- **(E) A person responsible under civil law for the health, welfare, or supervision of the complainant.**

Explanatory Note. The RCC definition of "position of trust with or authority over" provides a close-ended list of individuals based upon their relationship with a complainant.

Subsection (A) includes a "parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption, or an individual with whom such a person is in a romantic, dating, or sexual relationship." The language "romantic, dating, or sexual relationship" tracks the language in the District's current definition of "intimate partner violence"[552] and is intended to have the same meaning. "Domestic partnership" is a defined term in RCC § 22E-701.

Subsection (B) includes a "person acting in the place of a parent per civil law," a defined term in RCC § 22E-701, as well as the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship." The language "romantic, dating, or sexual relationship" tracks the language in the District's current definition of "intimate partner violence"[553] and is intended to have the same meaning. "Domestic partner" is a defined term in RCC § 22E-701.

Subsection (C) includes any person, more than 4 years older than the complainant, who resides intermittently or permanently in the same dwelling as the complainant. The terms "complainant" and "dwelling" are defined in RCC § 22E-701.

Subsection (D) includes any employee, contractor, or volunteer of a school, religious institution, or other specified institution, such as a youth organization, provided

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[552] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[553] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

that that individual have “significant contact with the complainant” or “exercises supervisory or disciplinary authority over the complainant.” “Complainant” is a defined term in RCC § 22E-701.

Finally, subsection (E) includes a “person responsible under civil law for the health, welfare, or supervision of the complainant.” “Person responsible under civil law for the health, welfare, or supervision of the complainant” is a phrase used in several RCC provisions and offenses, such as the statutes for the criminal abuse of minors[554] and criminal neglect of minors,[555] and has intended to have the same meaning that is discussed there. There may be overlap between subsection (E) and the other subsections of the revised definition, but subsection (E) is a stand-alone category that does not modify any of the other categories of individuals in subsections (A) through (D). For example, a person that is more than four years older than the complainant and lives in the same dwelling as the complainant would satisfy subsection (C) of the definition and does not also have to have a responsibility under civil law for the health, welfare, or supervision of the complainant under subsection (E).

The RCC definition of “position of trust with or authority over” replaces the term “significant relationship,” currently defined in D.C Code § 22-3001(10),[556] (applicable to provisions in Chapter 30, Sexual Abuse), and is used in the penalty enhancements for the revised sexual assault statute,[557] as well as the revised offenses of sexual abuse of a minor,[558] revised sexually suggestive contact,[559] enticing a minor into sexual conduct,[560] and several obscenity offenses in RCC Chapter 18.[561]

Relation to Current District Law. *The RCC definition “position of trust with or authority over” makes one clear substantive changes to the current statutory definition of “significant relationship in D.C. Code § 22-3001(10).*[562]

The RCC definition of “position of trust with or authority over” is close-ended, using the term “means,” and requires that an individual satisfy at least one of the categories in subsections (A) – (E) . The current definition of “significant relationship” is

[554] RCC § 22E-1501.
[555] RCC § 22E-1502.
[556] D.C. Code § 22-3001(10) (“‘Significant relationship’ includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.”).
[557] RCC § 22E-1301.
[558] RCC § 22E-1302.
[559] RCC § 22E-1304.
[560] RCC § 22E-1305.
[561] Creating or trafficking an obscene image of a minor (RCC § 22E-1807); Possession of an obscene image of a minor (RCC § 22E-1808); Arranging for a live sexual performance of a minor (RCC § 22E-1809); Attending or viewing a live sexual performance of a minor (RCC § 22E-1810).
[562] D.C. Code § 22-3001(10).

open-ended and defines the term as "includ[ing]" the specified individuals or "any other person in a position of trust with or authority over" the complainant."[563] There is no DCCA case law interpreting the definition of "significant relationship" and it is unclear whether a job title or specified relationship to the complainant is sufficient, or if a substantive analysis of the relationship between the actor and the complainant is required. Resolving this ambiguity, the RCC definition of "position of trust with or authority over" is limited to the specified individuals in subsections (A) – (D). The RCC definition makes clear that no substantive analysis of the relationship between the actor and the complainant is necessary beyond determining if it fits into one of the specified categories. This revision improves the clarity and completeness of the RCC definition.

The RCC definition of "position of trust with or authority over" makes four possible substantive changes to the current statutory definition of "significant relationship in D.C. Code § 22-3001(10).[564]

First, subsection (A) of the RCC definition includes an individual with whom a "parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption" is "in a romantic, dating, or sexual relationship." Subsection (A) of the current D.C. Code definition of "significant relationship"[565] includes a "parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption." Subsection (A) establishes a "per se" list of relatives, including these relatives' spouses or domestic partners, regardless of whether these individuals have any responsibility for the complainant. Subsection (C) of the current D.C. Code definition of "significant relationship,"[566] however, includes "the spouse, domestic partner, or "paramour" of "the person who is charged with any duty for the health, welfare, or supervision of the complainant." To the extent that the specified relatives in subsection (A), for example, a parent, also have a responsibility for the complainant, subsection (A) and subsection (C) of the current definition overlap for those relatives, and also for those relatives' spouses or domestic partners. However, subsection (C) of the current definition includes a "paramour" of the person with a responsibility for the health, welfare, or supervision of the complainant and subsection (A) does not. This apparent discrepancy means that the "paramour" of a biological parent that has a responsibility for the complainant would be included in subsection (C) of the definition, but the "paramour" of a biological parent who has no responsibility for the complainant in subsection (A) would not. There is no DCCA case law interpreting the definition of "significant relationship." Resolving this ambiguity, the RCC definition includes the "paramour" of a biological parent, regardless of the parent's relationship with the complainant in the "per se" list of individuals specified in subsection (A) and also includes the "paramour" of the other individuals in subsection (A). This change improves the clarity of the revised definition and removes a possible gap in liability.

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[563] D.C. Code § 22-3001(10)(D).
[564] D.C. Code § 22-3001(10).
[565] D.C. Code § 22-3001(10)(A) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").
[566] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include "The person *or the spouse, domestic partner, or paramour* of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act." (emphasis added).

Second, the CCRC recommends replacing subsection (C) of the current definition of "significant relationship" ("The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision" of the complainant) with subsection (B) ("A person acting in the place of a parent per civil law, the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship") and subsection (E) ("A person responsible under civil law for the health, welfare, or supervision of the complainant."). In subsection (C) of the current definition of "significant relationship," the scope of "charged with any duty or responsibility for the health, welfare, or supervision" of the complainant is unclear and, interpreted broadly, would include the spouses, domestic partners, and significant others of any individual with any duty or responsibility for the health, welfare or supervision of the complainant, such as doctors, taxi drivers, etc. There is no DCCA case law interpreting the current definition of "significant relationship." Resolving this ambiguity, the CCRC recommends replacing subsection (C) of the current definition with subsection (B) and subsection (E). Subsection (B) ("A person acting in the place of a parent per civil law, the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship") limits spouses, domestic partners, and significant others to those of a person acting in the place of a parent per civil law, as opposed to any individual with any duty for the health, welfare, or supervision. Subsection (E) of the revised definition ("A person responsible under civil law for the health, welfare, or supervision of the complainant.") continues to provide liability for any individual that has a duty under civil law for the health, welfare, or supervision of the complainant. This language improves the clarity, consistency, and proportionality of the revised definition.

Third, subsection (D) of the revised definition of "position of trust with or authority over" includes a "contractor" at a school, religious institution, or other specified organization. Subsection (D) of the current definition of "significant relationship" includes "any employee or volunteer" of a school, religious institution, or other specified organization.[567] There is no DCCA case law interpreting the current definition of "significant relationship" and it is unclear whether a "contractor" would be included. Resolving this ambiguity, subsection (D) of the RCC definition of "position of trust with or authority over" specifically includes a "contractor." A contractor may have extensive or significant contact with the minors at a school or other institution, similar to an employee or volunteer. This change clarifies and may eliminate a gap in liability in the revised statutes.

Fourth, subsection (D) of the RCC definition of "position of trust with or authority over" requires that the individual "has significant contact with the complainant" or "exercises supervisory or disciplinary authority over the complainant" and the subsection deletes the phrase "including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff" that is in the current definition. Subsection (D) of the current definition of "significant relationship" specifies "any employee or volunteer" of a school, specified institution, etc., "including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or

[567] D.C. Code § 22-3001(10)(D).

support staff, or any other person in a position of trust with or authority over a child or a minor."[568] There is no DCCA case law interpreting the definition of "significant relationship." It is unclear in subsection (D) of the current definition whether "any other person in a position of trust with or authority over" a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. In current law and in the RCC, whether an actor that is 18 years of age or older is in a "position of trust with or authority over" or a "significant relationship" with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under the age of 18 years. Requiring the actor to have significant contact with the complainant or to exercise supervisory or disciplinary authority over the complainant ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. This change improves the clarity, consistency, and proportionality of the revised statute.

The remaining changes to the current definition of "significant relationship" in D.C. Code § 22-3001(10) are clarificatory and are not intended to change current District law.

First, subsection (B) of the revised definition replaces "legal or de facto guardian" in the current definition of "significant relationship"[569] with a "person acting in the place of a parent per civil law." "A legal or de facto guardian" is undefined in the current definition of "significant relationship" and there is no DCCA case law interpreting its scope in the current sexual abuse statutes. The RCC consistently uses the term "person acting in the place of a parent per civil law," as defined in RCC § 22E-701. This change improves the clarity of the revised statute.

Second, subsection (B) of the revised definition replaces "paramour" in the current definition of "significant relationship"[570] with an individual with whom a specified person is "in a romantic, dating, or sexual relationship." "Paramour" is undefined in the current definition of "significant relationship," not everyday language, and there is no DCCA case law interpreting its scope in the current sexual abuse statutes. "Romantic, dating, or sexual relationship" is identical to the language in the current D.C. Code definition of "intimate partner violence"[571] and is used throughout the RCC. This change improves the clarity of the revised statute.

Third, the revised definition replaces "more than 4 years older" than the complainant in subsection (B) of the current definition of "significant relationship" with

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[568] D.C. Code § 22-3001(10)(D).

[569] D.C. Code § 22-3001(10)(B) (defining "significant relationship" to include "A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim.").

[570] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include "The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act.").

[571] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

"at least 4 years older" than the complainant. The current definition of "significant relationship" includes certain individuals "more than 4 years older than the complainant."[572] The current child sexual abuse statutes, in contrast, are worded to require that the complainant be "at least four years older" than the complainant.[573] Consequently, there is a difference of a day in liability due to the different required age gaps.[574] For clarification, the revised sexually suggestive conduct with a minor statute uses the language "at least four years older," the same age gap that is in other RCC sex offenses, such as sexual abuse of a minor (RCC § 22E-1302). The change improves the consistency of the revised offense.

Fourth, the revised definition of "position of trust with or authority over" deletes "a school, church, synagogue, mosque" from the phrase "a school, church, synagogue, mosque, or other religious institution" in subsection (D) of the current definition of "significant relationship."[575] Subsection (D) of the revised definition still specifies a "religious institution, but including specific types of religious institutions is unnecessary and inconsistent with the general references to school, athletic program, etc. in the rest of the subsection. The reference to a "religious institution" in subsection (D) is intended to include a church, synagogue, or mosque. This change clarifies the revised definition.

Fifth, subsection (E) of the revised definition of "position of trust with or authority over" does not specify "at the time of the offense" like the generally equivalent provision does in subsection (C) of the current definition of "significant relationship."[576] The RCC sex offenses specify that the actor must be in the "position of trust with or authority over" the complainant at the time of the sexual conduct and this language is surplusage. This clarifies the revised statute.

Finally, the revised definition also substitutes "complainant" for "victim" in the current definition of "significant relationship,"[577] consistent with the meaning of "complainant" in RCC § 22E-701.

"Possess," and other parts of speech, including "possesses," "possessing," and "possession" means:

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[572] D.C. Code § 22-3001(10)(B) (defining "significant relationship" to include "A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim.").

[573] D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting "[w]hoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."); 22-3009 (second degree child sexual abuse statute prohibiting "[w]hoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[574] For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is "at least four years older" than the complainant. However, the actor would not be included in the current definition of "significant relationship" because the actor is not "more than four years older" than the complainant.

[575] D.C. Code § 22-3001(10)(D) (defining "significant relationship" to include "Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution . . .").

[576] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include the "person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act.").

[577] D.C. Code § 22-3001(10).

(A) **Hold or carry on one's person; or**
(B) **Have the ability and desire to exercise control over.**

Explanatory Note. Subsection (A) of the RCC definition addresses actual possession, while subsection (B) addresses constructive possession.

The RCC definition of "possess" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "possess" are in some current offenses[578]). The RCC definition of "possess" is used in the revised offenses of murder,[579] manslaughter,[580] robbery,[581] misuse of documents in furtherance of human trafficking,[582] unlawful creation or possession of a recording,[583] identity theft,[584] unlawful labeling of a recording,[585] possession of stolen property,[586] trafficking of stolen property,[587] possession of tools to commit property crime,[588] and correctional facility contraband.[589]

Relation to Current District Law. The RCC definition of "possess" is new and does not substantively change District law.

The RCC definition of "possess" closely follows current District practice in defining actual and constructive possession.[590] The definition of actual possession in subsection

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[578] D.C. Code §§ 22-3154 (Manufacture or possession of a weapon of mass destruction); 22-1835 (Unlawful conduct with respect to documents in furtherance of human trafficking); 22-2603.02 (Unlawful possession of contraband); 22-3102 (Prohibited acts); 22-4504.02 (Lawful transportation of firearms); 22-4510 (Licenses of weapons dealers; records; by whom granted; conditions); 22-902 (Trademark counterfeiting); 22-4515a (Manufacture, transfer, use, possession, or transportation of molotov cocktails, or other explosives for unlawful purposes, prohibited; definitions; penalties); 22-3214 (Commercial piracy); 22-2603.01 (Definitions); 22-4508 (Transfers of firearms regulated); 22-4507 (Certain sales of pistols prohibited); 22-3214.01 (Deceptive labeling); 22-3227.02 (Identity theft); 22-1006.01 (Penalty for engaging in animal fighting); 22-3312.04 (Penalties); 22-3231 (Trafficking in stolen property); 22-811 (Contributing to the delinquency of a minor); 22-1708 (Gambling pools and bookmaking; athletic contest defined); 22-1001 (Definitions and penalties); 22-1831 (Definitions); 22-3232 (Receiving stolen property); 22-4514 (Possession of certain dangerous weapons prohibited; exceptions); 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception); 22-4504 (Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty).

[579] RCC § 22E-1101.

[580] RCC § 22E-1102.

[581] RCC § 22E-1201.

[582] RCC § 22E-1607.

[583] RCC § 22E-2105.

[584] RCC § 22E-2205.

[585] RCC §22E-2207.

[586] RCC § 22E-2401.

[587] RCC § 22E-2402.

[588] RCC § 22E-2702.

[589] RCC § 22E-3403.

[590] *See* D.C. Crim. Jur. Instr. § 3-104. Possession-Defined. ("C.- WHERE THE GOVERNMENT ALLEGES JOINT ACTUAL POSSESSION OR CONSTRUCTIVE POSSESSION Possession means to have physical possession or to otherwise exercise control over tangible property. A person may possess property in either of two ways. First, the person may have physical possession of it by holding it in his or her hand or by carrying it in or on his or her body or person. This is called 'actual possession.' Second, a person may exercise control over property not in his or her physical possession if that person has both the power and the intent at a given time to control the property. This is called 'constructive possession.'").

(A) is rooted in longstanding District case law.[591] As under current law, subsection (B) of the RCC definition of "possess" requires both an ability and desire to control the item possessed in order to prove constructive possession.[592] Although District case law has frequently used the phrase "dominion or control"[593] or the phrase "dominion and control"[594] to describe constructive possession, the RCC follows current District practice in omitting reference to "dominion" as unnecessary and potentially confusing.[595]

"Property" means anything of value. The term "property" includes:

(A) Real property, including things growing on, affixed to, or found on land;

(B) Tangible or intangible personal property, including an animal;

(C) Services;

(D) Credit;

(E) Money, or any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed; and

(F) A government-issued license, permit, or benefit.

Explanatory Note. The RCC definition of "property" replaces the current definition of "property" in D.C. Code § 22-3201(3),[596] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "property" is used in the RCC definition of "property of another,"[597] the provision for aggregation to determine property offense grades,[598] as well as the revised offenses of theft,[599] unauthorized use of property,[600] shoplifting,[601] criminal damage to property,[602] criminal graffiti,[603] fraud,[604] payment card fraud,[605] check fraud,[606] forgery,[607] identity theft,[608] financial exploitation of a vulnerable adult,[609] possession of stolen property,[610] trafficking of stolen property,[611] and extortion.[612]

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[591] *United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).").

[592] *Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc).

[593] *Id.*

[594] *Guishard v. U.S.*, 669 A.2d 1306, 1312 (D.C. 1995).

[595] *See* D.C. Crim. Jur. Instr. § 3-104. Possession-Defined. Comment. ("In previous editions, the Committee recommended deletion of the term "dominion" from this instruction. 'Dominion,' which is not used in everyday speech, may create misunderstanding, especially among lay jurors, and adds nothing intellectually distinct to the concept of 'control.' The Committee adheres to this view.").

[596] D.C. Code § 22-3201(3) ("'Property' means anything of value. The term "property" includes, but is not limited to: (A) Real property, including things growing on, affixed to, or found on land; (B) Tangible or intangible personal property; (C) Services; (D) Credit; (E) Debt; and (F) A government-issued license, permit, or benefit.").

[597] RCC § 22E-701.

[598] RCC § 22E-2002.

[599] RCC § 22E-2101.

[600] RCC § 22E-2102.

[601] RCC § 22E-2104.

[602] RCC § 22E-2503.

[603] RCC § 22E-2504.

[604] RCC § 22E-2201.

[605] RCC § 22E-2202.

[606] RCC § 22E-2203.

Relation to Current District Law. *The RCC definition of "property" makes one possible substantive change to the statutory definition of "property" in D.C. Code § 22-3201(3).* The RCC definition deletes "debt" and instead includes "money" and "any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed." The current definition of "property" includes "debt."[613] The term is not defined statutorily and there is no DCCA case law interpreting it. It is unclear, however, how "debt" can be "anything of value" that is required by the definition of "property." Resolving this ambiguity, the revised definition of "property" deletes "debt" and specifies types of property that satisfy the definition's requirement of "anything of value." This change improves the clarity of the revised statute.

The RCC definition of "property" makes one clarificatory change to the statutory definition of "property" in D.C. Code § 22-3201(3). Subsection (B) of the revised definition includes an "animal." This change improves the clarity and consistency of the revised definition.

The RCC definition of "property" is otherwise identical to the statutory definition under current law.[614]

"Property of another" means any property that a person has an interest in with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The term "property of another" does not include any property in the possession of the actor with which the other person has only a security interest.

Explanatory Note. In the RCC, the revised definition of "property of another" generally builds upon separate, civil law determinations of property rights. With the exception of property in the possession of the accused that the other person has only a security interest, the definition of "property of another" follows civil law determinations of property rights.

Property is "property of another" when a person has an interest in the property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. It is irrelevant that the other person may be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband.[615] In addition, this language does not categorically determine issues of joint ownership, such as, for example, whether a spouse

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[607] RCC § 22E-2204.
[608] RCC § 22E-2205.
[609] RCC § 22E-2208.
[610] RCC § 22E-2401.
[611] RCC § 22E-2402.
[612] RCC § 22E-2301.
[613] D.C. Code § 22-3201(3) ("'Property' means anything of value. The term "property" includes, but is not limited to: (A) Real property, including things growing on, affixed to, or found on land; (B) Tangible or intangible personal property; (C) Services; (D) Credit; (E) Debt; and (F) A government-issued license, permit, or benefit.").
[614] D.C. Code 22-3201(3).
[615] For example, a second thief can steal previously stolen property or contraband from the first thief, even though the second thief may not be able to sue the first thief in civil court to recover the property or contraband.

can steal from a spouse or a partner can steal from a partnership. The phrase "regardless of whether the accused also has an interest in that property" in the revised definition clarifies that having joint ownership or other property interests in an item does not necessarily mean it is not "property of another." The state of civil law as to whether a joint owner or person with a property interest has a right to interfere with the other joint owner's right to an item will continue to control whether that property is "property of another," as it does under current District law.

The second sentence of the revised definition of "property of another" establishes a narrow exclusion for security interests. Under this part of the revised definition, an individual who is a debtor cannot steal, misappropriate, or damage property in his or her possession in which the other person—the complainant—has only a security interest. Civil remedies such as contract liability, rather than criminal liability, address this situation between the debtor and creditor. However, under the revised definition, a third party can be criminally liable for stealing, misappropriating, or damaging property that is in the possession of the debtor because the debtor does not have only a security interest in that property, the debtor also has a possessory interest.

The RCC definition of "property of another" replaces the current statutory definition of "property of another" in D.C. Code § 22-3201(4),[616] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "property of another" is used in the revised offenses of robbery,[617] theft,[618] unauthorized use of property,[619] shoplifting,[620] criminal damage to property,[621] criminal graffiti,[622] fraud,[623] forgery,[624] identity theft,[625] financial exploitation of a vulnerable adult,[626] and extortion.[627]

Relation to Current District Law. The RCC definition of "property of another" makes one clear change to the current statutory definition of "property of another" in current D.C. Code § 22-3201(4).[628] The RCC definition of "property of another" narrows the scope of the security interest exception that is in the current definition of "property of another." The last sentence of the current definition of "property of another" states that "property of another" excludes property in the possession of the accused as to which

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[616] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").
[617] RCC § 22E-1201
[618] RCC § 22E-2101.
[619] RCC § 22E-2102.
[620] RCC § 22E-2104.
[621] RCC § 22E-2503.
[622] RCC § 22E-2504.
[623] RCC § 22E-2201.
[624] RCC § 22E-2204.
[625] RCC § 22E-2205.
[626] RCC § 22E-2208.
[627] RCC § 22E-2301.
[628] in D.C. Code § 22-3201(4).

"any" person has only a security interest.[629] As a result, any offense that requires property to be "property of another" excludes from its coverage a broad category of property. The legislative history for the current definition of "property of another" contains conflicting explanations of the intended meaning of the exclusion of security interests.[630] The legislative history does not recognize that its explanations conflict with one another, which indicates that the Council likely did not intend to exclude all property in which another person has a security interest. In contrast, the revised definition of "property of another" narrows the exclusion for security interests to situations where "the other person"—the complaining witness—is the party that has the security interest. Civil remedies such as contract liability, rather than criminal liability, address this situation. The revised definition of "property of another" does not change the limited D.C. Court of Appeals (DCCA) case law holding that the government does not have to prove the security interest exception as an element of shoplifting.[631] This change clarifies the definition and reduces a gap in District law.

The remaining changes to the revised definition are clarificatory and are not intended to change current District law.

First, the revised definition of "property of another" deletes the reference to "government" in the first sentence of the current definition.[632] The reference is surplusage because the revised definition of "property of another" incorporates the revised definition of "person." The revised definition of "person" in 22E-701 includes governments, corporations, and other legal entities, where such construction is reasonable. Deleting the reference to government clarifies the definition without changing District law.

Second, the revised definition deletes the sentence, "The term 'property of another' includes the property of a corporation or other legal entity established pursuant to an interstate compact" that is in the current definition.[633] The sentence is superfluous

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[629] D.C. Code 22-3201(4) ("The term 'property of another' does not include any property in the possession of the accused as to which any other person has only a security interest.").

[630] The legislative history for the 1982 Theft Act notes that the definition of "property of another" "does not extend to *property in which the other person* has only a security interest. Thus, the ordinary credit transaction is not included in this definition." *Extension of Comments on Bill No. 4-193* at 17 (emphasis added). However, the legislative history also notes that "property of another" "is not intended to cover property that is in *a person's* possession and in which another person has only a security interest." *Id.* at 4 (emphasis added). Given the different wordings in the explanations of "property of another," it appears that the drafters of the 1982 Theft Act did not consider or realize that the definition of "property of another" may exclude *all* property that has a security interest from theft offenses.

[631] *Alston v. United States*, 509 A.2d 1129, 1130-1131 (D.C. 1986) ("there was no intention [on the part of the Council] to transform the exception for property in which a security interest is held by another in the definitional section into an element of the offense of shoplifting which must be proved by the government in its case in chief. We therefore may not impose that requirement of prof on the government in shoplifting cases.").

[632] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").

[633] *Id*.

because the revised definition of "property of another" incorporates the revised definition of "person." The revised definition of "person" in 22E-701 includes corporations and other legal entities, where such construction is reasonable.

Third, the revised definition of "property of another" refers to "actor" instead of the "accused" that is in the current definition.[634] RCC § 22E-701 defines "actor" as a "person accused of any criminal offense." Using "actor" instead of "accused" is a drafting change and does not substantively change current District law.

Finally, the revised definition deletes "infringe upon" that is in the current definition of "property of another."[635] The revised definition specifies "not privileged to interfere," rendering "infringe upon" superfluous. Deleting "not privileged to interfere" does not change District law.

"Protected person" means a complainant who is:

- **(A) Under 18 years of age, when, in fact, the actor is 18 years of age or older and at least 4 years older than the complainant;**
- **(B) 65 years of age or older, when, in fact, the actor is under the age of 65 years and at least 10 years younger than the complainant;**
- **(C) A vulnerable adult;**
- **(D) A law enforcement officer, while in the course of his or her official duties;**
- **(E) A public safety employee, while in the course of his or her official duties;**
- **(F) A transportation worker, while in the course of his or her official duties; or**
- **(G) A District official, while in the course of his or her official duties.**

Explanatory Note. The RCC definition of "protected person" is new, the term is not currently defined in Title 22 of the D.C. Code (although there are several similar terms and related provisions in Title 22 concerning crimes against minors,[636] elderly persons,[637] vulnerable adults,[638] law enforcement officers,[639] public safety employees,[640]

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[634] D.C. Code § 22-3201(4).

[635] *Id*.

[636] D.C. Code § 22-3611 ("(a) Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both. (b) It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence. (c) For the purposes of this section, the term: (1) "Adult" means a person 18 years of age or older at the time of the offense. (2) "Crime of violence" shall have the same meaning as provided in § 23-1331(4). (3) "Minor" means a person under 18 years of age at the time of the offense.").

[637] D.C. Code §§ 22-932(3) (abuse of a vulnerable adult or elderly person statutes defining "elderly person" as "a person who is 65 years of age or older."); 22-3601 ("(a) Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment

otherwise authorized for the offense, or both. (b) The provisions of subsection (a) of this section shall apply to the following offenses: Abduction, arson, aggravated assault, assault with a dangerous weapon, assault with intent to kill, commit first degree sexual abuse, or commit second degree sexual abuse, assault with intent to commit any other offense, burglary, carjacking, armed carjacking, extortion or blackmail accompanied by threats of violence, kidnapping, malicious disfigurement, manslaughter, mayhem, murder, robbery, sexual abuse in the first, second, and third degrees, theft, fraud in the first degree, and fraud in the second degree, identity theft, financial exploitation of a vulnerable adult or elderly person, or an attempt or conspiracy to commit any of the foregoing offenses. (c) It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[638] D.C. Code § 22-932(5) (abuse of a vulnerable adult or elderly person statutes defining "vulnerable adult" as a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.").

[639] D.C. Code § 22-405 ("(a) For the purposes of this section, the term "law enforcement officer" means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision. (b) Whoever without justifiable and excusable cause assaults a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned not more than 6 months or fined not more than the amount set forth in § 22-3571.01, or both. (c) A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both. (d) It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."); D.C. Code § 22-2106 "(a) 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 engaged in, or on account of, the performance of such officer's or employee's official duties, is guilty of murder of a law enforcement officer or public safety employee, and shall be sentenced to life without the possibility of release. It shall not be a defense to this charge that the victim was acting unlawfully by seizing or attempting to seize the defendant or another person. (b) For the purposes of subsection (a) of this section, the term: (1) "Law enforcement officer" means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers. (2) "Public safety employee" means: (A) A District of Columbia firefighter, emergency medical technician/paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and (B) Any federal, state, county, or municipal officer performing

taxicab drivers,[641] transit operators and Metrorail station managers,[642] and District officials or employees.[643]). The RCC definition of "protected person" replaces these terms and provisions and is used in the revised offenses of murder,[644] manslaughter,[645]

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functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph. (c) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[640] D.C. Code § 22-2106 ("(a) 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 engaged in, or on account of, the performance of such officer's or employee's official duties, is guilty of murder of a law enforcement officer or public safety employee, and shall be sentenced to life without the possibility of release. It shall not be a defense to this charge that the victim was acting unlawfully by seizing or attempting to seize the defendant or another person. (b) For the purposes of subsection (a) of this section, the term: . . . (2) "Public safety employee" means: (A) A District of Columbia firefighter, emergency medical technician/paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and (B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph. (c) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[641] D.C. Code § 22-3751 ("Any person who commits an offense listed in § 22-3752 against a taxicab driver who, at the time of the offense, has a current license to operate a taxicab in the District of Columbia or any United States jurisdiction and is operating a taxicab in the District of Columbia may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[642] D.C. Code § 22-3751.01 ("(a) Any person who commits an offense enumerated in § 22-3752 against a transit operator, who, at the time of the offense, is authorized to operate and is operating a mass transit vehicle in the District of Columbia, or against Metrorail station manager while on duty in the District of Columbia, may be punished by a fine of up to one and ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and ½ times the maximum term of imprisonment otherwise authorized by the offense, or both. (b) For the purposes of this section, the term: (1) "Mass transit vehicle" means any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia. (2) "Metrorail station manager" means any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station. (3) "Transit operator" means a person who is licensed to operate a mass transit vehicle.").

[643] D.C. Code § 22-851 ("(a) For the purposes of this section, the term: . . . (2) "Official or employee" means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions . . . (c) A person who stalks, threatens, assaults, kidnaps, or injures any official or employee or vandalizes, damages, destroys, or takes the property of an official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law. (d) A person who stalks, threatens, assaults, kidnaps, or injures a family member or vandalizes, damages, destroys, or takes the property of a family member on account of the performance of the official or employee's duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.").

[644] RCC § 22E-1101.

[645] RCC § 22E-1102.

robbery,[646] assault,[647] offensive physical contact,[648] aggravated kidnapping,[649] and aggravated criminal restraint.[650]

Relation to Current District Law. The revised definition of "protected person" makes seven clear changes to the statutory language of the provisions in current Title 22 for crimes against minors,[651] elderly persons,[652] vulnerable adults,[653] law enforcement officers,[654] public safety employees,[655] taxicab drivers,[656] transit operators and Metrorail station managers,[657] and District officials or employees.[658]

First, subsection (A) requires at least a four year age gap between the actor and the complainant and, by use of the phrase "in fact," requires strict liability for the age gap. The District's current penalty enhancement for certain crimes against minors requires only a two year age gap[659] between an actor that is 18 years of age or older and a complainant that is under 18 years of age.[660] The current penalty enhancement[661] does not specify any culpable mental state for the age gap and District practice[662] suggests that strict liability applies, although there is no case law on point. In contrast, subsection (A) of the RCC definition of "protected person" requires a four year age gap, which creates uniformity with the required age gap in several current District offenses[663] as well as

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[646] RCC § 22E-1201.
[647] RCC § 22E-1202.
[648] RCC § 22E-1205.
[649] RCC § 22E-1401.
[650] RCC § 22E-1403.
[651] D.C. Code § 22-3611.
[652] D.C. Code § 22-932(3).
[653] D.C. Code § 22-932(5).
[654] D.C. Code §§ 22-405; 22-2106.
[655] D.C. Code § 22-2106.
[656] D.C. Code § 22-3751.
[657] D.C. Code § 22-3751.01.
[658] D.C. Code § 22-851.
[659] D.C. Code § 22-3611 ("(a) Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both.").
[660] Subsection (A) of the RCC definition of "protected person" and the current penalty enhancement for crimes against minors have the same age requirements for the actor and the complainant. The current penalty enhancement defines "adult" as a "person 18 years of age or older at the time of the offense" and a "minor" as a "person under 18 years of age at the time of the offense." D.C. Code § 22-3601(c). Rather than separately defining the terms of "adult" and "minor" like the current statute, subsection (A) incorporates the definitions of these terms directly into the revised statute, improving the clarity of the definition.
[661] The current penalty enhancement does not specify any culpable mental state for the required age gap. In addition, the current enhancement contains an affirmative defense that the accused "reasonably believed" that the victim was not a minor at the time of the offense. D.C. Code § 22-3611(b). However, the affirmative defense does not apply to the required age difference.
[662] D.C. Crim. Jur. Instr. § 8.103.
[663] The District's current child sexual abuse, enticing a child, and arranging for a sexual contact with a real or fictitious child statutes require at least a four year age gap between the actor and a complainant under the age of 16 years. D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3010 (enticing a child); 22-3010.02 (arranging for a sexual contact with a real or fictitious child); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

several of the revised sex offenses in RCC chapter 13. Requiring strict liability for the age gap clarifies current District law and is consistent with several of the revised sexual offenses in RCC chapter 13. This change improves the clarity, consistency, and proportionality of the revised offenses against persons.

Second, subsection (B) requires that the actor be under 65 years of age and at least 10 years younger than the complainant and, by use of the phrase "in fact," applies strict liability to this requirement. Neither the current penalty enhancement for crimes committed against senior citizens[664] nor the current offenses for criminal abuse[665] and criminal neglect of an elderly person[666] require an age gap between the elderly complainant and the actor. In contrast, subsection (B) of the RCC definition of "protected person" requires that the actor be under the age of 65 years and at least 10 years younger than the complainant and applies strict liability to this requirement. The age gap requirement for the actor reserves enhanced penalties for predatory behavior targeting the elderly, rather than violence between elderly persons, and is consistent with a penalty enhancement in the revised sexual assault statute (RCC § 22E-1303), as is the strict liability requirement. This change improves the consistency and proportionality of the revised offenses against persons statutes.

Third, subsection (C) of the RCC definition of "protected person" includes a complainant that is a "vulnerable adult," as that term is defined in RCC § 22E-701. Under current District law, a vulnerable adult is extended special protection under the criminal abuse of a vulnerable adult,[667] financial exploitation of a vulnerable adult,[668] and criminal neglect of a vulnerable adult[669] statutes, but those are the only offenses. In contrast, subsection (C) of the RCC definition of "protected person" consistently enhances penalties for harms to a "vulnerable adult" in certain RCC offenses against persons because vulnerable adults are among those most susceptible to criminal acts. This change improves the clarity, consistency, and proportionality of the revised offenses against persons.

Fourth, subsection (D) and subsection (E) of the RCC definition of "protected person" include complainants that are a "law enforcement officer" and a "public safety officer," as those terms are defined in RCC § 22E-701. Under current District law, harms to law enforcement officers receive enhanced penalties for assault and murder,[670] and

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The District's current contributing to the delinquency of a minor statute requires at least a four year age gap between the actor and a complainant under the age of 18 years. D.C. Code § 22-811.

[664] D.C. Code § 22-3601(a) ("Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[665] D.C. Code §§ 22-933; 22-932(3) (defining "elderly person" as "a person who is 65 years of age or older.").

[666] D.C. Code §§ 22-934; 22-932(3) (defining "elderly person" as "a person who is 65 years of age or older.").

[667] D.C. Code § 22-933.

[668] D.C. Code § 22-933.01.

[669] D.C. Code § 22-934.

[670] D.C. Code §§ 22-405 (assault on a police officer statute); 22-2106 (murder of a law enforcement officer statute). In addition to these specific offenses, D.C. Code § 22-851 prohibits committing specified crimes

harms to public safety employees receive enhanced penalties for murder.[671] In contrast, subsection (D) and subsection (E) of the RCC definition of "protected person" consistently enhance penalties for harms to law enforcement officers and public safety employees in certain RCC offenses against persons. This change improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

Fifth, subsection (F) of the RCC definition of "protected person" includes complainants that are a "transportation worker," as that term is defined in RCC § 22E-701. Under current District law, certain harms to taxicab drivers,[672] transit operators, [673] and Metrorail station managers[674] receive enhanced penalties, but the enhancements apply to different offenses as compared to other current penalty enhancements in District law, such as the penalty enhancement for crimes committed against minors.[675] Current District law also does not have a penalty enhancement for crimes committed against private car service drivers. In contrast, subsection (F) of the RCC definition of "protected person, through the definition of "transportation worker" in RCC § 22E-701, consistently enhances penalties for harms to transportation workers, including private car service drives, in certain RCC offenses against persons. This change improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

Sixth, subsection (G) of the RCC definition of "protected person" effectively repeals current D.C. Code § 22-851. Current D.C. Code § 22-851(b)[676] and (c)[677]

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against a law enforcement officer while the law enforcement officer is engaged in the performance of his or her duties or on account of the performance of those duties, provided that the law enforcement officer is also a District "official or employee," as that term is defined in D.C. Code § 22-851. D.C. Code § 22-851(a)(2), (c).

[671] D.C. Code § 22-2106. In addition, D.C. Code § 22-851 prohibits committing specified crimes against a public safety employee while the public safety employee is engaged in the performance of his or her duties or on account of the performance of those duties, provided that the public safety employee is also a District "official or employee," as that term is defined in D.C. Code § 22-851. D.C. Code § 22-851(a)(2), (c).

[672] D.C. Code § 22-3751.

[673] D.C. Code § 22-3751.01.

[674] D.C. Code § 22-3751.01.

[675] For example, the current penalty enhancement for crimes committed against minors applies to any crime that is a "crime of violence," as that term is defined in D.C. Code § 22-1331(4). D.C. Code § 22-3611(a), (c)(2). The definition of "crime of violence" is broad and includes several crimes that are not included in the penalty enhancements for taxicab drivers, transit operators, and Metrorail station managers in D.C. Code §§ 22-3751, 22-3751.01, and 22-3752. For example, assault with significant bodily injury, assault with intent to kill, assault with intent to commit first degree or second degree child sexual abuse, and burglary are included in the penalty enhancement for crimes against minors, but not the penalty enhancement for the transit operators, and Metrorail station managers. Although the scope of crimes for the penalty enhancement against minors is far broader than the penalty enhancement for crimes committed against transit operators, and Metrorail station managers, there are a few crimes in the penalty enhancement for crimes committed against transit operators, and Metrorail station managers that are not include in the penalty enhancement for minors, such as fourth degree sexual abuse and misdemeanor sexual abuse.

[676] D.C. Code § 22-851(b) ("A person who corruptly or, by threat or force, or by any threatening letter or communication, intimidates, impedes, interferes with, or retaliates against, or attempts to intimidate, impede, interfere with, or retaliate against any official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both.").

prohibit committing specified crimes against any District "official or employee," broadly defined in D.C. Code § 22-851(a)[678] as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions."[679] Current D.C. Code D.C Code § 22-851(d) prohibits committing specified crimes against a "family member" of a District official or employee, as defined in D.C. Code § 22-851(a),[680] on account of the official or employee's performance of official duties.[681] In contrast, subsection (G) of the RCC definition of "protected person" is limited to a "District official," as that term is defined in RCC § 22E-701,[682] and does not include family members of District officials. The RCC definition of "District official" narrows the penalty enhancement to individuals that have special obligations in District government.[683] This change improves the consistency and proportionality of the revised offenses against persons.

Seventh, the RCC definition of "protected person" eliminates the current penalty enhancement for a "citizen patrol member." Current District law has a penalty enhancement for committing specified crimes against a member of a citizen patrol in the course of his or her duties or because of his or her participation in a citizen patrol.[684] In contrast, the RCC definition of "protected person" does not include citizen patrol members and, by extension, does not enhance penalties for this category of complainants in the RCC offenses against persons. This change improves the consistency and proportionality of the revised offenses against persons.

Conduct within the scope of subsection (b) of D.C Code § 22-851 may also be affected by the revised [obstruction of justice offenses in RCC § 22E-XXXX, forthcoming].

[677] D.C. Code § 22-851(c) ("A person who stalks, threatens, assaults, kidnaps, or injures any official or employee or vandalizes, damages, destroys, or takes the property of an official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.").

[678] D.C. Code § 22-851(a) ("For the purposes of this section, the term: (2) 'Official or employee' means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.").

[679] D.C. Code § 22-851(a)(2).

[680] D.C. Code § 22-851(a) ("For the purposes of this section, the term: (1) 'Family member" means an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship.').

[681] D.C. Code § 22-851(d) ("A person who stalks, threatens, assaults, kidnaps, or injures a family member or vandalizes, damages, destroys, or takes the property of a family member on account of the performance of the official or employee's duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.").

[682] RCC § 22E-701 defines "District official" as having the same meaning as the term "public official" in D.C. Code § 1-1161.01(47). D.C. Code § 1-1161.01(47) is limited to individuals that have special ethical and campaign finance obligations under the current D.C. Code and is discussed further in the commentary to RCC § 22E-701.

[683] For example, many of the individuals in the definition of "public official" are required to file annual public financial disclosures, D.C. Code § 1-1162.24, and all public officials are subject to possible censure for certain ethical violations. D.C. Code § 1-1162.22(a).

[684] D.C. Code § 22-3602.

Other changes to the statutory language of the provisions in current Title 22 for crimes against minors,[685] elderly persons,[686] vulnerable adults,[687] law enforcement officers,[688] public safety employees,[689] taxicab drivers,[690] transit operators and Metrorail station managers,[691] and District officials or employees[692] are merely clarificatory. For instance, because the element that the complainant is a "protected person" is part of the gradations in several RCC offenses against persons, rather than a stand-alone penalty enhancement, there is no need to specify that the complainant must satisfy the requirements of the definition "at the time of the offense" as some current sentencing enhancements do.[693]

As applied to certain RCC offenses against persons, the RCC definition of "protected person" may substantively change current District law. For example, the RCC assault and robbery offenses eliminate the affirmative defenses in the current penalty enhancements for committing crimes against the elderly or minors. Under current District law, it is an affirmative defense to the senior citizen penalty enhancement that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed."[694] Similarly, under the current minor victim enhancement, it is an affirmative defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years old] at the time of the offense."[695] Instead of an affirmative defense, the RCC assault and robbery offenses apply a "reckless" culpable mental state to gradations that require that the complaint is a "protected person." "Reckless" is defined in RCC § 22E-206 and here requires that the accused must disregard a substantial risk that the complainant was under 18 or was 65 years of age or older. The "reckless" culpable mental state preserves the substance of the defenses for both the senior citizen enhancement and minor enhancement.[696] However, requiring a "reckless" culpable mental state improves the

[685] D.C. Code § 22-3611.
[686] D.C. Code §§ 22-932(3).
[687] D.C. Code § 22-932(5).
[688] D.C. Code §§ 22-405; 22-2106.
[689] D.C. Code § 22-2106.
[690] D.C. Code § 22-3751.
[691] D.C. Code § 22-3751.01.
[692] D.C. Code § 22-851.
[693] D.C. Code § 22-3601; D.C. Code § 22-3611(c)(1), (c)(2); D.C. Code § 22-3751; D.C. Code § 22-3751.01(a).
[694] D.C. Code § 22-3601(c).
[695] D.C. Code § 22-3611(b).
[696] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial risk that the complainant was 65 years of age or older. Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused

clarity and consistency of the offenses because the RCC assault and robbery statutes apply a "recklessly" mental state to the other categories of individuals in the definition of "protected person."

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "protected person" on current District law.

"Protection order" means an order issued pursuant to D.C. Code § 16-1005(c).

Explanatory Note. The RCC definition of "protection order" does not include civil injunctions or extrajudicial orders.

The RCC definition of "protection order" is new; the term is not currently defined in Title 22 of the D.C. Code (although an undefined reference to "protection order" appears in the current tampering with a detection device statute[697]). The RCC definition of "protection order" is used in the revised offense of tampering with a detection device.[698]

Relation to Current District Law. The RCC definition of "protection order" is new and does not substantively change District law.

As applied in the revised tampering with a detection device offense, the term "protection order" clarifies, but does not change, current District law. The current statute uses the phrase "protection order" but does not define it. Case law has not addressed its meaning. The revised code specifies that "protection order" refers to the civil protection orders that are issued after formal notice and hearing under Title 16 of the D.C. Code. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including any airplane, train, bus, or boat.

Explanatory Note. The RCC definition of "public conveyance" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "public conveyance" appear in the current disorderly conduct statute[699]). The RCC definition of "public conveyance" is used in the revised offense of public nuisance.[700]

Relation to Current District Law. The RCC definition of "public conveyance" is new and does not substantively change District law.

As applied in the revised public nuisance statute, the term "public conveyance" clarifies, but does not change, District law. The current disorderly conduct statute (which includes public nuisances) uses the phrase "public conveyance" but does not define it. Case law does not address its meaning. The revised code adds a definition of "public conveyance" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Public safety employee" means:

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would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial risk that the complainant was under 18 years of age.

[697] D.C. Code § 22-1211(a)(1).

[698] RCC § 22E-3402.

[699] D.C. Code § 22-1321(c).

[700] RCC § 22E-4202.

(A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician;

(B) Any investigator, vehicle inspection officer as defined in D.C. Code § 50-301.03(30B), or code inspector, employed by the government of the District of Columbia; and

(C) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in paragraph (A) and paragraph (B).

Explanatory Note. The RCC definition of "public safety employee" replaces the current statutory definition of "public safety employee" in D.C. Code § 22-2106(b)(1),[701] applicable to the current murder of a law enforcement officer statute. The RCC definition of "public safety employee" is used in the RCC definition of "protected person"[702] and in the revised offenses of murder,[703] manslaughter,[704] assault,[705] offensive physical contact,[706] aggravated kidnapping,[707] and aggravated criminal restraint.[708]

Relation to Current District Law. The RCC definition of "public safety employee" makes one clear change to the current statutory definition in D.C. Code § 22-2106(b)(1).[709] The current definition of "public safety employee" is limited to specified firefighters and emergency medical personnel, as well as any federal, state, county, or municipal officers performing comparable functions.[710] In contrast, subsection (B) of the RCC definition expands the definition to include "[a]ny investigator, vehicle inspection officer as defined in D.C. Code § 50-301.03(30B), or code inspector, employed by the government of the District of Columbia." These categories of complainants are included in the definition of "law enforcement officer" for the District's current assault on a police officer (APO) statute,[711] as well as the assault on a public vehicle inspection officer statutes.[712] This change clarifies District law by distinguishing persons who are regularly

[701] D.C. Code § 22-2106(b)(1) ("'Public safety employee' means: (A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and (B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph.").

[702] RCC § 22E-701.

[703] RCC § 22E-1101.

[704] RCC § 22E-1102.

[705] RCC § 22E-1202.

[706] RCC § 22E-1205.

[707] RCC § 22E-1401.

[708] RCC § 22E-1403.

[709] D.C. Code § 22-2106(b)(1).

[710] D.C. Code § 22-2106(b)(1).

[711] D.C. Code § 22-405(a) (defining "law enforcement officer" for the APO statute to include "any officer or member of any fire department operating in the District of Columbia" and "any investigator or code inspector employed by the government of the District of Columbia.").

[712] D.C. Code §§ 22-404.02; 22-404.03. Although the criminal offenses in D.C. Code §§ 22-404.02 and 22-404.03 state that the term "public vehicle inspection officer shall have the same meaning as provided in § 50-303(19)," in fact the term "public vehicle inspection officer" no longer exists in Title 50 of the D.C. Code. The definition of "public vehicle inspection officer" was repealed with the passage of the Vehicle-For-Hire Innovation Amendment Act of 2014 ("VFHIAA") (Mar. 10, 2015, D.C. Law 20-197, § 2(a), 61

involved with criminal law enforcement from others who are not, and creating broad, consistent definitions as to who constitutes a law enforcement officer or public safety employee.

As applied to certain RCC offenses against persons, the RCC definition of "public safety employee" may substantively change District law. For example, under current District law, murder is the only offense that enhances penalties specifically for physical harms to paramedics and emergency medical technicians.[713] Through their gradations referencing a "protected person," however, additional RCC offenses against persons, such as robbery and assault, provide new, enhanced penalties where a public safety employee—including paramedics, and emergency medical technicians—is victimized. The expansion of a penalty enhancement for harming such persons improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "public safety employee" on current District law.

"Purposely" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "purposely" is addressed in the Commentary accompanying RCC § 22E-206.

"Rail transit station" has the meaning specified in D.C. Code § 35-251(a).

Explanatory Note. The RCC definition of "rail transit station" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "rail transit station" is used in the revised indecent exposure offense.[714]

Relation to Current District Law. The RCC definition of "rail transit station" is new and does not itself substantively change existing District law.

"Recklessly" has the meaning specified in RCC § 22E-206.

Explanatory Note. The definition of "recklessly" is addressed in the Commentary accompanying RCC § 22E-206.

"Restricted explosive" means any device designed to explode or produce uncontained combustion upon impact, including a breakable container containing flammable liquid and having a wick or a similar device capable of being ignited.

DCR 12430), although the VFHIAA included a substantially similar, new definition for a "vehicle inspection officer." D.C. Code §50-301.03(30B) ("'Vehicle inspection officer' means a District employee trained in the laws, rules, and regulations governing public and private vehicle-for-hire service to ensure the proper provision of service and to support safety through street enforcement efforts, including traffic stops of public and private vehicles-for-hire, pursuant to protocol prescribed under this act and by regulation.") The VFHIAA legislative history does not, however, appear to include reference to the assault on public vehicle inspection officers offenses in D.C. Code §§ 22-404.02 and 22-404.03 or discuss how those offenses might be affected by the elimination of "public vehicle inspection officers."

[713] Note however, that assault-type behavior against all District employees in the course of their duties (including paramedics and emergency medical technicians) are subject to higher level penalties under the District's protection of district public officials statute, D.C. Code § 22-851.

[714] RCC § 22E-4206.

The term "restricted explosive" does not include any device lawfully and commercially manufactured primarily for the purpose of illumination, construction work, or other lawful purpose.

Explanatory Note. Lawfully and commercially manufactured explosives may include, but are not limited to, emergency flares, kerosene lamps, candles, toy pistol paper caps, chemistry sets, liquid nitrogen,[715] gunpowder,[716] pest control bombs, and mining equipment.

The RCC definition of "restricted explosive" replaces the current definition of "molotov cocktail" D.C. Code § 22-4515a(a). The RCC definition of "restricted explosive" is used in the revised definition of "dangerous weapon" and in the revised offenses of possession of a prohibited weapon or accessory[717] and carrying a dangerous weapon.[718]

Relation to Current District Law. The RCC definition of "restricted explosive" is similar to the definition "molotov cocktail" in D.C. Code § 22-4515a(a) and does not substantively change current District law.

"Result element" has the meaning specified in RCC § 22E-201.

Explanatory Note. The definition of "result element" is addressed in the Commentary accompanying RCC § 22E-201.

"Retail value" means the actor's regular selling price for the item or service bearing or identified by the counterfeit mark. In the case of items bearing a counterfeit mark which are components of a finished product, the retail value shall be the actor's regular selling price of the finished product on or in which the component would be utilized.

Explanatory Note. The definition of "retail value" specifies the relevant value of items bearing or identified with a counterfeit mark.

Relation to Current District Law. No change to current District law. This definition is taken verbatim from D.C. Code § 22-901 (3), and is intended to have the same meaning as under current law.

"Sadomasochistic abuse" means flagellation, torture, or physical restraint by or upon a person as an act of sexual stimulation or gratification.

Explanatory Note. The RCC definition of "sadomasochistic abuse" replaces the current definition of "sado-masochistic abuse" in D.C. Code § 22-2201(b)(2)(E)[719] and the reference to "[s]adomasochistic sexual activity for the purpose of sexual stimulation" in the definition of "sexual conduct" in D.C. Code § 22-3101(5)(D). The RCC definition of "sadomasochistic abuse" is used in the revised offenses of unauthorized disclosure of sexual recordings,[720] distribution of an obscene image,[721] distribution of an obscene

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[715] Often used in medicine.

[716] Often used for yardwork such as tree stump removal.

[717] RCC § 22E-4101.

[718] RCC § 22E-4102.

[719] "The term 'sado-masochistic abuse' includes flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed."

[720] RCC § 22E-1804.

image to a minor,[722] creating or trafficking an obscene image of a minor,[723] possession of an obscene image of a minor,[724] attending a live sexual performance of a minor,[725] and attending or viewing a live sexual performance of a minor.[726]

Relation to Current District Law. The RCC definition of "sadomasochistic abuse" makes one clear change to the definition of "sado-masochistic abuse" in D.C. Code § 22-2201(b)(2)(E). The revised definition makes no reference to the type of clothing that must be worn by the participants in sado-masochistic abuse. The current definition of "sado-masochistic abuse" includes any "flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed." Read literally, this definition is both overinclusive and underinclusive.[727] In contrast, the revised definition requires sexual stimulation or gratification without reference to any particular manner of dress. This change improves the clarity of the revised distribution of an obscene image and distribution of an obscene image to a minor statutes.[728]

As applied in the revised creating or trafficking an obscene image of a minor, possession of an obscene image of a minor, arranging a live sexual performance of a minor, and attending or viewing a live sexual performance of a minor offenses,[729] *the RCC definition of "sadomasochistic abuse" clarifies current District law.* The current sexual performance of a minor statute prohibits "sadomasochistic sexual activity for the purpose of sexual stimulation"[730] without any further definition and there is no DCCA case law. The RCC definition specifies discrete types of sadomasochistic abuse and retains the requirement of sexual stimulation. The RCC definition also adds sexual "gratification" for consistency with the desire to sexually "gratify" in the RCC definitions of "sexual act"[731] and "sexual contact."[732] The revised definition clarifies the scope of the revised statutes.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Secure juvenile detention facility" means any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

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[721] RCC § 22E-1805.
[722] RCC § 22E-1806.
[723] RCC § 22E-1807.
[724] RCC § 22E-1808.
[725] RCC § 22E-1809.
[726] RCC § 22E-1810.
[727] For example, the definition includes a street fight between people dressed in costumes on Halloween and fails to include torture for sexual gratification performed by a nude person on another nude person.
[728] RCC §§ 22E-1805 and 22E-1806.
[729] RCC §§ 22E-1807; 22E-1808; 22E-1809; 22E-1810.
[730] D.C. Code § 22-3101(5)(D) (defining "sexual conduct" to include "sadomasochistic sexual activity for the purpose of sexual stimulation.").
[731] RCC § 22E-701 (subsection (C)).
[732] RCC § 22E-701.

Explanatory Note. Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter. The word "secure" makes clear that a placement at home or in a community-based residential facility is excluded.[733] The definition does not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. The definition does not include buildings used by private businesses to detain suspected criminals, such as a booking room in a retail store.

The RCC definition of "secure juvenile detention facility" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current escape from institution or officer,[734] escape from juvenile facilities,[735] and unlawful possession of contraband[736] offenses). The term "building" that is used in the definition of "secure juvenile detention facility" is defined elsewhere in RCC § 22E-701. The RCC definition of "secure juvenile detention facility" is used in the revised escape from a correctional facility or officer[737] and correction facility contraband [738]offenses.

Relation to Current District Law. The RCC definition of "secure juvenile detention facility" is new and does not substantively change District law.

As applied in the revised escape from a correctional facility or officer offense, the term "secure juvenile detention facility" may substantively change District law. D.C. Code § 22-2601 uses the phrase "penal or correctional institution or facility" but does not define it. DCCA case law has held that, in addition to the Central Detention Facility ("D.C. Jail"), this phrase also includes the District's halfway houses,[739] however, case law is silent as to whether any juvenile detention facilities qualify.[740] D.C. Code § 10-509.01a uses the word "institution" and cross-references D.C. Code § 10-509.01, which is limited to locations outside the District of Columbia that operate as a "sanitorium, hospital, training school, correctional institution, reformatory, workhouse, or jail." In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

As applied in the revised correctional facility contraband offense, the term "secure juvenile detention facility" may substantively change District law. D.C. Code § 22-2603.01 defines "secure juvenile residential facility" to mean "a locked residential facility providing custody, supervision, and care for one or more juveniles that is owned, operated, or under the control of the Department of Youth Rehabilitation Services, excluding residential treatment facilities and accredited hospitals." It defines "grounds"

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[733] Community-based residential facilities include group homes, therapeutic foster care, extended family homes, and independent living programs.

[734] D.C. Code § 22-2601.

[735] D.C. Code § 10-509.01a.

[736] D.C. Code § 22-2603.02.

[737] RCC § 22E-3401.

[738] RCC § 22E-3403.

[739] *See Demus v. United States,* 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States,* 498 A.2d 1172, 1174 (D.C.1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).

[740] Juvenile detention facilities are generally regarded as service providers and are not, strictly speaking, "penal" or correctional in nature.

to mean "the area of land occupied by the penal institution or secure juvenile residential facility and its yard and outbuildings, with a clearly identified perimeter." In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. Each definition includes buildings (also defined in RCC § 22E-701) and building grounds. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Self-induced intoxication" has the meaning specified in RCC § 22E-209.

Explanatory Note. The definition of "self-induced intoxication" is addressed in the Commentary accompanying RCC § 22E-209.

"Serious bodily injury" means a bodily injury or significant bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or organ; or

(D) Protracted loss of consciousness.

Explanatory Note. "Serious bodily injury" is the highest of the three levels of bodily injury defined in the RCC. The definition incorporates the definitions of both lower levels: "bodily injury" and "significant bodily injury," also defined in RCC § 22E-701. The injury must involve a substantial risk of death or result in protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ, or protracted loss of consciousness. "Protracted" is intended to have the same meaning in subparagraphs (B), (C), and (D).

The RCC definition of "serious bodily injury" replaces the current statutory definition of "serious bodily injury" in D.C. Code § 22-3001(7),[741] applicable to provisions in Chapter 30, Sexual Abuse, and undefined references to "serious bodily injury" in the current aggravated assault,[742] criminal abuse or neglect of a vulnerable adult,[743] and unauthorized use of motor vehicle[744] statutes. There are undefined references to the term[745] and a different definition of the term[746] in other Title 22 statutes.

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[741] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[742] D.C. Code § 22-404.01 ("A person commits the offense of aggravated assault if: (1) By any means, that person knowingly or purposely causes serious bodily injury to another person…."); D.C. Code § 22-404.03 ("A person commits the offense of aggravated assault on a public vehicle inspection officer if that person…causes serious bodily injury to the public vehicle inspection officer; or…engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.").

[743] D.C. Code § 22-936 ("A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes serious bodily injury….").

[744] D.C. Code § 22-3215(d)(2)(ii) ("If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.").

[745] D.C. Code §§ 22-811(b)(4) (penalty provision for the contributing to the delinquency of a minor statute requiring that the minor or any other person sustain "serious bodily injury."); 22-3152(12)(A), (C), (D), (E), (defining "weapon of mass destruction" for the terrorism statutes to include "[a]ny destructive device

The RCC definition of "serious bodily injury" is used in the revised offenses of robbery,[747] assault,[748] sexual assault,[749] sexual abuse of a minor,[750] criminal abuse of a minor,[751] criminal neglect of a minor,[752] criminal abuse of a vulnerable adult or elderly person,[753] and criminal neglect of a vulnerable adult or elderly person.[754]

Relation to Current District Law. The RCC definition of "serious bodily injury" makes three clear changes to the current statutory definition of "serious bodily injury" in D.C. Code § 22-3001(7),[755] applicable to provisions in Chapter 30, Sexual Abuse.

First, the revised definition of "serious bodily injury" requires a "protracted loss of consciousness" instead of "unconsciousness." The District's current aggravated assault statute requires "serious bodily injury," but does not define the term,[756] and the DCCA has generally applied the sex offense definition of "serious bodily injury."[757] In the context of aggravated assault, the DCCA has specifically declined to hold that "unconsciousness" is categorically of the same severity as the other harms in the definition of "serious bodily injury."[758] In contrast, the RCC definition of "serious bodily

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that is designed, intended, or otherwise used to cause death or serious bodily injury . . .", "[a]ny weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a toxic or poisonous chemical," "[a]ny weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a biological agent or toxin," and "[a]ny weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of radiation or radioactivity, or that contains nuclear material."); 22-3154(a), (b) (manufacture or possession of a weapon of mass destruction statute requiring that the weapon of mass destruction be "capable of causing . . . serious bodily injuries to multiple persons."); 22-3155(a), (b) (use, dissemination, or detonation of a weapon of mass destruction statute requiring that the weapon of mass destruction be "capable of causing . . . serious bodily injuries to multiple persons."). [To date, the RCC has not recommended revisions to these statutes.]

[746] D.C. Code §§ 22-1001(c) (defining "serious bodily injury" for the animal cruelty statute as "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ. Serious bodily injury includes, but is not limited to, broken bones, burns, internal injuries, severe malnutrition, severe lacerations or abrasions, and injuries resulting from untreated medical conditions."). [To date, the RCC has not recommended revisions to this statute.]

[747] RCC § 22E-1201.

[748] RCC § 22E-1202.

[749] RCC § 22E-1301.

[750] RCC § 22E-1302.

[751] RCC § 22E-1501.

[752] RCC § 22E-1502.

[753] RCC § 22E-1503.

[754] RCC § 22E-1504.

[755] D.C. Code § 22-3001(7).

[756] D.C. Code § 22-404.01.

[757] *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute.).

[758] *In re D.P.*, 122 A.3d 903, 908 n. 10 (D.C. 2015) ("In light of our conclusion that [appellant] lacked the requisite mens rea for aggravated assault, we do not determine whether the complainant's brief loss of unconsciousness—from which she fully recovered without medical treatment and which did not amount to significant bodily injury . . . amounted to serious bodily injury."); *Vaughn v. United States*, 93 A.3d 1237, 1269 n. 39 (D.C. 2014) ("We question whether the government presented evidence that [the complainant] suffered serious bodily injury at all. The government presented evidence that [the complainant] briefly lost

injury" requires a "protracted loss of consciousness." In the RCC offenses against persons, a brief loss of consciousness constitutes at least "significant bodily injury," also defined in RCC § 22E-701. This revision improves the clarity and proportionality of the revised definition.

Second, the revised definition of "serious bodily injury" no longer includes "extreme physical pain." The DCCA has stated that the term "extreme physical pain" "is regrettably imprecise and subjective, and we cannot but be uncomfortable having to grade another human being's pain."[759] This revision improves the clarity and proportionality of the revised definition.

Third, the revised definition of "serious bodily injury" no longer includes "protracted loss or impairment of the function" of a "mental faculty." It is unclear whether "mental *faculty*" (emphasis added) refers to the physical condition of the brain or more generally to psychological distress. The DCCA has not interpreted this part of the current definition of "serious bodily injury." To the extent that "mental faculty" refers to the brain, "mental faculty" is redundant with "organ" in the current definition of "serious bodily injury." To the extent that "mental faculty" refers generally to emotional or psychological distress, it may be hard to qualify, similar to "unconsciousness" and "extreme physical pain" in the current definition. This revision improves the clarity and the proportionality of the revised definition.

Other than these changes, the revised definition does not change existing District law on the meaning of "serious bodily injury" as defined in the current sexual abuse statutes and applied to the current aggravated assault statute. The revised definition is meant to preserve case law interpreting the parts of the current D.C. Code definition, including "disfigurement," that were carried over to the RCC definition. The threshold for such an injury remains high.[760] The syntax of the revised definition clarifies that, as under current District case law interpreting the definition for the sexual abuse statutes,[761] the "substantial risk" applies only to the risk of death.

However, as applied to certain RCC offenses against persons, the revised definition of "serious bodily injury" may change current District law. For example, the

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consciousness following the attack, that the head injuries he incurred did not cause substantial pain, and that, although he sought medical care, he fully recovered from these injuries without medical intervention. This appears to fall well below the "high threshold of injury" . . . we have set to prove aggravated assault.") (internal citations omitted).

[759] *Swinton v. United States*, 902 A.2d 772, 777 (D.C. 2006).

[760] *Swinton v. United States*, 902 A.2d 772, 775 (D.C. 2006) ("Our decisions since *Nixon* have emphasized 'the high threshold of injury, that "the legislature intended in fashioning a crime that increases twenty-fold the maximum prison term for simple assault." *Jenkins v. United States,* 877 A.2d 1062, 1069 (D.C.2005) (internal quotation marks and citations omitted). The cases in which we have found sufficient evidence of 'serious bodily injury' to support convictions for aggravated assault thus have involved grievous stab wounds, severe burnings, or broken bones, lacerations and actual or threatened loss of consciousness. The injuries in these cases usually were life-threatening or disabling. The victims typically required urgent and continuing medical treatment (and, often, surgery), carried visible and long-lasting (if not permanent) scars, and suffered other consequential damage, such as significant impairment of their faculties. In short, these cases have been horrific." (internal citations omitted)).

[761] *Scott v. United States*, 954 A.2d 1037, 1046 (D.C. 2008) ("[W]e readily conclude that the 'substantial risk' . . . is only a substantial risk of death, not a substantial risk of extreme pain, disfigurement, or any of the other conditions listed.").

revised sexual assault statute (RCC § 22E-1301) and revised sexual abuse of a minor statute (RCC § 22E-1302) have a penalty enhancement if the actor recklessly causes "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact. The current sexual abuse statutes have a similar penalty enhancement for causing "serious bodily injury,"[762] as that term is defined by the current sex offense statutes. Due to the revised definition of "serious bodily injury," the penalty enhancement in the RCC sexual assault offense and RCC sexual abuse of a minor statute no longer apply to injury that results in any unconsciousness, extreme physical pain, or protracted loss or impairment of a "mental faculty," unless the other requirements of the revised definition are met. The revised penalty enhancement ensures the enhancement is reserved for the most serious injuries.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "serious bodily injury" on current District law.

"Serious mental injury" means substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.

Explanatory Note. The RCC definition of "serious mental injury" differs from the definition of "mental injury" in the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision[763] by adding the requirement that the harm be "substantial" and "prolonged."

The RCC definition of "serious mental injury" is new, the term is not currently statutorily defined in Title 22 of the D.C. Code. The RCC definition of "serious mental injury" is used in the revised offenses of criminal abuse of a minor,[764] criminal neglect of a minor,[765] criminal abuse of a vulnerable adult or elderly person,[766] and criminal neglect of a vulnerable adult or elderly person.[767]

Relation to Current District Law. The RCC definition of "serious mental injury" is new and does not substantively change current District law.

As applied to the RCC offenses for criminal abuse and criminal neglect of minors, vulnerable adults, and elderly persons, the term "serious mental injury" may change current District law. These RCC offenses prohibit either recklessly causing serious mental injury to the complainant[768] or recklessly creating, or failing to mitigate or

[762] D.C. Code § 22-3020(a)(3).
[763] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").
[764] RCC § 22E-1501.
[765] RCC § 22E-1502.
[766] RCC § 22E-1503.
[767] RCC § 22E-1504.
[768] Criminal abuse of a minor (RCC § 22E-1501); criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503).

remedy, a substantial risk that the complainant would experience serious mental injury,[769] but the current equivalent offenses in Title 22 either do not include such harm or risk of harm, or it is unclear whether the equivalent offenses in Title 22 do. For example, the current District child cruelty statute is silent as to whether the offense covers purely psychological harms,[770] but DCCA case law is clear that the offense extends at least to serious psychological harm.[771] However, the court has not articulated a precise definition of the requisite psychological harm, making it unclear whether the revised definition of "serious mental injury" changes current District law. Similarly, the current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "severe mental distress" resulted,[772] but the statute does not define the term and there is no DCCA case law. Applying the RCC definition of "serious mental injury" to these offenses improves the clarity, completeness, and consistency of the revised offenses.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "serious mental injury" on current District law.

"Services" includes:

(A) Labor, whether professional or nonprofessional;
(B) The use of vehicles or equipment;
(C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;
(D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;
(E) Admission to public exhibitions or places of entertainment; and
(F) Educational and hospital services, accommodations, and other related services.

Explanatory Note. The RCC definition of "services" replaces the current definition of "services" in D.C. Code § 22-3201(5),[773] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC

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[769] Criminal neglect of a minor (RCC § 22E-1502); criminal neglect of a vulnerable adult or elderly person (RCC § 22E-1504).

[770] D.C. Code § 22-1101.

[771] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[772] D.C. Code §§ 22-933, 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).

[773] D.C. Code 22-3201(5) ("'Services' includes, but is not limited to: (A) Labor, whether professional or nonprofessional; (B) The use of vehicles or equipment; (C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity; (D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere; (E) Admission to public exhibitions or places of entertainment; and (F) Educational and hospital services, accommodations, and other related services.").

definition of "services" is used in the RCC definition of "property,"[774] as well as the revised offenses of forgery[775] and financial exploitation of a vulnerable adult civil provisions.[776]

Relation to Current District Law. The RCC definition of "services" is identical to the statutory definition under current law.[777]

"Sexual act" means:

(A) Penetration, however slight, of the anus or vulva of any person by a penis;

(B) Contact between the mouth of any person and another person's penis, vulva, or anus;

(C) Penetration, however slight, of the anus or vulva of any person by any body part or by any object, with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire; or

(D) Conduct described in subsections (A)-(C) between a person and an animal.

Explanatory Note. The RCC definition of "sexual act" specifies several types of sexual penetration and oral sexual contact. The requirement in subsection (C) that the penetration be done with "the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire," excludes penetration done for legitimate medical, hygienic, or law-enforcement reasons. "Sexually" modifies each adjective in this desire requirement and requires that the penetration be sexual in nature.

The RCC definition of "sexual act" replaces the current statutory definition of "sexual act" in D.C. Code § 22-3001(8),[778] applicable to provisions in Chapter 30, Sexual Abuse. The RCC definition of "sexual act" is used in the RCC definitions of "commercial sex act"[779] and "sexual contact,"[780] and many RCC sex offenses[781] and obscenity and privacy offenses.[782]

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[774] RCC § 22E-701.

[775] RCC § 22E-2204.

[776] RCC § 22E-2209.

[777] D.C. Code § 22-3201(5).

[778] D.C. Code § 22-3001(8) ("'Sexual act' means: (A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph.").

[779] RCC § 22E-701.

[780] RCC § 22E-701.

[781] RCC §§ 22E-1301 (sexual assault); 22E-1302 (sexual abuse of a minor); 22E-1303 (sexual abuse by exploitation); 22E-1305 (enticing a minor into sexual conduct); 22E-1306 (arranging for sexual conduct with a minor); 22E-1307 (nonconsensual sexual conduct); 22E-1312 (incest).

[782] RCC §§ 22E-1803 (Voyeurism); 22E-1804 (Unauthorized Disclosure of Sexual Recordings); 22E-1805 (Distribution of an Obscene Image); 22E-1806 (Distribution of an Obscene Image to a Minor); 22E-1807 (Creating or Trafficking an Obscene Image of a Minor); 22E-1808 (Possession of an Obscene Image of a

Relation to Current District Law. *The revised definition of "sexual act" makes one clear change to the statutory definition of "sexual act" in D.C. Code § 22-3001(8).*[783]

Subsection (C) of the revised definition of "sexual act" requires that the defendant have the desire to "sexually abuse, humiliate, harass, degrade, arouse, or gratify" any person. "Sexually" modifies each adjective and requires that the penetration be sexual in nature. Subsection (C) of the current D.C. Code definition of "sexual act" requires an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[784] However the current D.C. Code definition's reference to the "sexual desire of any person" appears limited to an intent to "arouse or gratify" and the current subsection (C) appears to include penetration with any intent to abuse, humiliate, harass, or degrade. In contrast, subsection (C) of the revised definition of "sexual act" requires that the penetration be sexual in nature. It is disproportionate to include in the RCC sex offenses and similarly serious RCC offenses, like the human trafficking offenses in RCC Chapter 16, conduct that is not proven to be sexual in nature. The RCC provides liability for non-sexual conduct in the revised assault statute (RCC § 22E-1201) or offensive physical contact statute (RCC § 22E-1205). However, practically, it would be an exceedingly rare fact pattern where penetration-type conduct would occur with intent to abuse, humiliate, harass, or degrade, that is not also done with intent to *sexually* abuse, humiliate, harass, degrade, or arouse or gratify.[785] This revision improves the clarity, consistency, and proportionality of the revised definition, and reduces unnecessary overlap with non-sexual assault offenses.

The revised definition of "sexual act" makes five possible substantive changes to the statutory definition of "sexual act" in D.C. Code § 22-3001(8).[786]

First, subsection (A) of the revised definition of "sexual act" requires the penetration of the anus or vulva of "any person" by a penis. The current definition of "sexual act" requires the penetration of the anus or vulva "of another" by a penis.[787] The "of another" requirement in the current definition creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in a "sexual act" with the complainant and liability for the involvement of a third party.[788] This revision improves the clarity and consistency of the revised sexual abuse statutes.

Minor); 22E-1809 (Arranging a Live Sexual Performance of a Minor); 22E-1810 (Attending or Viewing a Live Sexual Performance of a Minor); 22E-4206 (Indecent Exposure).

[783] D.C. Code § 22-3001(8).

[784] D.C. Code § 22-3001(8)(C).

[785] While there can be virtually no penetration or oral contact that satisfies the definition of "sexual act" that is not sexual in nature, defining Subsection (C) in this way aligns the revised definition of "sexual act" with the revised definition of "sexual contact," where requiring a sexual intent does have practical impact on distinguishing liability for an assault (e.g. hitting someone with a bicycle or car on their buttocks) and a sexual assault (e.g. hitting someone on their buttocks while commenting on their sexual attractiveness).

[786] D.C. Code § 22-3001(8).

[787] D.C. Code § 22-3001(8)(A).

[788] For example, when subsection (A) of the current definition of "sexual act" is inserted into first degree and second degree sexual abuse (D.C. Code §§ 22-3002 and 22-3003), the plain language reading is "engages in the penetration, however slight, of the anus or vulva of another, by a penis," "causes another person to engage in the penetration, however slight, of the anus or vulva of another, by a penis," or "causes another person to submit to the penetration, however slight of the anus or vulva of another, by a penis."

Second, subsection (C) of the revised definition of "sexual act" specifies penetration by "any body part or by any object." Subsection (C) of the current definition of "sexual act" requires penetration of the "anus or vulva" by "a hand or finger or by any object" with intent to abuse, humiliate, harass, etc.[789] It is unclear in subsection (C) of the current definition whether penetration by a body part is limited to "a hand or finger," or if penetration by another body part, such as a toe, would be included as "any object." The scope of subsection (C) of the current definition of "sexual act" is also unclear because the current subsection (A) requires penetration of the "anus or vulva" by "a penis."[790] Subsection (C) of the RCC definition of "sexual act" resolves this ambiguity by specifying penetration "by any body part or by any object." This change improves the clarity of the revised definition and removes a possible gap in liability.

Third, subsection (C) of the revised definition clarifies that the penetration can be done "at the direction of a person" with the desire to sexually abuse, harass etc. Subsection (C) of the current definition of "sexual act" requires the penetration to be done with an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[791] The current definition appears to require that the individual who does the penetration—be it the actor, the complainant, or a third party—also have the intent to abuse, humiliate, etc. This interpretation leads to counterintuitive results and disproportionate penalties for similar conduct[792] and is inconsistent with the legislative history.[793] It is also inconsistent with the part of the current subsection (C) that permits an intent to arouse or gratify the sexual desire "of any person." There is no DCCA case law on this issue. Resolving this ambiguity, subsection (C) of the revised definition specifies that the actor can himself or herself have the required desire to sexually abuse, etc., if the actor engages in the penetration, but it is also sufficient for the complainant or a third party to engage in the penetration at the direction of the actor or another person with such a desire.[794] This change improves the clarity and consistency of the revised definition and removes a possible gap in current law.

The plain language readings create liability for the actor penetrating the complainant, but it is unclear if there is liability for the actor causing the complainant to penetrate a third person or for the actor causing a third person to penetrate the complainant.

[789] D.C. Code § 22-3001(8) ("'Sexual act' means . . . (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[790] D.C. Code § 22-3001(8) ("'Sexual act' means: (A) The penetration, however slight, of the anus or vulva of another by a penis.").

[791] D.C. Code § 22-3001(8)(C).

[792] For example, an actor that digitally penetrates the complainant's anus with the intent to abuse the complainant has satisfied subsection (C) of the current definition. The actor has also satisfied the current subsection if he or she digitally penetrates the complainant with the intent to sexually gratify a third person that is watching the encounter. However, if the actor makes the complainant digitally penetrate himself or herself, it is unlikely that the complainant shares the actor's intent to abuse the complainant or the intent to sexually gratify a third person and there may not be liability under the current definition.

[793] The Anti-Sexual Abuse Act of 1994 was intended to "strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1.

[794] For example, an actor that causes the complainant to digitally penetrate the complainant's anus has satisfied the first part of the current subsection (C) and revised subsection (C)—penetration of the anus or

Fourth, subsection (C) of the revised definition of "sexual act" requires penetration with the "desire to" sexually abuse, etc. Subsection (C) of the current definition of "sexual act" requires that the defendant act "with an intent" to abuse, etc.[795] The meaning of "intent" is undefined and it is unclear as to whether the meaning is more similar to the RCC § 22E-206 definition of "purpose" as "conscious[] desire" or "intent" as "practically certain." Resolving this ambiguity, subsection (C) of the revised definition of "sexual act" requires that the defendant act "with the desire to" sexually abuse, etc. The reference to "desire" tracks the higher culpable mental state in the RCC definition of "purpose." In addition, "intent" is a defined culpable mental state in RCC § 22E-206, and per the rules of interpretation in RCC § 22E-207, applies to every element that comes after it unless a different culpable mental state or strict liability is specified. If "intent" is included in an RCC offense through the definition of "sexual act" or "sexual contact," that would complicate the interpretation of culpable mental states in that offense. This change improves the clarity of the revised definition.

Fifth, subsection (D) the revised definition of "sexual act" specifically includes certain forms of bestiality, mainly an animal sexually penetrating or making contact with a person or a person so sexually penetrating or making contact with an animal.[796] The current definition of "sexual act" does not specifically refer to an animal, although subsections (A) and (B) of the statute do not specifically exclude involvement of animals. Subsection (C) does refer to a "person" in the phrase "arouse or gratify the sexual desire of any person," but also includes penetration by "any object."[797] There is no DCCA case law interpreting the current definition of "sexual act" as it pertains to animals. The District does not have a separate bestiality statute. Resolving this ambiguity, the revised definition clearly specifies that a sexual act may occur between a human and an animal.

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vulva of any person (the complainant) by a finger. However, it is arguable that the required intent of current subsection (C) has not been met. The actor may have the intent to abuse the complainant, but the complainant is the individual doing the actual penetration and likely does not share this intent. Under the revised subsection (C), however, there is no ambiguity as to whether the actor's conduct suffices because the complainant has engaged in the required penetration "at the direction of" the actor with the desire to sexually abuse the complainant.

[795] D.C. Code § 22-3001(8)(C).

[796] Subsection (D) of the revised definition of "sexual act" prohibits "conduct described in subsections (A)-(C) between a person and an animal." This requires reading subsections (A) – (C) broadly to include an animal even if the statutory language specifies "person" or is silent as to the ownership of a body part.

As it pertains to subsection (A) of the revised definition, subsection (D) prohibits an animal penis penetrating the anus or vulva of a person, as well as a human penis penetrating the anus or vulva of an animal. It is not intended to include a human complainant using an animal penis to penetrate an animal.

As it pertains to subsection (B) of the revised definition, subsection (D) prohibits contact between the mouth of any person and the penis, anus, or vulva of any animal, as well as contact between the mouth of any animal and the penis, anus, or vulva of any person. It is not intended to include a human complainant causing prohibited oral sexual contact between two animals.

As it pertains to subsection (C) of the revised definition, subsection (D) prohibits the body part of any animal penetrating the anus or vulva of a person, as well as a hand or finger of a person or an object wielded by a person penetrating the anus or vulva of any animal.

[797] D.C. Code § 22-3001(8)(C) ("The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

This change improves the clarity, consistency, and proportionality of the revised definition.

Finally, the RCC definition of "sexual act" makes three clarificatory changes to the current definition that do not substantively change District law.

First, subsection (B) of the revised definition clarifies that the contact must be with "another person's" penis, vulva, or anus. Subsection (B) of the current definition does not specify "any person" or "another person," requiring only "[c]ontact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus."[798] This omission creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in the prohibited contact with the complainant and liability for the involvement of a third party.[799] Specifying that the contact can be between the specified body parts of "another person" clarifies the definition.

Second, subsection (C) of the revised definition clarifies that the penetration can be of "any person." Subsection (C) of the current definition does not specify "any person" or "another person," requiring only "penetration…of the anus or vulva."[800] This omission creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in the prohibited penetration with the complainant and liability for the involvement of a third party.[801] Specifying that the penetration can be of "any person" (subsection (C)) clarifies the definition.

Third, the revised definition of "sexual act" no longer states that "the emission of semen is not required," as is the case in subsection (D) of the current definition of "sexual act."[802] Nothing in the remaining subsections of the current definition[803] or in the revised definition of "sexual act" suggests that emission of semen is required. The language is surplusage and potentially confusing. Consequently, the revised definition of "sexual act" omits this language to improve the clarity of the definition.

As applied in the revised voyeurism offense[804] *the revised definition makes one possible substantive change to current District law.* The voyeurism offense in D.C. Code

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[798] D.C. Code § 22-3001(8)(B).

[799] For example, when subsection (B) of the current definition of "sexual act" is inserted into the current second degree child sexual abuse statute (D.C. Code § 22-3009), the plain language reading is "engages in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus with that child" and "causes that child to engage in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus." It is unclear whether the specified body parts must belong to the complainant, the actor, or a third party.

[800] D.C. Code § 22-3001(8)(C).

[801] For example, when subsection (B) of the current definition of "sexual act" is inserted into the current second degree child sexual abuse statute (D.C. Code § 22-3009), the plain language reading is "engages in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus with that child" and "causes that child to engage in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus." It is unclear whether the specified body parts must belong to the complainant, the actor, or a third party.

[802] D.C. Code § 22-3001(8)(D).

[803] D.C. Code § 22-3001(8)(A) – (C) ("'Sexual act' means: (A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[804] RCC § 22E-1803.

§§ 22-3531(b)(3) and (c)(1)(C) uses the term "sexual activity," without defining it. District case law has not addressed its meaning. Broadly construed, the term may include in voyeurism liability conduct short of penetration, such as kissing or caressing. Resolving this ambiguity, the revised voyeurism statute uses the defined term "sexual act" to include direct contact between one person's genitalia and another person's genitalia, mouth, or anus.[805] Consequently, the revised voyeurism offense prohibits observing or recording a person who is engaging in a sexual act, masturbation, or displaying certain body parts[806]—but not mere kissing or caressing. This change improves the clarity and consistency of the revised offense.

As applied in the revised unauthorized disclosure of sexual recordings offense,[807] *the revised definition makes one possible substantive change to current District law.* The current non-consensual pornography statute protects against depictions of "sexual conduct," including masturbation and "[s]adomasochistic sexual activity for the purpose of sexual stimulation,"[808] while the current felony voyeurism statute protects depictions of "sexual activity"[809] without defining that term. Broadly construed, the term "sexual activity" may include conduct short of penetration, such as kissing or caressing. Resolving this ambiguity, the revised statute includes depictions of a "sexual act," as defined in RCC § 22E-701, as well as masturbation, sadomasochistic abuse, and images certain body parts[810]—but not mere kissing or caressing. This change improves the clarity and consistency of the revised offense.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Sexual contact" means:

(A) Sexual act; or

(B) Touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks of any person:

(i) With any clothed or unclothed body part or any object, either directly or through the clothing; and

(ii) With the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire.

Explanatory Note. Including "sexual act" in subsection (A) of the revised definition of "sexual contact" establishes that RCC sex offenses that require a "sexual contact" are lesser included offenses of otherwise identical RCC sex offenses that differ only in that they require a "sexual act"—for example first degree sexual assault and third degree sexual assault. The requirement in sub-subparagraph (B)(ii) of the revised

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[805] RCC § 22E-701.

[806] RCC § 22E-1803(a)(1)(A) ("…nude or undergarment-clad genitals, pubic area, anus, buttocks, or developed female breast below the top of the areola…").

[807] RCC § 22E-1804.

[808] D.C. Code §§ 22-3051(6); 22-3101(5).

[809] D.C. Code §§ 22-3531(b)(3) and (c)(1)(C).

[810] RCC § 22E-1804(a)(1)(A) ("…Nude genitals or anus; or Nude or undergarment-clad pubic area, buttocks, or developed female breast below the top of the areola …").

definition, "with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person," excludes touching done for legitimate medical, hygienic, or law-enforcement reasons. "Sexually" modifies each adjective in this desire requirement and requires that the touching be sexual in nature.

The RCC definition of "sexual contact" replaces the current statutory definition of "sexual contact" in D.C. Code § 22-3001(9),[811] applicable to provisions in Chapter 30, Sexual Abuse. The RCC definition of "sexual contact" is used in the definition of "commercial sex act"[812] and many RCC sex offenses[813] and obscenity and privacy offenses.[814]

Relation to Current District Law. *The RCC definition of "sexual contact" makes two clear changes to the statutory definition of "sexual contact" in D.C. Code § 22-3001(9).*[815]

First, the revised definition of "sexual contact" specifically includes a "sexual act," as that term is defined in RCC § 22E-701. It is unclear in current District law whether "sexual contact" necessarily includes a "sexual act" because the current definition of "sexual contact" requires the intent to abuse, humiliate, etc., and subsection (A) and subsection (B) of the current definition of "sexual act" do not.[816] In contrast, the revised definition of "sexual contact" statutorily specifies that "sexual contact" includes a

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[811] D.C. Code § 22-3001(9) ("'Sexual contact' means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[812] RCC § 22E-701.

[813] RCC §§ 22E-1301 (sexual assault); 22E-1302 (sexual abuse of a minor); 22E-1303 (sexual abuse by exploitation); 22E-1305 (enticing a minor into sexual conduct); 22E-1306 (arranging for sexual conduct with a minor); 22E-1307 (nonconsensual sexual conduct); 22E-1312 (indecent sexual proposal to a minor).

[814] RCC §§ 22E-1803 (Voyeurism); 22E-1804 (Unauthorized Disclosure of Sexual Recordings); 22E-1805 (Distribution of an Obscene Image); 22E-1806 (Distribution of an Obscene Image to a Minor); 22E-1807 (Creating or Trafficking an Obscene Image of a Minor); 22E-1808 (Possession of an Obscene Image of a Minor); 22E-1809 (Arranging a Live Sexual Performance of a Minor); 22E-1810 (Attending or Viewing a Live Sexual Performance of a Minor); 22E-4206 (Indecent Exposure).

[815] D.C. Code § 22-3001(9).

[816] In *In re E.H.*, the DCCA declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but noted that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a 'sexual act' (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove 'sexual contact' (for second-degree [sexual abuse of a child])". *In re E.H.*, 967 A.2d 1270, 1275 n.9 (D.C. 2009). The DCCA compared subsections (A) and (B) of the current definition of "sexual act" in D.C. Code § 22-3001(8) and noted that they do not require a specific intent "to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" like the current definition of "sexual contact" in D.C. Code § 22-3001(9) does. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense," but "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes otherwise identical sex offenses from having a lesser included relationship.

"sexual act." This change establishes that RCC sex offenses that require a "sexual contact" are lesser included offenses of otherwise identical RCC sex offenses that differ only in that they require a "sexual act"—for example first degree sexual assault and third degree sexual assault. This change improves the clarity, consistency, and proportionality of the revised sex offenses and removes a possible gap in current District law.

Second, the revised definition of "sexual contact" requires that the defendant have the desire to "sexually abuse, humiliate, harass, degrade, arouse, or gratify" any person. "Sexually" modifies each adjective and requires that the contact be sexual in nature. Subsection (C) of the current D.C. Code definition of "sexual contact" requires an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[817] However the current D.C. Code definition's reference to the "sexual desire of any person" appears limited to an intent to "arouse or gratify" and the current definition of "sexual contact" appears to include contact with any intent to abuse, humiliate, harass, or degrade.[818] In contrast, the revised definition of "sexual contact" requires that the touching be sexual in nature. It is disproportionate to include in the RCC sex offenses and similarly serious RCC offenses, like the human trafficking offenses in RCC Chapter 16, conduct that is not proven to be sexual in nature. The RCC provides liability for non-sexual conduct in the revised assault statute (RCC § 22E-1201) or offensive physical contact statute (RCC § 22E-1205). This revision improves the clarity, consistency, and proportionality of the revised definition, and reduces unnecessary overlap with non-sexual assault offenses.

The RCC definition of "sexual contact" makes two possible substantive changes to the current statutory definition of "sexual contact."

First, the revised definition clarifies that the touching can be done "at the direction of a person" with the desire to sexually abuse, etc. The current definition of "sexual contact" requires the touching to be done with an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[819] The current definition appears to require that the individual who does the touching—be it the actor, the complainant, or a third party—also have the intent to abuse, etc. This interpretation leads to counterintuitive results and disproportionate penalties for similar conduct[820] and is inconsistent with the legislative history.[821] It is also inconsistent with the part of the current definition that permits an intent to arouse or gratify the sexual desire "of any

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[817] D.C. Code § 22-3001(9).

[818] For example, if the current definition of "sexual contact" includes touching with any intent to abuse, humiliate, harass, or degrade, regardless of whether its sexual in nature, throwing a snowball at a person's buttocks with an intent to harass would be included in a "sexual contact."

[819] D.C. Code § 22-3001(9).

[820] For example, an actor that touches the complainant's breast with the intent to abuse the complainant has satisfied the current definition. The actor has also satisfied the current definition if he or she touches the complainant's breast with the intent to sexually gratify a third person that is watching the encounter. However, if the actor makes the complainant touch his or her own breast, it is unlikely that the complainant shares the actor's intent to abuse the complainant or the intent to sexually gratify a third party and there may not be liability under the current definition.

[821] The Anti-Sexual Abuse Act of 1994 was intended to "strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1.

person." There is no DCCA case law on this issue. Resolving this ambiguity, the revised definition specifies that the actor can himself or herself have the required desire to sexually abuse, etc., if the actor engages in the touching, but it is also sufficient for the complainant or a third party to engage in the touching at the direction of the actor or another person with such a desire.[822] This change improves the clarity and consistency of the revised definition and removes a possible gap in current law.

Second, the revised definition of "sexual contact" requires penetration with the "desire to" sexually abuse, etc. The current definition of "sexual contact" requires that the defendant act "with an intent" to abuse, etc.[823] The meaning of "intent" is undefined and it is unclear as to whether the meaning is more similar to the RCC § 22E-206 definition of "purpose" as "conscious[] desire" or "intent" as "practically certain." Resolving this ambiguity, the revised definition of "sexual contact" requires that the defendant act "with the desire to" sexually abuse, etc. The reference to "desire" tracks the higher culpable mental state in the RCC definition of "purpose." In addition, "intent" is a defined culpable mental state in RCC § 22E-206, and per the rules of interpretation in RCC § 22E-207, applies to every element that comes after it unless a different culpable mental state or strict liability is specified. If "intent" is included in an RCC offense through the definition of "sexual act" or "sexual contact," that would complicate the interpretation of culpable mental states in that offense. This change improves the clarity of the revised definition.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Significant bodily injury" means a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. In addition, the following injuries constitute at least a significant bodily injury: a fracture of a bone; a laceration that is at least one inch in length and at least one quarter inch in depth; a burn of at least second degree severity; a brief loss of consciousness; a traumatic brain injury; and a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation.

Explanatory Note. "Significant bodily injury" is the intermediate level of three levels of bodily injury defined in the RCC. The definition incorporates the definition of "bodily injury," also defined in RCC § 22E-701. The injury must require hospitalization or immediate medical treatment beyond what a layperson can personally administer and the hospitalization or immediate medical treatment must be necessary to either prevent long-term physical damage or to abate severe pain. Regardless whether the requirements

[822] For example, an actor that causes the complainant to touch his or her own breast has satisfied part of the current and revised definitions of "sexual contact"—touching the breast of any person (the complainant). However, it is arguable that the required intent of the current definition has not been met. The actor may have the intent to abuse the complainant, but the complainant is the individual doing the actual touching and likely does not share this intent. Under the revised definition, however, there is no ambiguity as to whether the actor's conduct suffices because the complainant has engaged in the required touching "at the direction of" the actor with the desire to sexually abuse the complainant.

[823] D.C. Code § 22-3001(9).

in the first sentence of the definition are proven, the injuries specified in the last sentence of the definition constitute at least "significant bodily injury," such as a fracture of a bone or a concussion. The reference to "neck or head" in "contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation" is intended to include the neck and eyes. There is no requirement that the bodily injury to the head or neck be caused by the strangulation or suffocation. Any contusion, petechia, or other bodily injury to the head or neck that the complainant sustains during the time in which strangulation or suffocation occurs is sufficient.[824]

The RCC definition of "significant bodily injury" replaces the current statutory definition of "significant bodily injury" in D.C. Code § 22-404(b),[825] applicable to the felony assault with significant bodily injury offense, and an undefined reference to "significant bodily injury" in the assault on a police officer[826] statute. The term is also defined in other Title 22 statutes.[827] The RCC definition is used in the RCC definition of "serious bodily injury"[828] and the revised offenses of robbery,[829] assault,[830] criminal abuse of a minor,[831] criminal neglect of a minor,[832] criminal abuse of a vulnerable adult or elderly person,[833] and criminal neglect of a vulnerable adult or elderly person.[834]

Relation to Current District Law. The RCC definition of "significant bodily injury" makes three clear changes to the statutory definition of "significant bodily injury" in D.C. Code § 22-404(b).[835]

First, the revised definition of "significant bodily injury" requires "immediate medical treatment beyond what a layperson can personally administer." The current definition of "significant bodily injury" merely requires "immediate medical attention"[836] for this prong of the definition. However, District case law has construed medical "attention" in the current statutory definition to mean medical "treatment,"[837] and has

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[824] For example, if the complainant bumps his or her head in an attempt to get free from the strangulation or suffocation, resulting in a contusion to his or her head, that contusion during strangulation or suffocation is sufficient to establish significant bodily injury.
[825] D.C. Code 22-404(b) ("For the purposes of this paragraph, the term "significant bodily injury" means an injury that requires hospitalization or immediate medical attention.").
[826] D.C. Code 22-405(c) ("A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.").
[827] D.C. Code § 22-861(a)(2) (injuring a police animal statute defining "significant bodily injury" as an injury that requires hospitalization or immediate medical attention."). [To date, the RCC has not recommended revisions to this statute.]
[828] RCC § 22E-701.
[829] RCC § 22E-1201.
[830] RCC § 22E-1202.
[831] RCC § 22E-1501.
[832] RCC § 22E-1502.
[833] RCC § 22E-1503.
[834] RCC § 22E-1504.
[835] D.C. Code § 22-404(b).
[836] D.C. Code § 22-404(b) ("For the purposes of this paragraph, the term 'significant bodily injury' means an injury that requires hospitalization or immediate medical attention.").
[837] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1264-65 (D.C. 2013) ("medical attention means the treatment that is necessary to preserve the health and wellbeing of the individual, *e.g.*, to prevent long-

held that the treatment must be "to prevent long-term physical damage or to abate severe pain,"[838] and be "beyond what a layperson can personally administer."[839] By codifying these requirements, the revised definition adopts the position of the DCCA that determining whether an injury is sufficient to constitute a "significant bodily injury" is an objective[840] inquiry as to the nature of the injury. Assessment of the nature of the injury can be a difficult factual issue for a jury or fact finder,[841] and in some cases expert medical testimony may be required to prove a significant bodily injury.[842] Whether a person wants to receive medical care[843] and whether medical care occurs[844] are not dispositive as to whether an injury "requires" medical care under either current law or the RCC. This change improves the clarity, completeness, and consistency of the revised definition.

Second, "hospitalization" in the revised definition of "significant bodily injury" must be necessary to "prevent long-term physical damage or to abate severe pain." The current definition of "significant bodily injury" does not have any additional

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term physical damage, possible disability, disfigurement, or severe pain . . . the attention required—treatment—is not satisfied by mere diagnosis.") (internal quotation marks omitted); *In re D.P.*, 122 A.3d 903, 911 (D.C. 2015) ("As interpreted by this court, immediate medical attention refers to treatment; in other words, the attention required . . . is not satisfied by mere diagnosis." (internal quotation marks omitted).

[838] *See, e.g.*, *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("In other words, there are two independent bases for a fact finder to conclude that a victim has suffered a significant bodily injury: (1) where the injury requires medical treatment to prevent "long-term physical damage" or "potentially permanent injuries"; or (2) where the injury requires medical treatment to abate the victim's "severe" pain."); *Wilson v. United States*, 140 A.3d 1212, 1218 (D.C. 2016) ("However bad the injuries, may seem, the government's combined evidence fails to show that immediate medical attention was required to prevent longterm [sic] physical damage and other potentially permanent injuries or abate pain that is severe instead of lesser, short-term hurts." (internal quotation marks omitted).

[839] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1265 (D.C. 2013) ("And we may infer, accordingly, that everyday remedies such as ice packs, bandages, and self-administered over-the-counter medications, are not sufficiently medical to qualify under the statute, whether administered by a medical professional or with self-help. Treatment of a higher order, requiring true medical expertise, is required.") (internal quotation marks omitted); *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("The focus here is not, however, whether [the complaining witness] needed to remove the glass to prevent long-term damage, but whether a medical professional was required to remove the glass because [the complaining witness] could not have safely removed it himself—for example, with tweezers or another self-administered remedy.").

[840] *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("The term "immediate medical attention" and the issue of whether the victim required hospitalization are objective inquiries.").

[841] *Belt v. United States*, 149 A.3d 1048, 1056 (D.C. 2016).

[842] *See Jackson v. United States*, 996 A.2d 796, 798 (D.C. 2010) (noting that in some cases, such as where the subject of proper medical treatment is not within the realm of common knowledge and everyday experience a medical opinion may be necessary to demonstrate criminal neglect).

[843] *See, e.g.*, *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010) ("[N]or is a decision by the injured party not to seek immediate medical attention determinative as to whether the injury in fact called for such attention.").

[844] *See, e.g.*, *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("Again, the standard is an objective one, and the fact that medical treatment occurred does not mean that medical treatment was required."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Even assuming [the complaining witness] did receive some form of treatment in the hospital, therefore, the fact that medical treatment occurred does not mean that medical treatment was required." (internal quotation marks omitted) (citing *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015)).

requirements for hospitalization beyond "requires hospitalization."[845] DCCA case law has speculated that the reference to "hospitalization" in the current definition may be intended to cover "latent" injuries that are not immediately apparent.[846] DCCA case law has also said that the requirements for an injury that requires "hospitalization" may be different from an injury that requires "immediate medical attention,"[847] the other prong of the current definition of "significant bodily injury." This case law suggests that hospitalization for merely diagnostic purposes, and not treatment, may be sufficient to prove a significant bodily injury.[848] However, in each of the DCCA cases where hospitalization for diagnostic testing constituted "significant bodily injury," the complaining witness sustained an injury.[849] Consequently, neither the current definition nor existing case law provides a clear standard to be used to determine when "hospitalization" satisfies the current definition of "significant bodily injury." In contrast, the RCC definition of "significant bodily injury" specifies the standard for an injury that requires hospitalization at any point in time is whether the hospitalization is

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[845] D.C. Code § 22-404(b) ("For the purposes of this paragraph, the term 'significant bodily injury' means an injury that requires hospitalization or immediate medical attention.").

[846] *In re R.S.*, 6 A.3d 854, 859 n.3 (D.C. 2010) ("It is not easy to envision a situation in which an injury might require hospitalization and yet not also require immediate medical attention. Perhaps the hospitalization definition, which is presented as an alternative, is to cover a situation where an injury is only latent and manifests itself a considerable time after the fact; *e.g.,* an unrecognized internal injury or concussion.").

[847] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1264 n.17 ("One can conceive of injuries (for example, a head injury that may or may not have resulted in a concussion) where immediate medical 'attention' in the form of monitoring or even testing is required, but where no 'treatment' is ultimately necessary to preserve or improve the victim's health. On the other hand, situations can surely arise when immediate then prolonged monitoring, coupled with testing, will eventuate in treatment. The question as to where the line is drawn between monitoring or testing and treatment in these fluid situations, however, is likely to become moot, as such scrutiny will normally involve hospitalization, the alternative basis for finding 'significant' bodily injury."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Then in *Quintanilla*, the court left open the possibility that an injury could require hospitalization in fluid situations that involve immediate then prolonged monitoring, coupled with testing, regardless of whether such monitoring or testing eventuate[s] in treatment.") (citations and quotation marks omitted).

[848] *Blair v. United States*, 114 A.3d 960, 979 (D.C. 2015) ("We distinguished hospitalization, which we called the alternative basis for finding significant bodily injury, observing that it may be entailed in fluid situations, involving immediate than prolonged monitoring, coupled with testing, that may (or may not) 'eventuate in treatment.'") (citations and quotation marks omitted).

[849] *Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015) ("While not every blow to the head in the course of an assault necessarily constitutes significant bodily injury, we conclude that where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury. Because the testimony and photographic evidence in this case showed that appellant 'kept banging [the complainant's] head against the ground' with the result that she felt disoriented; that the hospital emergency room physician ordered a CAT scan and X-ray of her head and neck to determine whether she sustained internal injuries; and that C.H. sustained multiple abrasions and bruising all over her body, including trauma around her eye, we hold that the evidence was sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that [the complainant's] injuries were significant and thus to support appellant's conviction of felony assault.") (internal citations omitted); *Brown v. United States*, 146 A.3d 110, 114-16 (D.C. 2016) (finding the evidence sufficient for significant bodily injury when the complainant went to the hospital five days after the assault due to lingering head pain and other symptoms, was given a CAT scan, was diagnosed with a concussion, and was instructed about what to do in order to avert worsened or prolonged symptoms).

required to "prevent long-term physical damage or to abate severe pain." This is the same standard the DCCA has applied to injuries requiring "immediate medical attention" in the current definition of "significant bodily injury" and precludes finding a "significant bodily injury" where there is hospitalization for merely diagnostic purposes. This change improves the clarity, completeness, and consistency of the revised definition.

Third, the RCC definition of "significant bodily injury" provides a bright-line list of specific types of injuries that per se (inherently) constitute at least a "significant bodily injury." The current definition of "significant bodily injury" doesn't have such a list and DCCA case law does not provide specific injuries that constitute "significant bodily injury." In contrast, the RCC definition of "significant bodily injury" provides a bright-line list of per se injuries. Whether or not the listed injuries could also meet the standards described in the first sentence of the RCC definition of "significant bodily injury" or also provide a basis for liability under the standard for the RCC definition of "serious bodily injury,"[850] proof of the listed injuries suffices to establish at least "significant bodily injury." Specifically listing per se significant injuries clarifies the current state of law, fills possible gaps in District law,[851] and may improve the consistency of adjudication.

The listed injuries in part reflect current District case law, which has generally held that concussions[852] and lacerations requiring stitches[853] are sufficient proof of significant bodily injury. The other injuries listed in the definition may frequently be the subject of criminal prosecutions but their status as significant bodily injuries has not been clearly (or at all) established in District case law. No District case law addresses severity of burns, but second degree burns are typically recognized as requiring medical treatment.[854] Loss of consciousness is currently a part of the statutory definition of

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[850] For example, a laceration that is one inch in length and one quarter inch in depth would be a per se significant bodily injury, but may also be a serious bodily injury if it results in protracted and obvious disfigurement.

[851] Current District case law appears to exclude from the definition of significant bodily injury latent injuries that, although requiring medical treatment, do not require admittance to a hospital. *Quintanilla v. United States*, 62 A.3d 1261, 1264 n.17 (D.C. 2013) ("[T]here is no provision in the statute for latent injuries that do not require hospitalization, even if they do ultimately require medical attention. It follows that, for injuries not requiring immediate medical attention, the injury will not be significant unless it does eventually require hospitalization."); *Teneyck v. United States*, 112 A.3d 906, 909 n.4 ("'[H]ospitalization' under the statute requires more than being admitted for outpatient care."); However, latent injuries (such as a concussion) that are per se significant bodily injuries listed in the second sentence of the RCC definition would be covered, even without proof of admittance to a hospital.

[852] *See Brown v. United States*, 146 A.3d 110, 114-15 (finding the evidence sufficient for "significant bodily injury" even though the complaining witness did not go to the hospital until five days after the attack when the complaining witness sustained repeated blows to his head and leg and the complaining witness was diagnosed with a concussion).

[853] *See, e.g., Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015) (Upholding finding of significant bodily injury based on medical treatment that included nine stiches for "gashes to her face" going down to the "white meat."); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010)(Upholding finding of significant bodily injury based on medical treatment that included four to six inches); *Flores v. United States*, 37 A.3d 866, 867 (D.C.2011)(Upholding finding of significant bodily injury based on medical treatment that included "eight to ten stitches and a tetanus shot.").

[854] *See, e.g.,* https://www.cdc.gov/masstrauma/factsheets/public/burns.pdf (last visited December 1, 2017)(stating that, in contrast to first degree burns which may be treatable by a layperson, medical treatment from a trained professional is required.

"serious bodily injury" for sexual abuse offenses,[855] however DCCA case law has questioned, without resolving, whether loss of consciousness constitutes a "serious bodily injury" for purposes of assault.[856] The inclusion of a traumatic brain injury[857] requires proof of such an injury, and mere evidence of blows to the head or diagnostic medical activity will not suffice.[858] The inclusion of a contusion (bruise) or other bodily injury to the neck or head sustained during "strangulation or suffocation," as defined in RCC § 22E-701, reflects the heightened seriousness of such injuries, particularly in light of research indicating such injuries are often linked to more serious patterns of violence.[859]

In addition to the above-discussed clear substantive changes to the current statutory definition of "significant bodily injury" in D.C. Code § 22-404(b),[860] the revised definition makes one possible substantive change. The revised definition of "significant bodily injury" requires that the injury be a "bodily injury," defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition." The

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[855] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[856] *In re D.P.*, 122 A.3d 903, 908 n. 10 (D.C. 2015) ("In light of our conclusion that [appellant] lacked the requisite mens rea for aggravated assault, we do not determine whether the complainant's brief loss of unconsciousness—from which she fully recovered without medical treatment and which did not amount to significant bodily injury . . . amounted to serious bodily injury."); *Vaughn v. United States*, 93 A.3d 1237, 1269 n. 39 (D.C. 2014) ("We question whether the government presented evidence that [the complainant] suffered serious bodily injury at all. The government presented evidence that [the complainant] briefly lost consciousness following the attack, that the head injuries he incurred did not cause substantial pain, and that, although he sought medical care, he fully recovered from these injuries without medical intervention. This appears to fall well below the "high threshold of injury" . . . we have set to prove aggravated assault.") (internal citations omitted).

[857] For example, a concussion. *See* https://www.cdc.gov/headsup/basics/concussion_whatis.html (last visited Dec. 1, 2017).

[858] In one case, the DCCA upheld a conviction for felony assault based on injuries that chiefly, though not solely, consisted of head trauma which was subjected to diagnostic testing but apparently was not specifically diagnosed as a concussion. *See Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015) ("While not every blow to the head in the course of an assault necessarily constitutes significant bodily injury, we conclude that where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury.") (internal citations omitted). The RCC definition of significant bodily injury calls the *Blair* ruling into question to the extent that there may not have been sufficient evidence that the injury caused by the defendant was a traumatic brain injury or that the injury otherwise required, to prevent long-term physical damage or to abate severe pain, hospitalization or immediate medical treatment beyond what a layperson can personally administer. The DCCA avoided reliance on the need for a medical diagnosis in a subsequent case involving head trauma. *Brown v. United States*, 146 A.3d 110, 116 (D.C. 2016) ("At the hospital, [the complaining witness] did not receive mere diagnosis, but was instructed [by the doctor] about what he needed to do to avert worsened or prolonged head pain or other symptoms. Thus [the complaining witness's] injury was one that, to preserve his well-being, necessitated that he be taken to the hospital shortly after the injury was inflicted."). To the extent the *Brown* court relied upon the doctor's diagnosis of a traumatic brain injury of the need for medical advice to avoid longer term damage, the decision is consistent with the RCC definition of "significant bodily injury."

[859] *See, e.g.,* Nancy Glass et al., Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women, Journal of Emergency Medicine, 35.3 (2008) (available online at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2573025/) (last visited December 1, 2017).

[860] D.C. Code § 22-404(b).

current definition of "significant bodily injury" requires an "injury." There is no DCCA case law interpreting "injury" in the current definition. The RCC definition incorporates the defined term of "bodily injury" into the revised definition to clarify that a "significant bodily injury" always constitutes a bodily injury."

As applied to certain RCC offenses against persons, the revised definition of "significant bodily injury" may change current District law. For example, the RCC offenses for criminal abuse and criminal neglect of minors, vulnerable adults, and elderly persons prohibit either recklessly causing significant bodily injury to the complainant[861] or recklessly creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience significant bodily injury.[862] However, the current equivalent offenses in Title 22 either do not include such harm or risk of harm, or it is unclear whether the equivalent offenses in Title 22 do. For example, the current first degree child cruelty statute prohibits, in part, "tortures,"[863] "beats,"[864] and "maltreats,"[865] and second degree child cruelty prohibits, in part, "maltreats."[866] The current statute does not define these terms and there is no DCCA case law determining the required amount of physical harm.[867] Resolving this ambiguity, the revised criminal abuse of a minor statute specifies the minimal degree of physical harm required for each grade of the offense, including a gradation for "significant bodily injury." Similarly, the current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "serious bodily injury"[868] or "permanent bodily harm"[869] resulted. The statute does not define any of these terms and there is no DCCA case law interpreting "serious bodily injury" or "permanent bodily harm" for this offense. The RCC offense codifies a gradation for causing "significant bodily injury," improving the clarity and completeness of the offense.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "significant bodily injury" on current District law.

"Significant emotional distress" means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. It is must rise significantly above the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day living.

Explanatory Note. The RCC defines "significant emotional distress" to mean substantial, ongoing mental suffering. Significant emotional distress does not include suffering minor inconveniences. The word "ongoing" makes clear that significant

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[861] Criminal abuse of a minor (RCC § 22E-1501); criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503).
[862] Criminal neglect of a minor (RCC § 22E-1502); criminal neglect of a vulnerable adult or elderly person (RCC § 22E-1504).
[863] D.C. Code § 22-1101(a).
[864] D.C. Code § 22-1101(a).
[865] D.C. Code § 22-1101(a).
[866] D.C. Code § 22-1101(b)(1).
[867] The DCCA has extensively discussed "maltreats" in terms of incorporating serious psychological or emotional harm, but not the required physical harm. *Alfaro v. United States*, 859 A.2d 149, 157-60 (D.C. 2004).
[868] D.C. Code § 22-936(b).
[869] D.C. Code § 22-936(c).

emotional distress must be continuous or continual in nature. Significant emotional distress is trepidation that outlasts the interaction. The distress must be high, reaching a level that would possibly lead to seeking professional treatment.[870] The degree of mental anguish must be something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which commonly experienced in day to day living.
The RCC definition of "significant emotional distress" replaces the definition of "emotional distress" in D.C. Code § 22-3132(4).[871] The RCC definition of "significant emotional distress" is used in the revised offense of stalking.[872]

Relation to Current District Law. The RCC definition of "significant emotional distress" clarifies, but does not change, District law. The current statute uses the phrases "emotional distress" and "seriously alarmed, disturbed, or frightened" but does not define them. Case law has explained that both phrases should be understood as mental harms that rise significantly above that which is commonly experienced in day to day living.[873] Emotional distress is "high," "markedly greater than the level of uneasiness, nervousness, unhappiness or the like," and "reaching a level that would possibly lead to seeking professional treatment."[874] The revised code adds a definition of "significant emotional distress" to more clearly state this case law. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Simulated" means feigned or pretended in a way which realistically duplicates the appearance of actual conduct.

Explanatory Note. The RCC definition of "simulated" applies to specific types of sexual conduct in the RCC obscenity offenses such as a simulated "sexual act" or "simulated" masturbation. In this context, the definition of "simulated" is intended to include highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring,[875] not other portrayals that are clearly staged. The definition excludes highly suggestive sex scenes like one would find in a movie. This definition is similar to another jurisdiction's definition[876] and is supported by Supreme Court case law.[877]

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[870] The government is not required to prove that the person actually sought or needed professional treatment or counseling.
[871] D.C. Code § 22-3132(4). ("'Emotional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling;").
[872] RCC § 22E-1206.
[873] *Coleman v. United States*, 16-CM-345, 2019 WL 1066002 (D.C. Mar. 7, 2019).
[874] *Id*.
[875] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.
[876] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").
[877] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller*: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

The RCC definition of “simulated” is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to “simulated” are in some current Title 22 offenses[878]). The RCC definition of “simulated” is used in the revised offenses of distribution of an obscene image,[879] distribution of an obscene image to a minor,[880] creating or trafficking an obscene image of a minor,[881] possession of an obscene image of a minor,[882] arranging a live sexual performance of a minor,[883] and attending or viewing a live sexual performance of a minor.[884]

Relation to Current District Law. The RCC definition of “simulated” is new and does not itself substantively change current District law.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

“Sound recording” means a material object in which sounds, other than those accompanying a motion picture or other audiovisual recording, are fixed by any method now known or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Explanatory Note. “Sound recordings” is currently defined in D.C. Code § 22-3214.01(a)(3)[885] for the current deceptive labeling statute. The RCC definition of “sound recording” replaces the current definition of “sound recording” in D.C. Code § 22-3214.01(a)(3) and the definition of “phonorecords” in the current commercial piracy statute[886] and is used in the revised offenses of unlawful creation or possession of a recording[887] and unlawful labeling of a recording.[888]

> ‘Sexually explicit conduct’ connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And ‘simulated’ sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute’s] requirement of a ‘visual depiction of an actual minor’ makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term “simulated sexual intercourse. *Williams*, 553 U.S. at 296–97.

[878] D.C. Code §§ 22-3101(5)(A) (Sexual Performance Using Minors); 22-3312.02 (Defacing or burning cross or religious symbol; display of certain emblems).
[879] RCC § 22E-1805.
[880] RCC § 22E-1806.
[881] RCC § 22E-1807.
[882] RCC § 22E-1808.
[883] RCC § 22E-1809.
[884] RCC § 22E-1810.
[885] D.C. Code § 22-3214.01(a)(3) (“‘Sound recordings’ means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).
[886] D.C. Code § 22-3214(a)(3) (“‘Phonorecords means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either

Relation to Current District Law. The RCC definition of "sound recording" is substantively identical to the definition of "sound recording"[889] in the current deceptive labeling statute.

"Speech" means oral or written language, symbols, or gestures.

Explanatory Note. Oral language means spoken words or sounds. Written language means inscribed words or letters. Symbols include images, icons, and props. Gestures means physical movements that communicate an idea. "Speech" is narrower than "communication."

The RCC definition of "speech" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current disorderly conduct statute[890]). The RCC definition of "speech" is used in the revised offense of disorderly conduct.[891]

Relation to Current District Law. The RCC definition of "speech" is new and does not substantively change District law.

The current *disorderly conduct* statute does not use the word "speech," but does distinguish between "language," "gestures," and "conduct." Case law has not addressed the meanings of these terms. The revised code adds a definition of "speech" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

"Strangulation or suffocation" means a restriction of normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth.

Explanatory Note. "Strangulation or suffocation" is not statutorily defined in Title 22 of the current D.C. Code. The RCC definition is used in the RCC definition of "significant bodily injury."[892]

Relation to Current District Law. The RCC definition of "strangulation or suffocation" is new to District law.

"Strict liability" has the meaning specified in RCC § 22E-205.

Explanatory Note. The definition of "strict liability" is addressed in the Commentary accompanying RCC § 22E-205.

"Transportation worker" means:

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directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

[887] RCC § 22E-2105.

[888] RCC § 22E-2207.

[889] D.C. Code § 22-3214.01(a)(3) ("'Sound recording' means "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

[890] D.C. Code § 22-1321.

[891] RCC § 22E-4201.

[892] RCC § 22E-701.

(A) A person who is licensed to operate, and is operating, a publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia;

(B) Any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station within the District of Columbia;

(C) A person who is licensed to operate, and is operating, a taxicab within the District of Columbia; and

(D) A person who is licensed to operate, and is operating within the District of Columbia, a personal motor vehicle to provide private vehicle-for-hire service in contract with a private vehicle-for-hire company as defined by D.C. Code § 50-301.03(16B).

Explanatory Note. The RCC definition of "transportation worker" is new, the term is not currently defined in Title 22 of the D.C. Code (although there is a penalty enhancement[893] with similarly defined terms for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as a penalty enhancement[894] for certain crimes committed against a taxicab driver. The RCC definition of "transportation worker" replaces the penalty enhancement and defined terms[895] for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as the penalty enhancement[896] for certain crimes committed against a taxicab driver. The RCC definition of "transportation worker" is used in the RCC definition of a "protected person."[897]

Relation to Current District Law. The RCC definition of "transportation worker" makes four clear changes to the statutory language of the defined terms[898] in the current penalty enhancement for certain crimes committed against a "Metrorail station

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[893] D.C. Code § 22-3751.01 ("(a) Any person who commits an offense enumerated in § 22-3752 against a transit operator, who, at the time of the offense, is authorized to operate and is operating a mass transit vehicle in the District of Columbia, or against Metrorail station manager while on duty in the District of Columbia, may be punished by a fine of up to one and ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and ½ times the maximum term of imprisonment otherwise authorized by the offense, or both."); 22-3751.01(b)(1), (b)(2), (b)(3) (defining "mass transit vehicle" as "any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia," "Metrorail station manager" as "any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station," and "transit operator" as a person who is licensed to operate a mass transit vehicle.").

[894] D.C. Code § 22-3751 ("Any person who commits an offense listed in § 22-3752 against a taxicab driver who, at the time of the offense, has a current license to operate a taxicab in the District of Columbia or any United States jurisdiction and is operating a taxicab in the District of Columbia may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[895] D.C. Code § 22-3751.01.

[896] D.C. Code § 22-3751.

[897] RCC § 22E-701.

[898] D.C. Code § 22-3751.01.

manager" or a "transit operator," as well as the penalty enhancement[899] for certain crimes committed against a taxicab driver.

First, subsection (A) of the RCC definition of "transportation worker" is substantively identical to the definitions of "mass transit vehicle"[900] and "transit operator"[901] in the current penalty enhancement[902] for these complainants and subsection (C) is substantively identical to the penalty enhancement[903] for crimes committed against a taxicab driver.[904] However, unlike the current penalty enhancements, subsection (A) does not require that the transit operator be "authorized" to operate the mass transit vehicle "at the time of the offense," and subsection (C) does not require that the taxicab driver be licensed and operating a taxicab "at the time of the offense." Instead, the definition of "protected person" in RCC § 22E-701 includes a transportation worker "in the course of his or her official duties" and the protected person gradations are codified directly into RCC offenses against persons. These are clarificatory changes that are consistent with other categories of complainants in the RCC definition of "protected person" that require the complainant to be "in the course of official duties."

Second, subsection (B) of the RCC definition of "transportation worker" is substantively identical to the definition of a "Metrorail station manager"[905] in the current penalty enhancement[906] for crimes committed against this category of complainant. However, subsection (B) does not require, as does current D.C. Code § 22-3751.01, that the Metrorail station manager be "on duty." Instead the definition of "protected person" in RCC § 22E-701 includes a transportation worker "in the course of official duties." This is a clarificatory change that is consistent with other categories of complainants in the RCC definition of "protected person" that require the complainant to be "in the course of official duties."

Third, subsection (D) of the definition of "transportation worker" codifies the requirements for a private vehicle-for-hire operator in contract with a private vehicle-for-hire company, as defined by D.C. Code § 50-301.03(16B).[907] The current penalty enhancement for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as the penalty enhancement[908] for certain crimes committed

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[899] D.C. Code § 22-3751.

[900] D.C. Code § 22-3751.01(b)(1) (defining "mass transit vehicle" as "any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia.").

[901] D.C. Code § 22-3751.01(b)(3) (defining "transit operator" as a person who is licensed to operate a mass transit vehicle.").

[902] D.C. Code § 22-3751.01.

[903] D.C. Code § 22-3751.

[904] D.C. Code § 22-3751.

[905] D.C. Code § 22-3751.01 (b)(2) (defining "Metrorail station manager" as "any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station," and "transit operator" as a person who is licensed to operate a mass transit vehicle.").

[906] D.C. Code § 22-3751.01.

[907] D.C. Code § 50-301.03(16B) ("'Private vehicle-for-hire company' means an organization, including a corporation, partnership, or sole proprietorship, operating in the District that uses digital dispatch to connect passengers to a network of private vehicle-for-hire operators.").

[908] D.C. Code § 22-3751.

against a taxicab driver, do not include drivers of private vehicle-for-hire. Including this category of complainant in the RCC definition of "transportation worker" fills a gap in current District law, particularly given the ubiquity of private vehicle-for-hire services.

As applied to certain RCC offenses against persons, the RCC definition of "transportation worker" may substantively change current District law. For example, the RCC's robbery and assault statutes provide more severe penalties for harms inflicted on protected persons, including transportation workers. While a penalty enhancement for robbery and assault already applies under current District law to commercial vehicle operators,[909] specified WMATA employees,[910] and taxicab drivers,[911] such penalty enhancements do not apply to private vehicle-for-hire operators. Consequently, subsection (D) effectively changes District law as applied to the RCC robbery and assault statutes, through their reference to "protected persons" and "transportation workers." Inclusion of these drivers in the same category as other transportation workers improves the proportionality of the revised offenses against persons and removes a gap in current District law. The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "transportation worker" on current District law.

"Undue influence" means: mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being.

Explanatory Note. This term specifies certain wrongful coercive means of overcoming the free will of a vulnerable adult or elderly person. Undue influence must cause the vulnerable adult or elderly person to act in a manner inconsistent with his or her financial, emotional, mental, or physical well-being.

Relation to Current District Law. This definition does not change current District law. The definition of "undue influence" is taken verbatim from D.C. Code § 22-933.01, and is intended to have the same meaning as under current law.

"Value" means:

- **(A) The fair market value of the property at the time and place of the offense; or**
- **(B) If the fair market value cannot be ascertained:**
  - **(i) For property other than a written instrument, the cost of replacement of the property within a reasonable time after the offense;**
  - **(ii) For a written instrument constituting evidence of debt, such as a check, draft, or promissory note, the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied; and**

[909] D.C. Code § 22-3751.
[910] D.C. Code § 22-3751.
[911] D.C. Code § 22-3751.

(iii) For any other written instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument.

(C) Notwithstanding subsections (A) and (B) of this section, the value of a payment card alone is $[X] and the value of an unendorsed check alone is $[X].

Explanatory Note. Subsection (A) of the RCC definition of "value" states that the "value" of property is its fair market value, a defined term per RCC § 22E-701, which means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied. "Owner" is a defined term per RCC § 22E-701 meaning a person holding an interest in property with which the actor is not privileged to interfere without consent. Moreover, the "value" is based on the fair market value at the time and place of the offense.

Subsection (B) provides alternative methods of determining "value" for written instruments and other property when the fair market value cannot be ascertained. These are rare situations when there is no evidence as to fair market value.[912]

Paragraph (B)(1) specifies that, for property other than written instruments, a defined term per RCC § 22E-701, when fair market value cannot be ascertained, "value" is the cost of replacement of the property within a reasonable time after the offense.[913]

Paragraphs (B)(2) and (B)(3) clarify the methods of valuation for written instruments, a defined term in RCC 22E-701, when fair market value cannot be

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[912] *See State v. Ohms*, 309 Mont. 263, 267 (2002) (interpreting the definition of "value," which required that replacement value be considered only when the market value "cannot be satisfactorily ascertained," as meaning "if the State is unable to present evidence of the stolen item's market value, it must establish that the market value of the stolen item cannot be ascertained before it resorts to the alternative of establishing value by proof of replacement value alone."); *State v. Foster*, 762 S.W.2d 51, 53 (Mo. Ct. App. 1988) (stating that "cost of replacement was not an authorized manner of proof" because "the state offered no evidence of the value of the items taken at the time and place of the crime" and "there is no basis for finding that the items could not have been appraised, or that evidence of their value at the time of the crime could not be satisfactorily ascertained" when the definition of "value" was "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime."); *Washington v. State*, 2013 Ark. App. 148, 3 (not reported in S.W.3d) ("Replacement value equals 'value' under the theft-of-property statute only if the market value cannot be ascertained. . . . [h]ere, there was evidence of market value…").

[913] The facts of *State v. Ohms*, 309 Mont. 263 (2002) provide an example. The property at issue was a stolen masonry saw and the felony threshold for value was $1,000. *Ohms*, 309 Mont. at 264. At trial, the owner testified that he had purchased the used saw approximately nine years earlier for $400. *Id.* at 266. He also testified that after the purchase he had the motor rebuilt for $600. *Id.* An expert testified that an entirely new unit would be priced at $3,924. The definition of "value" in Montana allows evidence of replacement value only if market value "cannot be satisfactorily ascertained." *Id.* The court held that the state could not use replacement value because the state did not first establish that the market value of the property could not be ascertained. *Id.* at 267.

Washington v. State, 2013 Ark. App. 148, 3 (not reported in S.W.3d) ("Replacement value equals 'value' under the theft-of-property statute only if the market value cannot be ascertained… [h]ere, there was evidence of market value . . . .").

ascertained.[914] Paragraph (B)(2) applies to written instruments that are "evidence of debt," such as checks, a defined term in RCC § 22E-701, drafts, or promissory notes. The "value" of such a written instrument is the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.[915] Paragraph (B)(3) applies to written instruments other than evidence of debt "that create[s], release[s], discharge[s], or otherwise affect[s] any other valuable legal right, privilege, or obligation."[916] The "value" of such written instruments is "the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument."

Subsection (C) first provides that, notwithstanding subsections (A) and (B), the "value" of a "payment card" alone is set at $[X]. "Payment card" is a defined term in RCC § 22E-701, meaning an instrument of any kind (including an instrument known as a credit card or debit card) issued for use of the cardholder for obtaining or paying for property, Second, the "value" of a check that has not been endorsed, i.e. a blank check unsigned on the front by the drawer, alone is set at $[X]. These fixed valuations only apply to the payment cards and blank checks themselves, not property that is obtained by use of the payment card or check.[917]

"Value" is currently defined in D.C. Code § 22-3001(7),[918] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "value" is used in the revised offenses of theft,[919] fraud,[920] payment card fraud,[921] check fraud,[922] forgery,[923] identity theft,[924] financial

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[914] Examples of written instruments whose fair market value can be reasonably ascertained include some public and corporate bonds and securities.

[915] For example, if a check is made out to an individual in the amount of $1,000 the value of that check normally is $1,000, the face amount of indebtedness. However, in one jurisdiction, the court used such an "ordinarily" caveat in a similar definition of "value" to determine that the value of a forged check was not the face amount of indebtedness. *See State v. Skorpen*, 57 Wash.App. 144, 149 (1990) ("The State argues that the value of the check 'shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount . . .' . In order to avoid rendering part of this phrase superfluous, it must be construed so as to recognize the possibility of situations in which the amount due or collectible on a written instrument is not its face amount.").

[916] For example, relying on such language, a case in New York held that two automobile registrations were "of value" because, in part, "the complainant herein has had his privilege to drive his vehicle suspended by the theft of its registration certificates. These certificates give rise at least to prosecution for theft of the piece of paper upon which proof of compliance with New York vehicle laws is indicated."). *People v. Saunders*, 82 Misc. 2d 542, 371 N.Y.S.2d 352 (Crim. Ct. 1975).

[917] For example, theft of a purse containing three payment cards and a checkbook yields a set valuation of $[X] that can be used for determining the gradation of theft—without requiring proof of available credit for each card or amount of funds available for the check at the time of the offense. If the defendant should then use a stolen payment card or check to obtain cash, goods, or property from a storeowner, the value of the property obtained from the storeowner would constitute a separate loss, with value being easily determined by the fair market value of the property received.

[918] D.C. Code § 22-3201(7) ("'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.").

[919] RCC § 22E-2101.

[920] RCC § 22E-2201.

[921] RCC § 22E-2202.

exploitation of a vulnerable adult,[925] possession of stolen property,[926] trafficking of stolen property,[927] and extortion.[928]

Relation to Current District Law. *The RCC definition of "value" makes one clear change to the statutory definition of "value" in in D.C. Code § 22-3001(7).[929]*

The RCC definition of "value" provides a set value for a payment card of $[X][930] and an unendorsed check at $[X], per subsection (C). Under the current statutory definition of "value," the "value" of a payment card is the amount of property "that has been or can be obtained through its use, or the amount promised or paid by the credit card, [or] check."[931] There is no case law on the meaning of this phrase.[932] In contrast, the RCC definition of "value" provides a set value for a payment card or an unendorsed check. A fixed amount provides a fairer and more efficient means of calculating the value of an unused payment card or blank check, items commonly involved in property crimes. The revised definition dispenses with proof of the amount of credit or funds available to a given card or bank account at the time of the property crime. Doing so also avoids disparate valuation of people's credit cards and checks based on their available credit or size of their bank account.[933] The provision instead strikes a balance between the greater, but unrealized, harm that the owner of the card or check could suffer if the stolen card or check was used, with the relatively minor, actual, inconvenience to the owner of losing the card or check. It also punishes more harshly a defendant who takes multiple cards or checks, as opposed to a defendant that takes only one card or check. This change improves the proportionality of the revised definition.

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[922] RCC § 22E-2203.
[923] RCC § 22E-2204.
[924] RCC § 22E-2205.
[925] RCC § 22E-2208.
[926] RCC § 22E-2401.
[927] RCC § 22E-2402.
[928] RCC § 22E-2301.
[929] D.C. Code § 22-3201(7).
[930] [A recommendation on the precise value is forthcoming, in conjunction with the CCRC review of penalties.]
[931] D.C. Code 22-3201(7) ("'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.").
[932] There is limited case law on the value of a credit card under the District's pre-1982 Theft Act laws. In *In re V.L.M.*, a receiving stolen property case, the DCCA stated that a "currently usable credit card, was of obvious monetary value to its owner, and indeed, to anyone else who might attempt to use it to obtain gasoline on credit." *In re V.L.M.*, 340 A.2d 818, 820 (D.C. 1975). Beyond this statement, there is no indication in *In re V.L.M.* how the DCCA valued the credit card. The trial court found that the credit card had no value in excess of $100, but the trial court's reasoning, and whether the DCCA approved of this method of valuation, is unclear. To the extent that *In re V.L.M.* supports a method of valuation for credit cards different from the standard in paragraph (B)(3) of the revised definition of "value," the revised definition of "value" is a change in law.
[933] For example, theft of a purse with two payment cards connected to accounts of $300 each would, if aggregated, provide a basis for theft of $600 under current law—graded as third degree theft in the RCC or a 180 day misdemeanor under current law. A purse with the same number of cards but in the name of a wealthier person who has credit limits of $15,000 each would, if aggregated, provide a basis for theft of $30,000—graded as first degree theft in the RCC or a 10 year felony under current law.

The RCC definition of "value" is generally consistent with the limited District case law interpreting the term "value" outside of the statutory definition in § 22-3001(7). Subsection (A) of the revised definition provides that, generally, the fair market value of property shall determine its "value." This codifies District case law for theft and theft-related offenses that establishes that "value" means "fair market value,"[934] as well as District case law recognizing that "fair market value" must be determined at the time[935] and place[936] of the offense. In addition, this part of the revised definition of "value" reflects current District practice.[937] Subsection (B) of the revised definition provides a number of alternate means of determining the value of written instruments and other property in the rare case when fair market value cannot be ascertained. The limited DCCA case law on "value" does not provide a clear rule for instances when fair market value cannot be ascertained, although several cases refer generally to the "value" of an object as its "useful, functional purpose."[938] The provisions in subsection (B) appear to be consistent with the application of this "useful, functional purpose" standard, and are not intended to change the application of such a flexible standard for establishing whether an item has some minimal value. The revised definition of "value" fills a gap in the existing statutory definition about valuation when fair market value cannot be readily ascertained.

It should be noted that the revised definition of "value" does not affect long-standing District case law on the evidentiary requirements for proving "value." Some of this case law predates the Theft and White Collar Crimes Act of 1982, which significantly revised the District's theft and theft-related offenses.[939] To the extent that this case law is still good law, the revised definition of "value" does not change it—

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[934] *See, e.g.*, *Foreman v. United States*, 988 A.2d 505, 507 (D.C. 2010);

[935] *See, e.g.*, *Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988) ("The value of property is determined at the time the crime through which it is acquired occurs.");.

[936] *See Long v. United States*, 156 A.3d 698 (D.C. 2017) (stating in a receiving stolen property case that "[p]roperty value . . . is its market value at the time and place stolen, if there is a market for it.") (quoting *Hebron v. United States*, 837 A.2d 910, 913 n.3 (D.C. 2003) (quoting LaFave, Criminal Law, § 8.4(b) (3d ed. 2000))).

[937] D.C. Crim. Jur. Instr. § 3.105 (jury instruction for "value" stating, in part, that "[v]alue means fair market value at the time when and the place where the property was allegedly" obtained).

[938] *See Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988) ("[T]he value of an item is to be determined by its 'useful functional purpose.' " (quoting Jenkins v. United States, 374 A.2d 581, 586 n.9 (D.C. 1977))). Note, however, that several cases referring to the "useful functional purpose" standard of value appear to be primarily concerned with establishing that the object has some minimal value for a lowest grade of liability. See, e.g., *Jenkins v. United States*, 374 A.2d 581, 586 n. 9 (D.C.1977) (broken window has some value); *Paige v. United States*, 183 A.2d 759 (D.C.Mun.App.1962) (vent fastener for auto window had some value); *Wills v. United States*, 147 A.3d 761, 775 n. 12 (D.C. 2016) (keys had some value). The revised definition of value in RCC 22E-2001 does not affect such cases' determination that the objects at issue had some value.

[939] In *Eldridge v. United States*, the DCCA noted that first degree theft under the 1982 Theft Act is the "rough equivalent" to the former statutory offense of grand larceny and adopted "*in toto*" for first degree theft "the proof requirements on the issue of value" established in pre-1982 case law for grand larceny. *Eldridge v. United States*, 492 A.2d 879, 881-82. *Eldridge* lists the following cases and citations as representative of this body of case law, although the list is not exclusive: *Malloy v. United States*, 483 A.2d 678, 680-81 (D.C. 1984); *Moore v. United States*, 388 A.2d 889 (D.C. 1978); *Williams v. United States*, 376 A.2d 442 (D.C. 1977); *Wilson v. United States*, 358 A.2d 324 (D.C. 1976); *Boone v. United States*, 296 A.2d 449 (D.C. 1972); *United States v. Thweatt*, 140 U.S. App. D.C. 120, 433 F.2d 1226 (1970).

except as to payment cards and unendorsed checks. Nor does the revised definition of "value" change any first degree theft cases on "value" decided after the 1982 Theft Act[940]—except as to payment cards.

"Vulnerable adult" means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.

Explanatory Note. The RCC definition of "vulnerable adult" specifies the requirements for proving a person is a "vulnerable adult" in the revised offenses against persons. Under this definition, the mental or physical limitation must substantially impair that person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests. Minor impairments, e.g. imperfect vision that can be remedied with prescription glasses, will not suffice.

The term "vulnerable adult" is currently statutorily defined in D.C. Code § 22-932(5)[941] for offenses and provisions concerning abuse and neglect of vulnerable adults. The RCC definition of "vulnerable adult" is used in the definition of a "protected person,"[942] as well as the revised offenses of abuse of a vulnerable adult or elderly person,[943] neglect of a vulnerable adult or elderly person,[944] and sexual assault.[945]

Relation to Current District Law. The RCC definition of "vulnerable adult" is identical to the current definition of "vulnerable adult" in D.C. Code § 22-932.

The RCC "vulnerable adult" definition does not itself change current District law, but may result in changes of law as applied to particular offenses. For example, the RCC robbery and assault gradations are based in part on whether the victim was a "protected person,"[946] and a "vulnerable adult" is defined as one kind of "protected person."[947] Consequently, the RCC provides enhanced penalties for assaults and robberies of vulnerable adults whereas, under current law, committing robbery or assault against a vulnerable adult does not change the grade of either offense, or otherwise authorize more severe penalties. Inclusion of vulnerable adults in the same category as seniors, minors, and others improves the proportionality of the revised offenses against persons and removes a gap in current District law.

"Written instrument" includes any:

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[940] *See, e.g.*, *Zellers v. United States*, 682 A.2d 1118 (D.C. 1996); *Hebron v. United States*, 837 A.2d 910 (D.C. 2003); *Chappelle v. United States*, 736 A.2d 212 (D.C. 1999); *Terrell v. United States*, 721 A.2d 957 (D.C. 1988); *Foreman v. United States*, 988 A.2d 505 (D.C. 2010).

[941] D.C. Code § 22-932(5) ("'Vulnerable adult' means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.").

[942] RCC § 22E-701.

[943] RCC § 22E-1503.

[944] RCC § 22E-1504.

[945] RCC § 22E-1301.

[946] RCC §§ 22E-1201, 1202.

[947] RCC § 22E-701.

(A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28;
(B) A will, contract, deed, or any other document purporting to have legal or evidentiary significance;
(C) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity;
(D) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items;
(E) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or
(F) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.

Explanatory Note. "Written instrument" is currently defined in D.C. Code § 22-3241(a)(3)[948] for the forgery offense. The RCC definition of "written instrument" replaces the current definition of "written instrument" in D.C. Code § 22-3241(a)(3). The RCC definition is used in the revised definition of "value,"[949] as well as the revised offense of forgery.[950]

Relation to Current District Law. The revised definition of "written instrument" is consistent with current District law. The revised definition differs slightly by explicitly including "a will, contract, deed, or any other document purporting to have legal or evidentiary significance." However, including these documents in the definition of "written instrument" does not change current law, as the list of documents in the definition of "written instrument" in the current D.C. Code is also non-exhaustive.

[948] D.C. Code § 22-3241(a)(3) ("'Written instrument' includes, but is not limited to, any: (A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28; (B) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity; (C) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profitsharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items; (D) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or (E) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.").
[949] RCC § 22E-701.
[950] RCC § 22E-2204.